

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: VIOXX PRODUCTS  
LIABILITY LITIGATION

MDL No. 1657  
Section: "L"  
New Orleans, Louisiana  
Thursday, January 22, 2009

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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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P R O C E E D I N G S

(THURSDAY, JANUARY 22, 2009)

(STATUS CONFERENCE)

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5 THE COURT: Be seated, please. Good morning, ladies and  
6 gentlemen. Counsel make your appearance for the record.

7 MR. BIRCHFIELD: Good morning, your Honor. Andy  
8 Birchfield on behalf of the Plaintiffs Steering Committee. In Mr.  
9 Herman's absence, Chris Seeger and I will be covering or dividing  
10 the issues from the plaintiffs' side.

11 MR. MARVIN: And Douglas Marvin for Merck, your Honor.

12 THE COURT: We are here today for our monthly status  
13 conference. We have a number of items. I met with the liaison  
14 committee to discuss the agenda, added some things to them, and will  
15 take it in the form and fashion given to me.

16 Settlement agreement first. Any reports on that?

17 MR. BIRCHFIELD: Your Honor, under the settlement  
18 agreement, the administration of the settlement is moving  
19 efficiently. Once the settlement was announced in November of 2007  
20 we indicated that we anticipated heart attack interim payments would  
21 begin in August and they did. And the interim payments on the heart  
22 attack cases continue on a monthly basis.

23 Under the settlement agreement, the interim payments  
24 for ischemic stroke cases are scheduled to begin in February, and  
25 we're pleased to report that those are on track and the interim

1 payments for strokes will begin next month.

2 In the joint report, your Honor, on page five, there is  
3 one correction that needs to be noted. On August the 27th the court  
4 entered an order capping contingent fee arrangements at 32 percent.  
5 A group of attorneys that identifies themselves as the Vioxx  
6 Litigation Consortium filed a motion for reconsideration, and in the  
7 joint report on page five we indicate that the court denied that  
8 motion for reconsideration; and that is incorrect and we wanted to  
9 make sure that everyone was aware of that mistake. In fact, the  
10 court also entered an order that appointed the Tulane Civil  
11 Litigation Clinic to represent the clients of the Vioxx Litigation  
12 Consortium as it pertains to this issue.

13 The Vioxx Litigation Consortium filed a motion to  
14 reconsider that appointment and that was the issue that the court  
15 denied, and the Vioxx Litigation Consortium filed a writ of mandamus  
16 to the Fifth Circuit seeking a stay of that order and the Fifth  
17 Circuit entered that stay.

18 THE COURT: Right. I granted the motion for  
19 reconsideration. And my thinking on the reconsideration was that I  
20 anticipated convening a hearing and hearing from the parties either  
21 by way of affidavits or evidence or argument. I hadn't really met  
22 with them to see what they intend to do. But my first step was to  
23 grant the motion for reconsideration. They indicated they had  
24 something to say, and throughout this litigation I've looked to you  
25 in good faith, all of you, and when you tell me that you have

1 something to say that means I have something to listen to. So they  
2 felt that they needed to say something to me, and, therefore I  
3 needed to listen.

4 For a hearing it seemed to me that it's best to have  
5 two people or two sides represented at the hearing, and I didn't see  
6 it being feasible to have the Liaison Committee or the Plaintiffs'  
7 Committee participate in it because they are in some fiduciary  
8 relationships, and also the attorneys for the consortium have some  
9 representation on that committee. Also, I did not feel it was  
10 appropriate to pull in a lawyer who conceivably could have an  
11 interest in getting clients or having some agenda, so I felt it was  
12 best to get some group to speak at least on the issue for the other  
13 side.

14 I was not in a position to take the other side of the  
15 issue, so to speak, to generate some discussion, and if I tweak the  
16 order or I change it or I modify it, to have some credibility for  
17 that position, I felt it was important to have the sides represented  
18 who might have some interest in the matter; and so I appointed the  
19 Tulane committee, but the Fifth Circuit has stayed that appointment.  
20 There have been some briefs filed, and I am waiting to hear from  
21 them at that point.

22 MR. BIRCHFIELD: Thank you, your Honor. And Orran Brown  
23 and Lynn Greer are here this morning, and Lynn Greer is prepared to  
24 give a report on the claims administration process.

25 THE COURT: Okay.

1 MR. BROWN: Good morning, your Honor, I am Orran Brown,  
2 and with me today is Lynn Greer. We're from BrownGreer and we are  
3 the claims administrator for the Vioxx settlement program.

4 As Mr. Birchfield mentioned, the main focus of the report  
5 today is on claims review and claims payment, that is our main focus  
6 in the program now. And Lynn will cover that full territory in just  
7 a moment.

8 We will not today present the usual presentation on  
9 enrollment registration. The numbers have not changed appreciably  
10 in that area since we were here last time. We continue to just work  
11 on the mop-up in the enrollment area, we are still around 50,000  
12 claimants who are enrolled in the program. We still are working  
13 with pro ses and with counsel to try to clean up any of the  
14 remaining enrollment deficiencies, most of which now have gotten to  
15 the point where they involve state issues, in cleaning up issues  
16 about the release. But we will not spending time today showing the  
17 numbers on that because they have not changed and we are really  
18 geared now towards the claims review.

19 Also, worth mentioning today is that we've been working  
20 ourselves and working with the parties on developing the contours of  
21 the extraordinary injury payments program. Those are two separate  
22 funds set up under the settlement agreement for extraordinary  
23 injuries, either past economic losses of lost wages or medical  
24 expenses of \$250,000 or more; or a special injury, an extraordinary  
25 injury not covered by the existing injury grids. We've been

1 developing the criteria and the process for that program, too,  
2 alongside the other claims review programs we're doing. We hope by  
3 the next conference to be able to announce further details on that  
4 and then to have that program rolled out in the very near future.

5 So unless the court has any questions about --

6 THE COURT: One thing that I mentioned in the prior  
7 conference that I am getting calls from individuals who say that  
8 their attorneys have told them they have certain points but they  
9 want to make sure that their attorney's comments are accurate. This  
10 type case is not like the case where one attorney has one client and  
11 there's a long-term relationship or a lot of confidence based on the  
12 relationship. Some attorneys have a large number of cases and the  
13 clients don't know them as well as they do when it's a one-on-one  
14 relationship.

15 So it's not necessarily unusual that this happens, but in  
16 a case of this sort where you're dealing with thousands or 50,000  
17 individuals, they want to test their lawyer. I am not saying they  
18 don't trust their lawyer, they just want to make sure they got it  
19 right. And so they're calling the court and it's difficult to say,  
20 well, call your lawyer because they've talked to their lawyer, they  
21 don't want to talk to their lawyer anymore, they want to talk to  
22 somebody else to make sure what their lawyer told them was accurate.

23 So we've got to figure out a mechanism by which they can  
24 be satisfied, because if they're not, the lawyer's going to have  
25 grief and it's going to be problematic. So I would like you to get

1 involved in it in some way that I can direct them to you or find  
2 some way you can deal with it.

3 MR. BROWN: We have spoken with the parties about that  
4 issue and a couple of things that I think will help deal with that  
5 situation. One is we arm the counsel with documentation that shows  
6 the points award notice and the reasons for it. Those are documents  
7 that counsel can print, send to their clients. We will dress them  
8 up to look a little more official so that they are clearly from the  
9 claims administrator and clearly the independent judgment that has  
10 derived the claims evaluation.

11 We also have been very careful when claimants contact  
12 us directly who are represented by counsel, we've been very careful  
13 not to try to intrude upon their relationship with their counsel,  
14 but we can provide and do provide information, not advice but just  
15 information about their claim and we can confirm the analysis that  
16 their counsel has told them.

17 So we invite the court to forward those questions to us,  
18 and we will place something on the more general website to which all  
19 of the claimants have access that describes that process more fully  
20 and describes that what the counsel have is coming directly from us  
21 but also directing them if they want confirmation of that they can  
22 contact us directly.

23 THE COURT: If they call me and I send them to you, what  
24 will you do? Will you send them a copy of the letter that you've  
25 given to the attorney or will you check with the attorney or how --

1 what procedure do you anticipate?

2 MR. BROWN: I think there, your Honor, we would check  
3 first with their counsel and make sure that we have the full picture  
4 and that counsel may have already taken care of it, has already  
5 talked to the person and we need do nothing. Because we want to  
6 have that opportunity first to make sure the counsel are aware of  
7 the inquiry and maybe they've already taken care of it or would like  
8 to. We'll make sure that gets done.

9 If it's something that is purely informational and the  
10 counsel have not taken care of it or don't object to us confirming  
11 it, we will then reach out to that claimant probably by a phone call  
12 or an e-mail if we have that e-mail because sometimes we get those  
13 inquires from those claimants from e-mail.

14 THE COURT: I think we have to watch bottlenecks because  
15 if we have too many people on the phone answering questions, you're  
16 not going to be able to have anybody fixing the points and keep the  
17 matter moving.

18 MR. BROWN: That's right.

19 THE COURT: But we've gotten 20 or 30 calls, so probably  
20 not a lot, but we have to keep an eye on that. If there is some  
21 way, if it becomes problematic, then we have to come up with a plan.

22 MR. BROWN: And that's why, your Honor, we have not  
23 invited that because of the level of activity it might encourage.  
24 And the primary counsel have done a very good job of keeping their  
25 people informed and we don't want to tread on that in any way. So

1 we will respond to inquiries as they come up. We will make sure  
2 that everybody is comfortable with the information they've gotten,  
3 but we've been very careful not to try to encourage the sort of  
4 mushroom effect of those numbers of calls.

5 THE COURT: Okay.

6 MR. BROWN: Thank you, your Honor. And now Lynn will  
7 cover where we are in the claims process.

8 THE COURT: Okay.

9 MS. GREER: Good morning, your Honor, Lynn Greer from  
10 BrownGreer. In response to questions from your Honor last month, we  
11 have changed the format and the content of the claims portion of the  
12 presentation in large part because we have now passed some critical  
13 deadlines and a lot of the information I used to present on how many  
14 configurations of claims packages have come in are now behind us.

15 So what I would like to do today is very quickly tell the  
16 court where we are in terms of claims packages that we have received  
17 that can join the claims queue. We have also broken apart the  
18 presentation to address the heart attack claims separately from the  
19 stroke claims because they are on different processing tracks. And  
20 finally, we have, in response to your questions last month, come up  
21 with projections of what we need to do each month to be able to  
22 issue an interim payment in the third quarter of this year.

23 This first slide shows that as of last night there are  
24 approximately 48,000 claimants who have submitted enough information  
25 for us to be able to begin their claims review. I want to pause

1 here for a moment to stress that this does not mean that these are  
2 complete claims packages, does not mean that they have everything we  
3 ultimately need to be able to review the claim even at the Gates  
4 analysis; because what we did to get this number and to allow people  
5 into the queue was to require only a claims form, which was a very  
6 simple document, to complete, and either one proof of Vioxx use or  
7 an event record or medical record.

8           So it is very likely and, in fact, as we go through the  
9 process we see that a lot of people are in row one who actually  
10 don't have enough to even pass the Gates. And, for example, in  
11 looking at the claims that are currently pending in the queue, which  
12 means that we haven't even looked at them yet, there's 16 percent  
13 that have either proof of Vioxx use or an event record but not both,  
14 and that is clearly not enough to even be found eligible. So this  
15 48,000 number is good because it allows us to begin review of the  
16 claim but it does not mean that the claims packages are complete.

17           At the end of December, we were able to finalize the  
18 non-submitting program claimant status for 1,238 claims, and these  
19 were persons who had received notices that we did not have enough  
20 for them to be able to join the claims queue. They were given three  
21 notices, opportunities to submit their packages, they were sent the  
22 final notice of non-submitting program claimant on December 5th, and  
23 they did not appeal or object to that, And so as of today, the 1,238  
24 claimants who are no longer in the program. And these releases and  
25 stipulations of dismissal will be sent to Merck.

1           Row three shows that there are another 665 who are what  
2 we call potential non-submitting program claimants. These were  
3 people who asked for a timely extension request, which the  
4 settlement agreement allowed us to give. We gave them until  
5 December 30th to submit their packages, and after that date we still  
6 had not received enough information for them. And so what is  
7 happening with the 665 is the settlement agreement gives them 15  
8 business days to appeal our decision. That time period runs on  
9 February the 2nd. So there may be folks within the 665 who will  
10 appeal and ultimately not be found non-submitting, but that's the  
11 number of potential non-submitting people who are out there now.

12           And just in summary, 961 firms have submitted materials  
13 and 364 pro ses.

14           We have looked at the claims forms submissions that  
15 have been filed where the claimants and their counsel can indicate  
16 what injury it is that they are alleging. And this slide shows that  
17 based on a total of 48,037 claimants who have submitted a claims  
18 form, roughly 62 percent, or almost 30,000, are claiming heart  
19 attack; 37 percent, or 17,574, are claiming stroke; and there's one  
20 percent who have submitted a claims form but they have not indicated  
21 what injury it is they are claiming so we don't know. For a total  
22 of 48,037.

23           This is a overview, your Honor, shows where the claims  
24 are, the heart attack claims are in and through the Gates review  
25 process, and this is a different slide from what we have shown

1 before. This only address the heart attack claims.

2 The first row shows that there are 9,337 claims that have  
3 not been touched yet by us. Over 4,000 of these were claims  
4 packages that we received after November 1st, and all of these are  
5 claims packages that we received after the original July 1st claims  
6 package deadline.

7 Row two shows 3,189 claimants where we have looked at  
8 the claim once and we have made our initial Gates determination, but  
9 in previous conferences I've explained that this is the juncture at  
10 which we do another review to make sure that our initial Gates  
11 review is absolutely correct. And so 3,189 are claimants who we've  
12 looked at the claim once and we need to look at it again to make  
13 sure our determination is correct.

14 There have been 8,902 claimants who have come through  
15 Gates have been found eligible for points, and I'll talk in a minute  
16 about where those 8,902 claimants are in the points process.

17 There are 3,364 who have come through the Gates process  
18 and have failed and have received a notice of Gates failure from us.  
19 And what happens when that notice is issued is the claimant is then  
20 aware that they have failed Gates review, they are told that at that  
21 point the claim is going to go to the Gates review. They have 14  
22 days to give us additional documentation. If there's some missing  
23 piece of evidence that they believe will make their claim eligible,  
24 they can submit it within that 14 days and we will re-review that  
25 claim.

1           It's important here, your Honor, there are a lot of  
2 times after we send out the claims administrator notice of  
3 ineligibility where we tell the claimants you have 14 days, and at  
4 that point we start getting requests for extension of that 14-day  
5 window. And it's understandable, it's the first time counsel has  
6 learned that there's something possibly fatally wrong with their  
7 claim. But we are very vigilant about monitoring that 14-day window  
8 because if we don't then we will run into problems being able to  
9 process claims for points of issuing and issue the final payment.

10           Row 4B show, and this is just a snapshot of where we were  
11 last night, there are over 4,000 claims that are currently with the  
12 Gates Committee where we have not received a final vote from the  
13 Gates Committee. And, your Honor, the Gates Committee has been  
14 working very hard to vote on the claims that we send to them. They  
15 have come up with a plan and a goal of processing 4,000 claims a  
16 month to be able to keep us in line with being able to issue the  
17 final MI payment in the third quarter.

18           MR. SEEGER: Very nice of you not to throw us under the  
19 bus on that one, thank you.

20           MS. GREER: This slide summarizes the 8,902 claims that  
21 were on the previous slide. I apologize that that last row is a  
22 little bit cut off.

23           What this shows us is that the 8,902 claims break down as  
24 follows: Row one are claims that have already been paid, so through  
25 December we've paid 4,582 claimants. Row two shows that as of today

1 we have advanced to the point of points 2,575 claims. And it is  
2 from this population where we can make payments in January.

3 And, your Honor, the deadline for accepting a notice of  
4 points award to be paid in January is actually tonight at midnight.  
5 And so what we have as of last night is row 2A, the 1,418 claimants  
6 are those that will definitely be paid. They have accepted and  
7 they've accepted the notice of points. Row B shows that there are  
8 another 769 people who theoretically could come in by midnight  
9 tonight and accept their notice of points award and be paid next  
10 week. And so that totals 2,187 claimants who are potentially  
11 eligible for payment this month.

12 There are 388 who have appealed or who are special  
13 marker claims, which are points less than ten for MI claims who have  
14 elected to go into special review. And those are claimants that  
15 will not be paid this month because they are in that appeal status.

16 Row three shows that there are 494 claims where we have  
17 done what we need to do from a review standpoint, but there is some  
18 administrative reason for why the notice of points award cannot  
19 issue. These reasons include perhaps that we have not gotten final  
20 clearance from the lien resolution administrator on the claim  
21 because we have to have that information before we can issue a  
22 notice of points award. But the majority of these are or close to  
23 the majority are a combination of issues ranging from there are  
24 still enrollment deficiencies that have to be cleared. For example,  
25 a lot of the claims in this category are death claims and so we have

1 the representative capacity issue on the enrollment documents that  
2 are holding up our ability to issue points.

3 Row four shows that there are 77 claims as of last night  
4 that we had reviewed initially for points that we need to do our QC  
5 on.

6 Row five shows 602 claims and these are claims that we  
7 have started points review on and we found a problem in the content  
8 of the records. Our goal in any process that we handle is that the  
9 settlement agreement does layout very specific requirements about  
10 the types of records that have to be submitted. For example, in  
11 this settlement, a claimant must submit a year's worth of follow-up  
12 records.

13 If we are able when we look at the claim to glean  
14 everything we need to glean and there are only six months of  
15 follow-up records, we are not going to hold up that claim and insist  
16 on a year's worth. But 602 claims we have started review on and  
17 there's something missing that we need to look at again to be able  
18 to see if we can go forward with the review of the claim. This is  
19 about a seven percent deficiency rate on the claims side, in  
20 complete claims package side, and what that means is it just takes  
21 us longer and a lot of times we have to go back to the firm and  
22 request more records.

23 Row six shows that as of last night there were 187  
24 claims where we were doing the points review, and that last number  
25 is 385 that are currently pending in the points review queue.

1           Your Honor, this slide is a projection slide that we  
2 have developed to address your Honor's questions from last month,  
3 and what this does is it takes the total MI claims that we started  
4 with on the first slide of 29,903, and what we have done is we have  
5 estimated and what we have done is we estimated a Gates pass rate of  
6 70 percent. What we are finding is that when we review a claim  
7 because we don't have a lot of discretion, we have to apply the  
8 criteria of the settlement agreement, the claims administrator pass  
9 rated Gates is much lower than 70 percent. But that doesn't mean  
10 much because the Gates Committee has a lot of discretion to put  
11 claims into the program. And, in fact, they have been putting a lot  
12 of claims into the program.

13           THE COURT: Do you have a feel for how much or what's a  
14 percentage that gets through you?

15           MS. GREER: It's a little less than 40 percent. We feel  
16 that at the end of the day as we look at these claims packages and  
17 we're looking at the quality of packages that are coming and we're  
18 reviewing, we believe it's a fair estimate that 70 percent of the  
19 claims will ultimately pass through the Gates. So when you multiply  
20 the 70 percent by the 29,903 what that means is that there will  
21 probably at the end of the day be a total of 20,932 claims that will  
22 be eligible for points.

23           If you then subtract the 4,582 that we've already paid and  
24 you subtract the 2,187 that theoretically could be paid and we've  
25 done all you can do on those, you end up with 14,163 that we must

1 review and move towards points award between now and the end of  
2 August. That comes down to roughly 2,023 claims that we need to  
3 review and advance to points award per month.

4 But that's not the whole picture because we know that  
5 there are going to be claims where we issue notice of points where  
6 the claimants will appeal. The appeal rate is running about ten  
7 percent. And for the special marker claims, there's a group of  
8 about .7 percent of the total group who will actually ask to be  
9 delayed to special review. So we need to add another 216 claims  
10 because we need to issue that many to be able to glean the 2,023.  
11 So what we need to be doing every month is advancing 2,239 claims to  
12 notice of points award on average.

13 There will be months where we will exceed that, there  
14 may be months where we don't hit that; but the important thing is  
15 that we believe, and certainly this past month we've progressed  
16 2,575, so we believe that this is a number that we will be able to  
17 meet and certainly average over the next seven months.

18 Your Honor, this slide shows us that in the points  
19 awards that we have reviewed and issued to date, the average points  
20 per level are as follows: And I'll go through this for the benefit  
21 of those listening on the phone who can't see the slides. Injury  
22 Level 1, the average points now are running at 226.30; Level 2,  
23 207.21; Level 3, 147.55; Level 4, 102.09; Level 5, 86.28; Level 6,  
24 57.58, and the rate of special markers, which again are the claims  
25 that have less than 10 points, is 4.70 percent.

1 I would like to spend some time now on the stroke  
2 progress, and these again are on a separate track. These payments  
3 will not begin until February, and what this shows us is that of the  
4 17,000, roughly 17,000 stroke claims there are 5,776 that we have  
5 not reviewed yet, they are in the initial Gates queue. There are  
6 8,015 that we have done our initial review that we need to go and do  
7 our QC review. 2,623 have passed through the Gates and have been  
8 eligible for points. 202 we have issued notice of ineligibility to,  
9 and the Gates Committee has 748 that they have not issued a final  
10 vote on yet.

11 We have to by February 1st, your Honor, review 2,500  
12 stroke claims to be able to come up with a dollar value per stroke  
13 point. And we are, as of last night, we have reviewed 2,290, so we  
14 have 210 left to go between now and the February 1st. We are on  
15 track to meet that and we hope by the next status conference we will  
16 be able to announce the point value for stroke claim.

17 This final slide is a summary of the payments and the  
18 dollars that have been issued. We have to date, as I've reported,  
19 paid 4,582 claims for a total of \$393,241,611. There are pending  
20 payments of 1,418 claims, these are the ones who definitely accepted  
21 and the dollars that will be paid to those claims is over 137  
22 million. There are another 769 claimants for 61 million who could  
23 accept by midnight tonight. And so the total potential January  
24 payments, again, is 2,187 for almost 200 million.

25 Does your Honor have any questions?

1 THE COURT: No. Anyone else? Okay. Thank you.

2 MS. GREER: Thank you.

3 THE COURT: The next item is registration enrollment of  
4 claims in the settlement program. Have we covered that?

5 MR. BIRCHFIELD: Yes, your Honor.

6 THE COURT: Lien administrator.

7 MR. BIRCHFIELD: Yes, sir. Under the settlement  
8 agreement calls for the appointment of a lien resolution  
9 administrator, and the Garretson firm serves in that role. And  
10 today we have Jason Wolfe who is here to report on that progress,  
11 the negotiations for the and the resolution of the governmental  
12 healthcare liens.

13 THE COURT: Okay.

14 MR. WOLF: Your Honor, I'm Jason Wolf, Director of  
15 Operations with the Garretson firm. I am here to report as the lien  
16 resolution administrator for the Vioxx settlement program. In the  
17 capacity of lien resolution administrator, our focus remains to  
18 insure the compliance with federal, state and military healthcare  
19 programs, that includes over 60 agencies in all. We're also to make  
20 certain that the compliance program is integrated seamlessly into  
21 the claims administration process, work closely with BrownGreer and  
22 insure that the compliance work does not interrupt interim payments.

23 I am pleased to announce to the court and the parties that  
24 we do have an agreement in place with the Centers for Medicare &  
25 Medicaid Services to address all ischemic stroke claims that are

1 scheduled to be paid, start being paid in February.

2 We are now concentrating our efforts in administrating the  
3 ischemic stroke program in concert with the miocardial infarction  
4 program as claimants progress and are scheduled to be paid.

5 As for Medicare, as reported in our last hearing, we  
6 continue to drive entitlement exchanges with the federal government  
7 to identify claimants that have an obligation to Medicare to ensure  
8 that we're in a position through our global resolution program to  
9 satisfy those obligations.

10 Your Honor, considerable efforts are focused on  
11 addressing two areas that our past experience shows commonly will  
12 result in delays if not addressed quickly and appropriately. Those  
13 are addressing key variable changes with the claimant population;  
14 for instance, there's close to 2,600 claimants that key data points  
15 that tie to our work change; for instance, social security number  
16 changes throughout the process, 2,600 claimants, their social  
17 security numbers changed, therefore, we work closely to identify  
18 that change and then put them back in the system to ensure that  
19 their appropriate Social Security number funnels through the  
20 program.

21 In addition to that, another form of discrepancy that  
22 we work to cure as quickly as possible with the related party is  
23 claimants that do not have a social security number or do not have  
24 an appropriate date of birth to ensure that we're employing a  
25 compliance program for the appropriate person.

1           The Medicare compliance program, the global resolution  
2 program is working efficiently and productively. Evidence of that  
3 is in the re-determination process that's been provided in detail in  
4 the past. There's only 67 claimants to date that have elected to  
5 seek a re-determination of their global reimbursement application or  
6 category, and that program and the re-determination activity is  
7 very, very low and working well with the claimants.

8           As for Medicaid, the work with the agencies continues  
9 to be a cooperative nature. I think we've reported on Texas at the  
10 last status hearing, and that proved to end with their agreeing to  
11 the program.

12           The procedures and protocols developed well in advance of  
13 the myocardial infarction payments have proven to be very effective  
14 for all of the agencies as the claims activity for well over 18,000  
15 Medicaid entitled beneficiaries has proven quite a bit of work and  
16 demands upon the agencies and their limited staff and resources.

17           With respect to other governmental liens, as you recall  
18 not only Medicare and Medicaid, but this program was also introduced  
19 to insure compliance of military programs and Indian healthcare  
20 programs, that was through self-reporting through claimant and/or  
21 counsel. There's over 800 that have self-reported which we've taken  
22 that self-report and then worked directly with the agency, the  
23 respective agency to insure their interests are satisfied. All of  
24 those programs that this is truly their first participation in a  
25 program of this sort has proven to be, continued to have great

1 cooperation with them.

2 So in sum, your Honor, I will conclude that we're  
3 pleased to report that the Medicare and Medicaid compliance program  
4 is moving efficiently and mechanics are continuing to be in place to  
5 process claims as they become available.

6 THE COURT: Okay. Thank you. Let's talk about the  
7 private liens. I met with representatives from Avmed and the  
8 Plaintiffs Committee. What's the result of that?

9 MR. SEEGER: Your Honor, would you mind if I bring  
10 Mr. Sobol up with me as well so we can report to your Honor?

11 THE COURT: Yes.

12 MR. SEEGER: Judge, we are happy to report that we've  
13 reached an agreement really on a first of its kind, an agreement  
14 between plaintiffs' attorneys and the insurers to make an offer in  
15 effect to the universe of Vioxx claimants to participate in a  
16 privately lien resolution program. And if you have a minute, I'll  
17 take you through some of the basic terms, your Honor.

18 THE COURT: Sure.

19 MR. SEEGER: Mr. Sobol and his group we believe represent  
20 about, you know, most of the insurers that have covered Vioxx --  
21 people who took Vioxx as well as who sustained injuries. We think  
22 the number, he represents somewhere around 70 percent of the covered  
23 lives out there. We put together a program, although it would  
24 require 90 percent participation voluntarily by plaintiffs' lawyers  
25 and their clients for everyone to participate in a streamlined

1 resolution process that would do a few things: First, it would save  
2 a huge traction cost between the clients, the lawyers, and the  
3 carries. I think we've agreed on a file review amount with the  
4 Garretson law firm about \$300 and about only 150 of that has to be  
5 to the claimant as a cost.

6 In addition to that, the agreement would provide for  
7 pretty steep discounts in the liens. We would have a determination,  
8 a lien determination process, that's going to be coordinated by the  
9 Garretson law firm, very much participated in by Mr. Sobol and his  
10 clients, as well as the negotiating committee and the PSC to come up  
11 with procedures for how to determine what these liens really are  
12 because that is a process we have to go through. Once we determine  
13 what the liens are, anybody participating would get a 50 percent  
14 discount of their lien.

15 Now, in addition to that there would be an ultimate cap  
16 on what could be recovered out of any claims recovery. For example,  
17 once that 50 percent, that lien has been reduced 50 percent,  
18 claimants who have 100,000 or less will not pay more than 15 percent  
19 of the recovery no matter what the lien is and will receive a full  
20 discharge of Vioxx liens. That number then goes down to 12 and a  
21 half percent for claims that are valued between 100 and 250,000.  
22 And then it's capped at ten percent for people receiving 250,000 or  
23 more.

24 Now, the other thing about this is the carriers have  
25 agreed that the payments for this will come out of the back-end

1 payments, so it's not going to hold up the settlement, it's not  
2 going to hold up interim payments and will be taken out of the back  
3 end.

4 In addition to that, your Honor, we've created an audit  
5 and appeal procedure where there will be random auditing of the  
6 files to make sure that it's being implemented and administered  
7 correctly. And then the attorneys on behalf of their clients will  
8 have an opportunity to appeal to your Honor if they believe that the  
9 lien amounts are incorrect or there's been a problem.

10 The offer, by the way, and I haven't had a chance to  
11 really coordinate with Mr. Johnston on this, but it will be extended  
12 also to pro se claimants. I guess we need to coordinate how that  
13 notice will be provided, maybe through your office, Mr. Johnston.

14 In exchange for participating, as I said, they will get  
15 a fuel release from the carriers.

16 Now, right now this does not, the agreement does not  
17 encompass 100 percent of the private healthcare world, we think it  
18 encompasses two thirds or more. But it is available to any private  
19 health care carrier, whether it's a small union fund or a big  
20 insurance company, to come in now and participate and to actually  
21 have their liens administered through this.

22 And hopefully everyone will avail themselves of it and it  
23 will be a nice and efficient way of using the size of this MDL to  
24 pass on great value to the claimants but also to save the carriers  
25 substantial transaction costs, and we think it does that.

1           That's really -- I think I hit all of the salient points.  
2 I do have to say, your Honor, when Mr. Sobol became involved, this  
3 process has taken many months, it really wasn't until his  
4 involvement -- and I don't want to compliment him too much -- that  
5 we really started to make tremendous movement here, so I would like  
6 to give him credit for that.

7           THE COURT: I give credit to both of you. A matter of  
8 this sort really is worked out because of the attorneys involved and  
9 because of the work and diligence of the attorneys.

10           The governmental liens, as we all know, are statutory  
11 liens, and therefore, the transactional cost is nil because they  
12 have to be paid out and they're paid out through the attorneys or  
13 through the litigants or in some way, but they're paid out because  
14 they're statutory.

15           The private liens are not. But the private liens are  
16 liens. They're legitimate liens, they're debts owed by the person  
17 who received the services, and they have to be paid. They can be  
18 paid the easy way or the hard way.

19           In a matter of this sort where the claims are grouped  
20 together, it seems to me that it is a benefit to each side to  
21 utilize the economy of scale that an MDL affords and get benefits  
22 for each side. On the side of the insurance companies, they  
23 minimize or exclude their transactional costs, so they get some  
24 benefit. They've got a focal point from which they can collect all  
25 of their liens at one time or at a focal point.

1           But the litigants, the plaintiffs, the claimants ought  
2 to also receive some benefit, and so through the efforts of counsel,  
3 each side has benefited from it, the plaintiffs or the claimants  
4 will get a tremendous discount on their liens, which they have to  
5 pay. And if they're not in this program they have to pay  
6 100 percent of the liens. They're going to be sued and the lien is  
7 going to be collected, the amount is going to be collected. So you  
8 have caps and you have tremendous discount. So the claimants  
9 benefit from it.

10           So I think that this is a good program and I hope that  
11 future MDLs piggyback on this approach because I do think it's a  
12 benefit to both sides.

13           And I have one other group that is looking at this, the  
14 New York group, I've had some motions with them and their numbers  
15 are not as big as Avmed, but hopefully they can come in on this; and  
16 I really urge them to take a close look at this program and see  
17 whether or not they can resolve their issues rather than have the  
18 court speak on them.

19           MR. SEEGER: Let me just say one other thing. Judge, so  
20 people sitting in the crowd here know and people reading the  
21 transcript, we expect within the next couple of days to have a  
22 notice completed that will go out to all of the attorneys and to the  
23 pro se claimants explaining the terms of the deal.

24           For people sitting here right now, we are very much aware  
25 and we tried to build in things, this is just by way of example,

1 certain states don't have a right of equitable subordination, we've  
2 carved those states out. So we've tried to anticipate all of the  
3 issues, we tried not to let perfect get in the way of really, really  
4 good. We think it's really, really good.

5 THE COURT: I'd ask that you as a representative of the  
6 Plaintiffs Committee to contact the Greater New York Benefit Fund  
7 and open negotiations with them. If I can meet with you all, as  
8 I've done with the Avmed, let me know and I'll do so.

9 MR. SEEGER: Thank you, your Honor.

10 MR. SOBOL: I would just add, your Honor, as to other  
11 insurers other than the Avmed group, we are already reaching out to  
12 them to get the fullest participation we possibly can of all private  
13 insurers, and also the process anticipates that there will be some  
14 information that guides us to some of the smaller insurers so then  
15 we can also know who to target in terms of the smaller insurers, the  
16 smaller health and welfare funds that might be out there.

17 The other thing I would add, your Honor, in terms of  
18 the benefits I think it's important, this also reaches for all  
19 parties certainty within a reasonable period of time measured in  
20 several months hopefully, or in that ball park, as Mr. Seeger  
21 indicated not holding up any dollars because the dollars would be  
22 paid on the back end. That certainty is also very important for  
23 everybody, they'll get closure, particularly for some of the large  
24 inventories that some of the attorneys have.

25 THE COURT: I would appreciate it if you can also make a

1 call to the New York group, and sometimes insurance companies have  
2 this language that they speak to each other and no one else knows  
3 what they're saying, kind of like Harry Potter's group, so maybe you  
4 can encourage them to take a closer look at the program, too.

5 MR. SOBOL: Of course, your Honor.

6 MR. SEEGER: And, your Honor, thank you for kicking our  
7 butts on this and suggesting that we needed to get this done. It  
8 was helpful.

9 THE COURT: The truth of the matter is that the attorneys  
10 and not the courts really moved this matter, and I appreciate all of  
11 the work that you've done.

12 MR. SEEGER: Thank you.

13 MR. SOBOL: Thank you.

14 THE COURT: Special Master. Anything?

15 MR. JUNEAU: Good morning, your Honor. Patrick Juneau,  
16 your Honor, the Special Master in this case. Your Honor, there have  
17 been actually 20 appeals that have been assigned to the Special  
18 Master and Deputy Special Masters in this case. There have been 14  
19 rulings already issued on those 20. The balance are relatively  
20 close to being decided in different phases, but it has to do with  
21 documentation and so forth. So the progress is being made in that  
22 regard, and I would anticipate similar results in the future. And  
23 that's pretty much where we are, your Honor.

24 THE COURT: I appreciate the work of the Special Masters.  
25 And, Pat, I think it would be helpful if you, Doug, and Andy met and

1 you got each other up to speed on any issues that you need to talk  
2 about so that they can anticipate.

3 MR. JUNEAU: We preliminary discussed that a little bit  
4 this morning. Thanks, your Honor.

5 THE COURT: Okay. Good. Any state court trial settings,  
6 Andy?

7 MR. BIRCHFIELD: No, your Honor. The next item is the  
8 class action.

9 THE COURT: The class actions.

10 MR. BIRCHFIELD: I think Mr. Levin will handle that.

11 THE COURT: Arnold, you're on that?

12 MR. LEVIN: Your Honor, you will be presented a  
13 stipulation to dismiss the master class action complaint, personal  
14 injury and medical monitoring. You will also be -- will receive an  
15 order, Rule to Show Cause order. Since the complaints were  
16 administrative complaints, the underlying complaints and the  
17 underlying litigation should also be dismissed, but the PSC did not  
18 have the authority to dismiss them. So we'll set that up by rule.

19 THE COURT: Right. File the rule, I'll hear from the  
20 parties on it if we need any oral argument. I'll post a notice and  
21 then I'll deal with it.

22 Discovery directed to third parties, anything on that?

23 MR. BIRCHFIELD: The only issue relating to third-party  
24 discovery pertains to ESI. The PSC had issued a subpoena to ESI for  
25 the production of some medical records, some records have been

1 produced and BrownGreer has posted those records. The PSC received  
2 a letter late last night, I know the court --

3 THE COURT: I received a copy of the letter.

4 MR. BIRCHFIELD: -- pertaining to the cause, the PSC will  
5 be discussing that and responding promptly, your Honor.

6 THE COURT: Okay.

7 MR. BIRCHFIELD: And then the next item is the  
8 State/Federal coordination.

9 THE COURT: Anything from Dawn?

10 MS. BARRIOS: Good morning, your Honor. Dawn Barrios for  
11 the State Liaison Committee. I've handed your law clerk this month  
12 only one CD of remands, and I am very excited that we're down to  
13 one.

14 THE COURT: Good.

15 MS. BARRIOS: Attached to that, your Honor -- oh, I'm  
16 sorry. On the CD we're now starting to put the MDL numbers so that  
17 when we're whittling it down to the remand cases, you will have that  
18 at your fingertips.

19 THE COURT: Right.

20 MS. BARRIOS: Attached to the CD, your Honor, is a  
21 statistical spreadsheet. We have 685 remand cases or cases with  
22 pending remands still pending. In that group there's a total  
23 claimants of 2,045. Of that 2,045, only 104 have not registered or  
24 enrolled in the program, and of that 104, about 34 or 35 fall into  
25 the third-party payor or governmental action group. So we're

1 looking at really only about 65 remaining claimants that have cases  
2 with pending remands. And we're working very closely with  
3 BrownGreer and Merck and the pro se office in whittling that down  
4 for your Honor.

5 THE COURT: Okay.

6 MS. BARRIOS: A remand issue came to my attention, your  
7 Honor, from an attorney in Alabama. His case name is Wanda Hill v.  
8 Merck, and I am going to speak with Merck about it more in detail  
9 after the status conference, but I believe the issue merits the  
10 court's at least notice at this time.

11 Wanda Hill has gone through the program and has been  
12 awarded points. It is a death case. Under state law the state  
13 district court must divide the proceeds. At the present time  
14 because the case was removed, there's no underlying state court  
15 action. The counsel contacted me to seek a remand. He has not  
16 filed one yet, he asked me what the procedure would be, and what  
17 we're looking at is a possible procedure that your Honor would put  
18 into place to allow the cases that have gone through the program but  
19 need some action by a state district judge to remand those cases.  
20 That is more paperwork on our parts, but it will save the claimant  
21 another filing fee, in this particular case about \$300.

22 So I wanted to bring that issue to your attention, and  
23 I'll be talking to Mr. Marvin about it after the conference.

24 THE COURT: The issue really, if it were just one case I  
25 think you could carve that out and deal with it. The problem that

1 you have in MDL is just numbers, just sheer numbers because  
2 everything I do potentially affects everybody else. And we're  
3 dealing with 50,000 claims, and I don't know how many are death  
4 claims or not. So we have to watch dealing with it in a way that is  
5 going to cause a large movement into remand territory or into state  
6 court.

7 I hadn't really thought it through, but when you're  
8 speaking, I'm thinking perhaps under Rule 17 I can do something with  
9 appointing a next of friend, guardian ad litem to receive the funds  
10 and then maybe some ancillary procedure can be opened in the state  
11 for the purpose of distributing those funds in accordance with the  
12 appropriate state law. I don't know whether that would work, but I  
13 would like to think about that.

14 There's some opportunities that I have to appoint some  
15 guardian ad litem to at least get the funds and then deal with them  
16 in some way.

17 MS. BARRIOS: Yes, your Honor.

18 THE COURT: If I can do it in a way that keeps the cases  
19 here, that would be my preference. If we have to tweak it in some  
20 way, I'll try to do that. But I don't want to have a mass exodus,  
21 that's my only concern.

22 MS. BARRIOS: Yes, your Honor, I'll brainstorm with  
23 Mr. Marvin and we'll get back to you to learn of your desires.

24 THE COURT: Okay.

25 MS. BARRIOS: The other thing that I would like to report

1 is just that 11 o'clock we've scheduled a telephone status  
2 conference with the governmental action plaintiffs, and I understand  
3 that several will participate and several are in court today.

4 THE COURT: Okay.

5 MS. BARRIOS: But just for statistics purpose, we have 13  
6 now governmental action plaintiffs, the case for the Michigan  
7 Attorney General was remanded by the Michigan district court. We  
8 have approximately 50 consumer cases, purchase claims in the MDL,  
9 and of the public third-party payor, there's approximately 11 cases.

10 THE COURT: And with those particularly, I guess to some  
11 extent it would be limited to the cases that were initially filed  
12 here; if not, then the parties can stipulate and get the court's  
13 jurisdiction here.

14 But I think we're close to the point where I am going to  
15 look to you and your group to see whether there are any particular  
16 case or cases that express the interest and the issues of the common  
17 group, and then I would like to meet with you all and Merck and talk  
18 with you about putting it up for trial, which would involve your  
19 focussing on the amount of discovery that's still necessary or is  
20 necessary to get a case of this sort ready. It's a lot different  
21 than the PI's that we've been dealing with, and whether or not there  
22 are any motions, any motion practice that's necessary, the  
23 substantive motion or procedural motions, and how long it will take  
24 to try it, and I'll issue a scheduling order after conferring with  
25 you all and then we'll pick a trial date and try it.

1 MS. BARRIOS: Yes, your Honor.

2 THE COURT: Okay. Pro se claimants.

3 MR. DUGAN: Your Honor, on that particular subject we have  
4 one other item on the agenda, a request from myself to -- would you  
5 like me to address that or at this particular time?

6 THE COURT: No, that's fine, we're already talking about  
7 that. That's the issue that I would like you to focus on.

8 MR. DUGAN: Yes, thank you, your Honor, and that's what  
9 I'm suggesting to the court is that at this point you have two types  
10 of cases: The governmental action cases and the private cases. I  
11 have requested, and it's in the agenda, I sent a letter to Russ  
12 Herman requesting that the Blue Cross/Blue Shield of Louisiana case  
13 would be interested in serving as a bellwether trial. It was the  
14 first third-party payor case filed, it has original jurisdiction  
15 here.

16 Your Honor, in April of 2006 I had requested your Honor to  
17 set a trial at that particular time. I had requested it on behalf  
18 of Blue Cross and the Louisiana Attorney General case. We have  
19 conducted discovery already in that case. As far as the PSC's  
20 personal injury trial package is a tremendous work effort. Your  
21 Honor is absolutely right in that a TPP trial package is going to  
22 need to be tweaked for that particular type of case. Myself and  
23 Mr. Sobol have probably the most experience in trying these types of  
24 cases.

25 And another reason that I thought the Blue Cross case

1 makes more sense to try first is that all of the governmental action  
2 cases also have motions to remand pending, so we won't have that  
3 particular issue with the Blue Cross case.

4 THE COURT: Let's do this, Jim. Let me set a status  
5 conference with you and Merck and anyone else that you need, and  
6 we'll talk about those issues. I am interested at the status  
7 conference hearing from you all as to how much discovery you need,  
8 the nature, type of discovery for both sides. And whether or not  
9 there are any significant motions that you can you can anticipate,  
10 meaning substantive motions and then procedural motions, and give me  
11 some feel for how long it will take to try the case, and then I'll  
12 set some trial dates consistent with your calendars and we'll do it.

13 MR. DUGAN: That'll be very easily done, your Honor.  
14 Thank you.

15 MR. BEISNER: Your Honor, I just wanted to note on that,  
16 and obviously this will be dealt with at the status conference.

17 THE COURT: Make your appearance.

18 MR. BEISNER: I'm sorry, John Beisner for Merck, I  
19 apologize.

20 Your Honor, the one note I did want to make on that is  
21 just defining the universe for that status conference.

22 THE COURT: Sure.

23 MR. BEISNER: As I understand it, the third-party payor  
24 claims here are part of the purchaser class action that's pending  
25 here. I think Ms. Cabraser and a group of the plaintiffs involved

1 in those cases have been talking about what to do with those, and so  
2 I think that all needs to be analyzed as part of that.

3 THE COURT: Okay. Together.

4 MR. BEISNER: The bigger universe, because as a technical  
5 matter the Blue Cross claim I guess is part of the class action  
6 pending and they filed separately.

7 THE COURT: Get in on this, Elizabeth. And we can have a  
8 status conference and I would like you to be present, too, so you  
9 can give us some input.

10 MS. CABRASER: Thank you, your Honor. Elizabeth Cabraser  
11 for plaintiffs, and wearing -- wearing no hat, but wearing my  
12 Purchase Claims Committee hat.

13 Counsel is correct. This is an intersecting set of  
14 interests, and has coalesced around the AG's and governmental entity  
15 claims, and the private third-party payor claims. And we are now at  
16 a point where the lien resolution program clears out some underbrush  
17 and enables us all to focus on these claims.

18 And as your Honor has indicated and as we have discussed  
19 in other sessions, what we need to do is get together with those  
20 governmental entities and private third-party payors who are  
21 interested in proceeding to set their cases for trial to make sure  
22 the necessary discovery is done effectively and efficiently to see  
23 if we can respond to your Honor's stated requests for some  
24 informative representative trial, if there are going to be judicial  
25 resources expended on a trial, to see whether that should be

1 structured as a jury trial and/or a bench trial, and to make sure  
2 that everyone is interested in going forward in this forum can  
3 participate in that process, without creating duplication or  
4 distraction.

5           So we will continue our discussions on the plaintiffs  
6 side, be happy to attend and participate in any status conferences  
7 so that we all know that we are on the same page and we're  
8 responding to what your Honor wants us to do.

9           THE COURT: Let's get a status conference in about ten  
10 days.

11           MR. BEISNER: Your Honor, if I may make a suggestion, I  
12 don't want to leap ahead, but I am wondering if perhaps doing it in  
13 conjunction with the next status conference.

14           THE COURT: Well, I am moving the status conference up a  
15 little bit --

16           MR. BEISNER: That's why I was suggesting that.

17           THE COURT: -- so that might work pretty well, yeah. I'll  
18 have a status conference then -- when is the next meeting? Tuesday,  
19 February 10th, status conference after that meeting.

20           And before then, Elizabeth, you and Jim and whoever else  
21 is interested in it. Get together and talk about it. My thinking  
22 is, I don't think we need to just try one case. You know, in the  
23 heart attack cases we tried six. So I am not suggesting we try six,  
24 but at least focus on several cases to see whether or not it makes  
25 sense to try several of those cases and then learn from those cases

1 to see whether or not we need to try all of the other ones.

2 But I'll look to you all to at least discuss that with me.  
3 I am not going to set any deadlines or discovery at this time, I am  
4 looking for you to give me some input on that procedure. My  
5 thinking, as I said, one thing you have to focus on is that some of  
6 these cases, either the parties may not be entitled to it or  
7 interested in a jury trial, so that's something that needs to be  
8 focused on. There's some jury trials, some non-jury trials, and  
9 there's some got to be common issues of evidence or discovery or  
10 something that you can profit from, the whole group can profit from  
11 having two or three cases teed up for discovery and then trial.

12 MS. CABRASER: Thank you, your Honor. Our next plaintiff  
13 side status or conference call is set for Monday morning. I'll make  
14 sure that the necessary people can be on that call so that we'll be  
15 fully prepared to address all of these issues on the 10th.

16 THE COURT: All right.

17 MR. BEISNER: Your Honor, I just wanted to note on behalf  
18 of Merck that we're quite happy, and we would hope that we would  
19 have some opportunity to have some discussion on both sides of this  
20 as well before the status conference.

21 I say that in part because we also need to take account of  
22 the fact that Judge Higbee in New Jersey is setting some cases,  
23 getting ready to set some cases for trial on the third-party payor  
24 area; and I think in the same way that courts work together so well  
25 in planning the bellwether cases among the jurisdictions, that's an

1 important consideration to have here as well.

2 THE COURT: Sure. Okay. And I'll touch base with her and  
3 see what her calendar is.

4 MR. SEEGER: Your Honor, it's a little out of order. I  
5 was going to give you an update also on the AG side. I think the  
6 parties have come to an agreement on a confidentiality order that we  
7 need to submit to your Honor to take a look at.

8 THE COURT: Okay.

9 MR. SEEGER: Also, I guess the last point from the PSC's  
10 perspective that we expect to be filing a motion with the court to  
11 establish some type of an assessment or a hold back with regard to  
12 both the private third parties and the AG's as well, but we will be  
13 making that motion shortly.

14 THE COURT: Okay. And then the foreign individual claims,  
15 I am working on that and I should be getting that out to you  
16 shortly.

17 MR. BIRCHFIELD: Yes, your Honor. We also had the pro se  
18 claimants.

19 THE COURT: Right.

20 MR. BIRCHFIELD: The court appointed curator Bob Johnston  
21 is here.

22 MR. JOHNSTON: Your Honor, Bob Johnston, curator for the  
23 pro se claimants. We are providing the court with this month's  
24 status report, so let me just be very brief.

25 We continue to get lots of calls and it has not tapered

1 off. In fact, I think it may be even increasing in some times. We  
2 do our very best to assist these individuals through accessing the  
3 claims administrator's curator's portal. We maintain communication  
4 and have a terrific relationship with the claims administrator. The  
5 high quality there is deeply appreciated.

6 I think the only other unique situation as regarding  
7 the Merck motion to dismiss, which includes a number of pro se  
8 claimants, that has generated interests, shall we say, from those  
9 that we are representing in the curator status; and we are working  
10 with counsel for Merck to insure that all communications and  
11 documents received by the curator's office are forwarded to counsel  
12 for Merck as well as the claims administrator. And we've had some  
13 claimants who expressed a desire not to proceed with the pending  
14 suit, we obviously passed that information on.

15 So I think it continues to go well. We have a lot of  
16 activity and I feel that we provide valuable assistance to these  
17 individuals.

18 THE COURT: I do, too. I think you provided valuable  
19 assistance to the people, the pro se people, and I think that that's  
20 an important part of this process, to make sure that they're  
21 represented.

22 MR. JOHNSTON: They have a lot of questions and they don't  
23 have a lawyer to represent them, and we try in as clear a  
24 communication and common sense as we can to help them. So, thank  
25 you, Judge.

1 THE COURT: We've received some calls, too.

2 MR. JOHNSTON: You too, huh?

3 THE COURT: We received one from a person living at the  
4 government's expense, wanted to advise us that he was being  
5 waterboarded and wanted to know whether Vioxx participated in some  
6 way in making that --

7 MR. JOHNSTON: A lot of suspicion there.

8 THE COURT: -- so we passed it on to the appropriate  
9 people.

10 MR. JOHNSTON: Well, we also deal with those who are  
11 living through government assistance, shall we say, and they seem to  
12 have a high interest in this. I'm sure it provides them with some  
13 mental activity and what have you that they otherwise would not  
14 have. Thank you, Judge.

15 THE COURT: Okay. Thank you.

16 MR. MARVIN: Your Honor, I think we're up to item 18 on  
17 page 15.

18 THE COURT: Yes.

19 MR. MARVIN: Merck has a number of motions to present to  
20 your Honor. Will your Honor want to hear those after the status  
21 conference?

22 THE COURT: We'll finish this and then I'll come back out  
23 and hear those.

24 Decision Quest.

25 MR. BIRCHFIELD: Yes, your Honor. The PSC has had

1 numerous discussions with counsel for Decision Quest, and currently  
2 the trial counsel that retained Decision Quest for particular  
3 bellwether trials are working out a resolution with Decision Quest  
4 and will report back to the PSC on that.

5 THE COURT: Okay. And there's a Fee Allocation Committee.

6 MR. BIRCHFIELD: Yes, your Honor. The Fee Allocation  
7 Committee has met and as was reported last month we held  
8 presentations, we've received presentations, all of those were  
9 transcribed by a court reporter, and the last round of presentations  
10 are scheduled for tomorrow. Mr. Levin.

11 MR. LEVIN: Your Honor, the PSC and the Allocation  
12 Committee, sans one member, filed a motion, a global motion for the  
13 eight percent and reimbursement of costs. We did not file a motion  
14 with regard to allocation. The motion was filed two days ago, it  
15 was an affidavit of Russ Herman and an affidavit of Phil Garrett,  
16 the accountant, and there is also CD's of the work papers of Phil  
17 Garrett that have been filed under seal so that Mr. Beisner doesn't  
18 see them.

19 But they are available and it's my understanding your  
20 Honor will be establishing a procedure where people can come, other  
21 attorneys can comment with regard to the motion.

22 THE COURT: Yes. Two issues: One is, I was trying to see  
23 how big the pie is before I decide how big the slices of the pie  
24 ought to be, and that is the reason for the issue that we have to  
25 deal with with the motion for reconsideration of the 32 percent.

1           But my thinking on the request that you filed is that I  
2 will be posting that, I'll be advising everybody who has any  
3 interest in it that that is the request and invite, if they have  
4 any, objections; and whatever objections there are, then I'll meet  
5 with all parties and we'll set a hearing, a briefing schedule,  
6 whatever you need so that we can deal with any objections.

7           But since whatever the percentage is comes out of the  
8 attorney's fee, it's not fair for people to deal with it unless they  
9 know what the percentage is, the whole percentage is so that they  
10 can make some decision on it. So that's what I am trying to think  
11 through and deal with. Okay.

12           MR. BIRCHFIELD: Your Honor, Item 22, the motion for  
13 reconsideration, we discussed that earlier.

14           I think that brings us to the final item on the agenda,  
15 Merck's motion and rule under Pretrial Order 29.

16           THE COURT: Okay. And we'll deal with that in a moment.  
17 The next meeting will be Tuesday, February 10th at two o'clock.  
18 I'll meet with the committees, with the liaison committee at 1:30 as  
19 we usually do.

20           MR. BIRCHFIELD: Thank you, your Honor.

21           THE COURT: Anything from anyone else? Anything from  
22 anybody? Okay. Thank you very much. The court will stand in  
23 recess and I'll be back in about ten minutes.

24           THE DEPUTY CLERK: Everyone rise.

25           (WHEREUPON, A RECESS WAS TAKEN.)

1 (OPEN COURT.)

2 THE COURT: Be seated, please. Sorry I was a little late.  
3 I had a phone call that I had to take.

4 We're back on the record, and one item that is present for  
5 the meeting today is Merck's motions. I'll hear from the parties.

6 MS. WIMBERLY: Dorothy Wimberly on behalf of Merck. Your  
7 Honor --

8 THE COURT: We have one person who is on the phone that  
9 has an issue. They take the position that they have a motion for  
10 remand pending, and, therefore, they should not have to respond to  
11 the motion to dismiss. Is the person able to speak?

12 MS. WALSH: Yes, your Honor. My name is Theresa Walsh,  
13 I'm from the law firm Brown Chiari. Yes, that was our reply to the  
14 Campbell case, the case of Kathleen Campbell. I think my position  
15 is basically set forth in our papers.

16 MS. WIMBERLY: And, your Honor, our position is set forth  
17 in our reply. We do not believe that the pendency of a motion to  
18 remand deprives the court of jurisdiction, and we believe that the  
19 motion should be granted.

20 THE COURT: Anything in response?

21 MS. WALSH: No, your Honor. It's obvious our position is  
22 to the contrary, and we set for the basis for our motion -- we've  
23 attached our motion for remand in our papers.

24 THE COURT: I have read them, I've reviewed them, I've had  
25 this to deal with on several occasions. The motions to remand does

1 not deprive the court of jurisdiction until the motion for remand is  
2 granted and the case is then removed from this area. As long as I  
3 have the case, pending motions does not deprive the court of  
4 jurisdiction.

5 And of course if it did deprive the court of jurisdiction,  
6 then the MDL would not be able to move because there are literally  
7 thousands, initially, motions to remand. And what I try to do in  
8 these cases is to group those motions and to proceed with the  
9 discovery as long as the people are here they can participate in the  
10 discovery and benefit from the discovery. I see that as an  
11 advantage.

12 Then I get to the motions to remand in an appropriate  
13 time, if they are still pending. As I say, initially had thousands,  
14 now I have less than 100 because they have participated in the  
15 discovery and have also participated in the settlement discussions  
16 and in the settlement program. And that's generally the way that  
17 MDLs are handled if they're handled efficiently.

18 And the point that I make is that there are cases which  
19 indicate that as long as the motion -- the filing of the motion, the  
20 pending of a motion does not deprive the court of jurisdiction, so  
21 I'll deny that motion to divest the court of jurisdiction, I think  
22 the court still has jurisdiction over the matter.

23 Now, what about the substance of it, what's the problem  
24 there?

25 MS. WALSH: The substance of the remand motion, your

1 Honor?

2 THE COURT: No, the motion to dismiss.

3 MS. WALSH: Basically I believe the motions, the other  
4 motions we have not filed any responding papers for the compliance  
5 of the expert disclosure.

6 THE COURT: Do you need time to do that? I've tried to be  
7 understanding with somebody who is moving in that direction, or is  
8 able to move in that direction but has not done so for some reason.  
9 If you felt that you didn't have to and you were in good faith that  
10 you didn't have to because there was a pending motion, I'll give you  
11 enough time to respond. But if your motion is that you don't have  
12 to respond to Lone Pine orders, then I'll be ready to rule on the  
13 motion to dismiss.

14 MS. WALSH: Your Honor, I don't have any further response.  
15 We have not provided any expert disclosure in the case.

16 THE COURT: Would you be able to do that in a relatively  
17 short time?

18 MS. WALSH: I do not think that that is going to happen.  
19 I have had discussions with my client on this issue.

20 THE COURT: Okay. I understand and I appreciate the work  
21 that you've done and the efforts that you've made on behalf of your  
22 client, but because the client has had enough time to present this  
23 material and has not done so, I feel that it is appropriate to  
24 dismiss the case. So I'll grant the motion to dismiss.

25 Thank you very much for participating with us here today.

1 MS. WALSH: Thank you, your Honor. And I think there was  
2 one case we discussed that we didn't respond to, but I did speak  
3 with Ms. Wimberly about the Bonilla case.

4 MS. WIMBERLY: That's correct.

5 MS. WALSH: And in that particular case the issue that I  
6 have, and we had discussed it, was that -- it's a death case. We  
7 have a fiduciary appointed who I haven't been able to speak with,  
8 and I was notified by the family that she is basically  
9 incapacitated, she had a stroke, she is in a nursing home, and we  
10 are looking to have somebody substituted in her place. And I think  
11 we agreed to adjourn that particular motion to the next special term  
12 date so that we can address that issue.

13 THE COURT: Okay. That's fine.

14 MS. WIMBERLY: That's correct, your Honor. We had agreed  
15 to that.

16 THE COURT: Good.

17 MS. WIMBERLY: Your Honor, the two clients that Ms. Walsh  
18 was speaking of are among approximately 250 people on the fourth  
19 Lone Pine motion, which I will get to shortly, and they'll be swept  
20 up in the rulings on that.

21 I wanted to begin, your Honor, with the first motion that  
22 was set for today, which is Merck's second motion for an order to  
23 show cause why cases should not be dismissed for failure to comply  
24 with the Lone Pine requirements of Pretrial Order 29, and that  
25 appears as record Document 17302.

1           With respect to all of the plaintiffs identified on  
2 Exhibits 1 and 2 attached to that rule, we received no response,  
3 with the exception of a response or reports that were filed by three  
4 plaintiffs, Virginia Borden, Helen Siegel and Lee Laux; requests  
5 that the motion be deferred until the next status conference with  
6 respect to two plaintiffs who had special circumstances, one  
7 involves our need to review a submission and the other involves a  
8 motion to withdraw that is being filed. And that is Emma Sadler and  
9 Shannon Thibault.

10           With respect to all of the remaining plaintiffs on  
11 Exhibits A and B, we're asking that the court grant the motion.  
12 And, in fact, as to Mr. Gruber's clients who comprise the bulk of  
13 those plaintiffs, he has specifically filed papers indicating no  
14 opposition to the dismissal. So we would ask that the motion be  
15 granted and the cases of all plaintiffs with the exception of the  
16 five that I mentioned be dismissed with prejudice.

17           And as to Ms. Borden, Siegel and Laux, we would be  
18 withdrawing the motion without prejudice and deferring as to  
19 Ms. Sadler and Ms. Thibault.

20           And I have a prepared order and I will e-mail that and the  
21 appropriate exhibits to your clerk.

22           THE COURT: Let me hear from the parties.

23           MR. BLANKS: Your Honor, Leonard Davis on behalf of  
24 Plaintiffs Steering Committee. As we've done in the past, the  
25 Steering Committee objects to the dismissals and doesn't think that

1 they're appropriate.

2 THE COURT: Okay. All right. Anyone else?

3 I've reviewed the material and I've given these  
4 individuals ample time to respond. I've been very liberal in  
5 extending the deadlines and giving them every opportunity. They  
6 have not responded notwithstanding a number of deadlines and several  
7 notices in the interest of justice and also to move this case, I  
8 have no alternative but to grant the motion. So I'll do so with the  
9 exception of those individuals who have been carved out.

10 MS. WIMBERLY: Next, your Honor, we have three carryover  
11 items from the December conference. The first relates to, was a  
12 carryover from Merck's first motion for failure to comply with the  
13 pretrial requirements of Pretrial Order 29, and that was record  
14 Document 16944, it's a single plaintiff David Rockell. His counsel  
15 Cellino & Barnes had requested that we roll this item over to this  
16 status conference and obtain an order that they could serve on  
17 Mr. Rockell similar to the fourth Lone Pine, which required them to  
18 contact the curator and indicate whether they intended to proceed or  
19 not.

20 Cellino & Barnes confirmed that they, in fact, served and  
21 complied with the order; and to our knowledge there has been no  
22 response, although the curator will be confirming that, and we would  
23 ask that the case be dismissed with prejudice pursuant to the  
24 motion.

25 THE COURT: Any response on that, other than plaintiff's

1 committee opposes it and says that if you do, as an alternative if I  
2 do dismiss it, it should be dismissed without prejudice to refile at  
3 a later date?

4 MR. BLANKS: That's correct, your Honor.

5 THE COURT: I'll overrule that objection and grant the  
6 motion.

7 MS. WIMBERLY: Next carryover was from Merck's second  
8 motion for failure to comply with the Lone Pine requirements of  
9 Pretrial Order 28. It involved, again, clients represented by  
10 Cellino & Barnes. Seven particular plaintiffs identified in the  
11 caption of that which is record document No. 16033, and, again,  
12 Cellino & Barnes confirmed compliance on their part, and to our  
13 knowledge there's been no indication or contact or compliance by the  
14 plaintiffs, and we would ask that the motion be granted and these  
15 cases dismissed with prejudice.

16 THE COURT: Okay.

17 MR. BLANKS: PSC has the same position, your Honor.

18 THE COURT: I'll overrule their objection and dismiss it  
19 with prejudice.

20 MS. WIMBERLY: The third carryover item was from Merck's  
21 fourth cross motion rule and motion to dismiss, which was record  
22 Document 17136. It involved 46 plaintiffs represented by the law  
23 firm of Jones, Swanson; and as with Cellino & Barnes, they asked  
24 that the matter be pushed to this status conference. A similar  
25 order was issued requiring that their clients contact the curator by

1 a certain date and indicate whether they intended to proceed. And  
2 again, subject to the pro se curator's confirmation, we will be  
3 asking that these be dismissed. Mr. Garrison, who is here from  
4 Jones, Swanson, did file a response indicating that in the holiday  
5 rush they overlooked the signed order. And he requested, and we  
6 have agreed, to continue this motion with respect to his clients  
7 until February 10th.

8 THE COURT: Okay. Fine. Let that be done.

9 MS. WIMBERLY: The final motion, which involves 200 plus  
10 plaintiffs, is Merck's fourth motion to show cause for failure to  
11 comply with the Lone Pine requirements of Pretrial Order 28, which  
12 appears as record document 17303, and the original document had four  
13 groupings of plaintiffs listed. The first on Exhibit A involved  
14 plaintiffs who had nothing to do with motions to withdraw and did  
15 not have that special order requiring counsel to serve the order on  
16 their clients, and the clients in turn to contact the curator.

17 Exhibits B-1 and B-2 to the original motion involved cases  
18 with pending motions to withdraw where the counsel were required to  
19 serve the order.

20 And Exhibit C were -- included pro se plaintiffs.

21 With respect to all of these, the counsel for the  
22 plaintiffs on Exhibits B-1 and B-2 served the order in compliance  
23 with the court's directive, and again subject to confirmation from  
24 the curator's office as to which -- it was just a few -- who  
25 indicated a desire to continue their case, we would ask that the

1 court dismiss their claims with prejudice.

2 Mr. Hageman from Simon Passanante law firm is present, he  
3 has five cases which are included in this. He has the last three  
4 cases on Exhibit B-1 and the only two cases on Exhibit B-2. And I  
5 believe he would like to address the court briefly, your Honor.

6 MR. HAGEMAN: May it please the court, Todd Hageman with  
7 the Simon law firm in St. Louis. I am here on behalf of five  
8 plaintiffs, JoAnn Atkins, Leonard Jackson, Gwenever Wilson, John  
9 Kramper and LaVerne Wright. Your Honor, there are motions to  
10 withdraw in each of the five cases.

11 Prior to the motion to withdraw on each of these five  
12 plaintiffs, there has been no communication between them and my  
13 office for quite some period of time. Before the motion to dismiss  
14 was filed, I hired an investigator to track down each of the five  
15 clients without success. There's been years of continued efforts on  
16 my office's part to try and contact the clients. Once we received  
17 the motion to dismiss, I followed requirements of the pretrial  
18 order, sent the order to the clients, no response.

19 Also, we have complied with all of the requirements of the  
20 pretrial order, four motions to withdraw including publication,  
21 notification, and so forth. And so on that basis, your Honor, I  
22 would ask that my pending motions to withdraw on those five cases be  
23 granted before any motion to dismiss.

24 THE COURT: I'll grant those motions and then I'll deal  
25 with the motions to dismiss. Have they been afforded an opportunity

1 to respond?

2 MR. HAGEMAN: Absolutely, all within the requirements of  
3 the PTO.

4 THE COURT: After I relieve you, of which I have done, I  
5 will now address that motion and I'll grant that motion to dismiss.

6 MR. HAGEMAN: Thank you, your Honor.

7 MS. WIMBERLY: Thank you, your Honor. And again, Ms.  
8 Santoyo and I are going to get together and we are going to  
9 carefully review her record of which specific pro se plaintiffs have  
10 contacted and have complied with the order. It's a very limited  
11 number, and I will be presenting to the court the updated exhibits  
12 which will remove those plaintiffs who have indicated that they  
13 intend to respond, and they will be in a separate exhibit which will  
14 defer the motion as to them because not only did they have to  
15 contact the curator by January 9th, the order further required that  
16 an expert report be served by January 31st; so we would like to  
17 continue as to any of those clients who have indicated they would  
18 like to pursue the case, the motion to them, to the next status  
19 conference. And by that time we'll know whether they, in fact, have  
20 complied.

21 THE COURT: All right. In your motion indicate that  
22 you've talked with the pro se counsel.

23 MS. WIMBERLY: Certainly, your Honor. And again, as soon  
24 as I have conferred with Ms. Santoyo and we finalize the exhibits, I  
25 will be e-mailing these to your clerk this afternoon.

1 THE COURT: Okay. Thank you very much. Anything further,  
2 other than the next meeting we have at 11 o'clock with the AG's?  
3 Okay. All right. The court will stand in recess until then.

4 (WHEREUPON, A RECESS WAS TAKEN.)

5 (OPEN COURT.)

6 THE COURT: Be seated, please. We have a number of people  
7 in the courtroom and also I understand we have several individuals  
8 on the telephone. Who do I have on the telephone?

9 MR. FOX: Your Honor, this is Randy Fox from the New York  
10 Attorney General's office.

11 MR. SEAL: Joe Seal, I represent the state of Utah.

12 MR. MILLER: Michael Miller on behalf of Montana, your  
13 Honor.

14 MR. DICKENS: Bruce Dickens on behalf of Montana, your  
15 Honor.

16 MR. SHAWN: Erik Shawn from the Levy, Phillips &  
17 Konigsberg firm on behalf of Erie County, New York and Chautauqua  
18 County, New York.

19 MS. BOSSIER: Judge Fallon, this is Sheila Bossier, I  
20 represent the state of Mississippi.

21 MR. YOUNG: James Young from the Florida Attorney  
22 General's office.

23 MS. BJORK: Rebecca Bjork with O'Melveny and Myers  
24 representing Merck.

25 THE COURT: Anyone else in the courtroom, anybody wishes

1 to make an appearance?

2 MR. DUGAN: Good afternoon -- still good morning, your  
3 Honor, James Dugan on behalf of the Louisiana Attorney General.

4 MS. CABRASER: Good morning, your Honor. Elizabeth  
5 Cabraser, chair of the Purchase Claims Committee with the PSC.

6 MS. BARRIOS: Dawn Barrios, court appointed liaison for  
7 the Attorney General cases.

8 MR. DAVIS: Leonard Davis from Herman, Herman, Katz &  
9 Cotlar who is plaintiff liaison counsel in this matter.

10 MR. ANDERSON: Brian Anderson representing Merck.

11 MR. BARNETT: Good morning, your Honor, Ben Barnett on  
12 behalf of Merck.

13 MR. FLASTER: Good morning. Eben Flaster for Merck.

14 THE COURT: Okay. We're here for our scheduled status  
15 conference. I understand from the last meeting there was some  
16 negotiations on the trial package. What's the result of that?  
17 Anyone?

18 MR. DAVIS: Your Honor, Leonard Davis. If I may report to  
19 the court the status and include the discussion of the trial package  
20 all the one time it may be helpful. We've had a number of  
21 communications, e-mail conversations with the AG's, including Dawn  
22 Barrios who has been coordinating this matter pursuant to your  
23 Honor's directives. We've also had a number of telephone  
24 conferences with counsel for Merck.

25 In addition to that, we had a meeting yesterday with

1 Merck and Dawn Barrios after receiving a tremendous amount of input  
2 from the AG's and other counsel, and put together what I'll call a  
3 four step approach that we're prepared to advise the court on.

4 The first is a recommendation for Pretrial Order No. 13A,  
5 which is confidentiality pertaining to government actions. I  
6 believe that your Honor may have a copy of that. If not, I can get  
7 another one to the court.

8 THE COURT: Okay. I have it, 13A.

9 MR. DAVIS: And I'll call that step one in the four-step  
10 process here.

11 THE COURT: Okay.

12 MR. DAVIS: That has been agreed to by all parties except  
13 for one issue, which I'll allow Mr. Dugan to express and Ms. Barrios  
14 to address down the road, and it's only an issue of who should get  
15 copies of the certificates that are required or proposed to be  
16 required under Pretrial Order 13A and Pretrial Order 13.

17 But what this effectively does is bring in to the  
18 process Pretrial Order 13, which is as the court's aware the  
19 confidentiality with respect to documents that have been produced in  
20 the past by Merck. So that's step one.

21 Step two is an order that allows for the AG's to have  
22 access to the depository, the plaintiff's depository, which is here  
23 in New Orleans as your Honor is aware.

24 THE COURT: Right.

25 MR. DAVIS: And we have agreement with respect to that

1 order, and it'll be presented to the court for consideration. Merck  
2 is in the meantime reviewing the documents that it previously  
3 produced to us to go back and assure that those documents are  
4 identified as being confidential or no longer confidential.

5 As the court may or may not be aware, we were getting  
6 monthly reports from Merck with respect to those documents. At the  
7 time of the settlement, quite frankly that slowed down and it was  
8 stayed pursuant to the court's order. We have asked Merck to please  
9 go back and to look at what's been produced and give us that listing  
10 so that all parties who have access to these documents will know  
11 whether or not the particular documents are confidential or are no  
12 longer confidential, and that will be a benefit to everyone. And  
13 Merck has said that they are willing to do that and will get back to  
14 us in the near future to do that.

15 THE COURT: What are we looking at, Ben, what's the time  
16 frame?

17 MR. BARNETT: Your Honor, we should be able to get that  
18 list to them in I would say in a week's time.

19 THE COURT: Okay.

20 MR. BARNETT: We've already requested that the list be  
21 created. As soon as we get it we will send it out.

22 THE COURT: All right. Let's plan on doing it then in a  
23 week.

24 MR. DAVIS: And what we'll do is, your Honor, when we get  
25 that, whether it comes in the form of a load file or a list, we just

1 don't know, but I expect we'll get it in the same way that we have  
2 in the past, we'll upload it, we'll put it in the depository so it's  
3 accessible to everybody.

4 THE COURT: Let me know when you receive it.

5 MR. DAVIS: Yes, your Honor. That's step two.

6 Step three, which will be done within the next week,  
7 the PSC will be filing a motion before the court to set an  
8 assessment for the trial package. We have met with the AG's on  
9 several occasions and told them that we would make the trial package  
10 available, and we will, in fact, do that. And the court can  
11 ultimately determine what that assessment ought to be.

12 THE COURT: Okay.

13 MR. DAVIS: We'll file our motion and we'll set it -- if  
14 you want it set for the next status conference we can set it then.  
15 We should have it filed soon.

16 THE COURT: File it and I'll give everybody an opportunity  
17 to respond to it. The AG's ought to have some input on that, give  
18 me the benefit of their view, and then I'll set it for hearing.

19 MR. DAVIS: Okay. The fourth step is the development of a  
20 scheduling order to move these cases forward in accordance with your  
21 Honor's directives as you stated during the status conference  
22 earlier, that will layout discovery and different cases. All of  
23 this, I believe, has been discussed and spoken to the AG's and other  
24 folks. And that's where we are, your Honor.

25 THE COURT: Now, from the standpoint of the AG's, are

1 there any cases that are filed here or do they all have motions to  
2 remand pending?

3 MR. DAVIS: I believe that most all of them have remand  
4 motions. I know Ms. Barrios has been advising the court on those  
5 remand motions.

6 THE COURT: Right.

7 MR. DAVIS: I believe there is one case that Mr. Dugan  
8 has, which is a Blue Cross case --

9 THE COURT: I am trying to parse those out. The Blue  
10 Cross, the third-party cases are different than some of the  
11 governmental issues.

12 MR. DUGAN: I think most of those issues are really the  
13 same, your Honor.

14 THE COURT: You feel -- okay.

15 MR. DUGAN: Absolutely, your Honor.

16 MR. DAVIS: Ms. Barrios is giving me the spreadsheet that  
17 she had earlier for the court. There are two cases that are Federal  
18 District Court in the Eastern District of Louisiana, the first one  
19 is James Caldwell and State of Louisiana, Department of Health and  
20 Hospitals v. Merck, which is the Louisiana AG case, which is Jim  
21 Dugan's; the other is State of Utah v. Merck, and it's a Utah state  
22 case with a Medicaid fraud type allegation. Those are the two there  
23 are in the Eastern District.

24 THE COURT: What I was trying to do, for the benefit of  
25 those on the phone, is to see whether or not -- after the discovery,

1 after you get all of the documents that you need and access that you  
2 need, I think we've got to then move forward on it. What my  
3 thinking is is to have you folks get together and see if you can  
4 come up with some cases. Mr. Dugan has already come up with one  
5 case that he feels is ready to be tried, or at least ought to be on  
6 that list. If there are any other cases that are somewhat  
7 representative of the bulk of the cases and if there's interest in  
8 trying them here, then we'll get those cases together and I'll meet  
9 with the parties and we'll look at the discovery needs of those  
10 cases, how much more discovery is necessary, what type of discovery,  
11 any substantive motions that need to be filed, any procedural  
12 motions that need to be filed, the length of trial, and things of  
13 that sort. And then we'll proceed to set them for trial and deal  
14 with them.

15 MR. DAVIS: Judge, those two cases are the government  
16 actions that are pending. Now, in addition to those cases there are  
17 third-party payor cases, which Ms. Cabraser has been overseeing on  
18 behalf of the PSC. She has a much better handle on those cases than  
19 I do and possibly could address the court.

20 MS. CABRASER: Well, just briefly while I destroy the  
21 sound system.

22 THE COURT: That's okay.

23 MS. CABRASER: And I didn't want to distract from the main  
24 event here which is getting the governmental entity cases organized.  
25 We've been looking at cases on the private side to see which cases

1 could be made ready for trial possibly in conjunction with AG cases,  
2 so as not to slow down or complicate this process. And we're  
3 continuing to do that.

4 When we have something together that we think would be  
5 productive to discuss with Merck and then with this court, we'll  
6 certainly do that, and we are going to try to do that before the  
7 next status conference that the court has set on these issues.

8 THE COURT: Okay. Anything from Merck?

9 MR. BARNETT: Your Honor, just briefly. Just for the sake  
10 of clarification.

11 THE COURT: Put your name on the record.

12 MR. BARNETT: I'm sorry, it's Ben Barnett on behalf of  
13 Merck. Just a point of clarification in Mr. Davis' description of  
14 the staging. Once the court has approved the confidentiality order  
15 PTO 13A, at that point we will be in a position where Ms. Barrios  
16 can provide the AG's the documents we've already given them in terms  
17 of the production list, the responses to the master discovery, and  
18 that sort of thing. At that point we will not be agreeing to give  
19 them access to the depository, that will follow the negotiation of  
20 the access order. And our goal is to send a draft within the next I  
21 would say two weeks so that that order can be put in place quickly.

22 Once they have access to the depository, we know that  
23 there was a concern that they actually wanted to see the documents  
24 and see what was in there before they agreed to do any scheduling  
25 order. Our view is once they've had sufficient time to actually

1 look at the documents it would make sense to meet and confer with  
2 them because we may be able to direct them to documents that have  
3 previously been produced which could set the stage for them drafting  
4 common discovery to seek additional documents they might need.

5 So I don't think that's in variance with what Mr. Davis  
6 was saying, but I wanted that clarification on the record.

7 THE COURT: I think that makes sense. There's no sense in  
8 re-inventing wheels and starting from ground zero. If the AG's and  
9 the third-party payors and the private interests ought to be able to  
10 profit from what's been done so they don't have to start all over  
11 again, that's what the whole point.

12 MR. DAVIS: What Mr. Barnett said is correct, and we have  
13 agreed to help facilitate those discussions so that if there are any  
14 issues with respect to production of documents we can hopefully  
15 assist as we've done in the past with those.

16 THE COURT: Good. Okay. Anything further from anyone?  
17 So let's see if we sum up then. By the next status conference, I'll  
18 hear from the parties as to some common issues, cases that need or  
19 are ready for trial and any discovery that needs to be undertaken,  
20 some scope of the discovery, whether or not I can anticipate any  
21 motions, substantive motions, whether you can anticipate at this  
22 time any procedural motions, give me some idea as to the length of  
23 time that you anticipate a trial of this sort would take.

24 As you know, the other Vioxx case that I tried I set for  
25 two weeks and three days, four days, and we tried six of those cases

1 in that period of time. So I am looking for some time around that  
2 sort of schedule, maybe even sooner, I mean shorter trial time. But  
3 I'll listen to you and get some ideas from you.

4 Also, the issue is whether some cases are jury trials and  
5 some cases are judge trials. I don't know what we do with that, but  
6 that at least ought to be looked at.

7 And our next status conference is on Tuesday,  
8 February 10th.

9 MR. DUGAN: Your Honor, can I just make one comment?

10 THE COURT: Sure.

11 MR. DUGAN: Your Honor, in reference to proposed Pretrial  
12 Order 13A, there was just one section in there that I had objected  
13 to, and that was in my opinion the unclear appointment of  
14 Ms. Barrios and her specific role and authority in reference to  
15 that. But I hear your Honor and you have my commitment that we're  
16 going to be willing and working together.

17 THE COURT: I had asked Ms. Barrios to try to coordinate  
18 all of the various logistical problems that are present in a case of  
19 this sort at this sublevel case in the sense that this is another  
20 aspect of the Vioxx litigation. And she's been able to coordinate  
21 it and it's at the direction of the court that she's been doing  
22 that. I specifically asked her to do it.

23 MR. DUGAN: Thank you, your Honor.

24 THE COURT: Anything further?

25 MR. FOX: Yes, your Honor, this is Randy Fox.

1 THE COURT: Okay. Go ahead, Randy.

2 MR. FOX: At the last status conference I had undertaken  
3 before the court to notify Ms. Barrios the state of the status of  
4 the MDL --

5 THE COURT: Right.

6 MR. FOX: -- and I just wanted to let you know that I have  
7 done that in the form of a memo sent to the directors of each  
8 state's Medicaid fraud control unit. And as a general matter, those  
9 units are located within state Attorney General's offices.

10 THE COURT: Okay. I appreciate you doing that, Randy. I  
11 want everybody who is interested to be aboard in this type  
12 situation.

13 MR. DAVIS: Your Honor, just to sum up the time frame,  
14 because I know the court always likes to do that with respect to  
15 these matters. By the end of this week we will have to you Pretrial  
16 No. 13A, it will be e-mailed, the recommendations so that the court  
17 can consider it. Within a week we'll hear back from Merck with  
18 respect to the confidential/non-confidential, and we'll also submit  
19 to the court the proposed access to the PSC depository order for the  
20 court's consideration.

21 Thereafter or hopefully probably within the next week  
22 we'll file a motion for the assessment and you will have before you  
23 by the next status conference a suggested outline for a scheduling  
24 order. Whether it be in the form of an agenda or scheduling order,  
25 I don't know, but that'll be discussed amongst the parties.

1 THE COURT: Okay. All right. Anything from anybody on  
2 the phone? Any questions or observations, suggestions? I  
3 appreciate you all participating. Ben, do you have anything?

4 MR. BARNETT: Nothing further, your Honor.

5 THE COURT: Okay. All right, then, the court's adjourned  
6 at this time.

7 THE DEPUTY CLERK: Everyone rise.

8 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

9  
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11  
12 REPORTER'S CERTIFICATE

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

19  
20  
21 

22 Karen A. Ibos, CCR, RPR, CRR

23 Official Court Reporter  
24  
25