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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: VIOXX PRODUCTS  
LIABILITY LITIGATION

MDL DOCKET NO. 1657  
NEW ORLEANS, LOUISIANA  
DECEMBER 14, 2007, 9:00 A.M.

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

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1 P-R-O-C-E-E-D-I-N-G-S

2 FRIDAY, DECEMBER 14, 2007

3 M O R N I N G S E S S I O N

4 (IN OPEN COURT)

5  
6  
7 THE DEPUTY CLERK: Everyone rise.

8 THE COURT: Be seated, please. Good morning, ladies and  
9 gentlemen. Call the case, please.

10 THE DEPUTY CLERK: MDL #1657, *In re Vioxx*.

11 THE COURT: Would counsel make their appearances for the  
12 record.

13 MR. HERMAN: May it please the Court, good morning,  
14 Judge Fallon. I'm Russ Herman, liaison counsel for the PSC.

15 MR. WITTMANN: Phil Wittmann, liaison counsel for the  
16 defendants.

17 THE COURT: We're here today in connection with our  
18 monthly meeting in this matter. I met with the various  
19 committees this morning to discuss with them their proposed  
20 agenda. I received the agenda timely several days ago. I've  
21 added some things to the agenda. We'll take them in the order in  
22 which they are set forth.

23 First, the settlement agreement. Any report on the  
24 settlement agreement?

25 MR. HERMAN: Yes, Your Honor. Initially, there have

1 been six seminars regarding the settlement agreement literally  
2 conducted from coast to coast. Mr. Marvin, Doug Marvin  
3 represented Merck, and Mr. Birchfield and Mr. Seeger will have  
4 brief reports. I only need to say that things are going quite  
5 well in the administration, and Your Honor will hear more about  
6 that.

7 MR. SEEGER: Good morning, Your Honor. Chris Seeger.  
8 Just briefly, we've held all day seminars starting in  
9 Philadelphia. We went from there to Atlanta, to Houston, Denver,  
10 LA, New York and recently here in New Orleans meeting with  
11 lawyers throughout the country to go through the settlement.

12 For the most part, Andy has prepared a PowerPoint  
13 which Your Honor has reviewed, more or less the PowerPoint that  
14 we used on November 9th, but we took a lot more time in these  
15 sessions really walking people through the settlement, making  
16 them aware of the deadlines, things that needed to be completed  
17 and, probably most importantly, hearing any concerns that people  
18 might have.

19 I have to say for the most part, the response has  
20 been overwhelmingly positive. I understand there are a couple of  
21 lawyers that have a couple of issues on this or that, but for the  
22 most part it's been overwhelmingly positive. Everyone seems to  
23 be pretty pleased with the deal, and I really haven't yet met the  
24 lawyer who says I can't recommend it to my client so I think  
25 that's a good thing.

1           I think another positive thing and one thing that  
2 really distinguishes this settlement from any other settlement  
3 that's come before it -- and this has a lot to do with Your Honor  
4 and the other judges -- is on the day we announced it, we put the  
5 entire deal on the website. Everything has been incredibly  
6 transparent. There are no confidential deals or agreements, that  
7 clients, for example, can go on the website and read it for  
8 themselves if they would like to.

9           We've also prepared -- two of our ethics experts  
10 have also prepared letters of communications that are available  
11 to all lawyers to send to their clients that outline, that really  
12 summarizes the deal, puts it in plain English and outlines every  
13 relevant or material portion of it.

14           Also at these sessions we've brought -- and you're  
15 going to meet and speak with today -- we've brought Orran Brown  
16 and his partner Lynn Greer, who will be talking about claims  
17 administration. We've also brought Matt Garretson, who will be  
18 handling the lien issues, who Your Honor will meet today as well,  
19 and one of our ethics experts, Lynn Baker, from the University of  
20 Texas has made herself available, and we've brought her to many  
21 of these sessions so the lawyers could ask questions. Generally  
22 we just want people to know if they have questions or concerns  
23 that we're all available to answer them or to get them answers.

24           Andy is going to spend a little time talking about  
25 actually his portion of what he's been discussing with them.

1 MR. BIRCHFIELD: Good morning, Your Honor.  
2 Andy Birchfield. Throughout the course of these meetings, as  
3 Chris mentioned, we started in Philadelphia, went to Atlanta,  
4 Houston, Denver, LA, and we also had a meeting in New York and  
5 New Orleans, and we have met with over 700 lawyers, walked them  
6 through the details of the settlement program, the checklist that  
7 they are to follow in presenting information to their clients and  
8 registering their clients for the program.

9 If I could, I would like to talk for just a few  
10 minutes about the upcoming deadlines and the questions that we  
11 have received and we're going to address. The first deadline is  
12 for registration, and the deadline is January 15th. One of the  
13 questions that has arisen is who should be registered, and we've  
14 explained to the lawyers that all clients, all Vioxx clients  
15 should be registered, whether they are a claimant that would be  
16 entitled to compensation under the settlement program or not.  
17 Regardless of whether it is a heart attack or a stroke or some  
18 other type of injury, all of those clients are to be registered.

19 The next deadline is for the enrollment process,  
20 and it's February 29th. In order to enroll the client, those  
21 forms are to be obtained from BrownGreer once the registration  
22 process is completed. That is one of the things that has been  
23 fairly encouraging is, as Russ mentioned, this process is well  
24 underway.

25 As a result of these meetings and lawyers engaging

1 in this process, beginning to get a good handle on the settlement  
2 program, the terms of the settlement program and how their  
3 clients are evaluated under the settlement program, we have had  
4 approximately 50. Yesterday we were at about 46. I know that  
5 there were a number of registration forms that were received  
6 overnight. We are approaching 10,000 clients that have been  
7 registered. So the program is well underway, and we're just a  
8 little more than 30 days post the announcement of the settlement.

9 THE COURT: And with the registration, the attorneys are  
10 not compelled to say that they approved the settlement or would  
11 recommend the settlement during the registration process?

12 MR. BIRCHFIELD: That is correct, Your Honor.

13 THE COURT: They simply say, These are claims that  
14 results from taking Vioxx, period.

15 MR. BIRCHFIELD: That is right. Your Honor, one of the  
16 modifications that has been made is to the registration  
17 affidavit. In fact, we changed the registration form and it was  
18 modified, but we're asking the Court -- in fact, we will file a  
19 motion and Doug has that and will file that with the Court this  
20 morning -- asking the Court to modify that so that there on the  
21 registration affidavit, there is no commitment to recommend at  
22 that stage. That will be covered with the enrollment form, the  
23 deadline will be -- which is February 29th.

24 THE COURT: And anybody who has filed one of those other  
25 affidavits will put in the part that that will be negated or

1 removed post-hoc so that we have everybody consistent. The  
2 purpose of the registration is sort of like a census, like  
3 December 25, zero. Everybody had to register in Bethlehem.  
4 That's what it basically it is at this time.

5 MR. BIRCHFIELD: Yes, sir. And one of the things that  
6 we have been urging lawyers to do and have gotten a very good  
7 response is early registration. That's important for a couple of  
8 reasons:

9 One, is the registration form that is used by  
10 BrownGreer to generate releases, the individualized releases that  
11 will go out to the clients.

12 It also provides the information that is necessary  
13 for the lien administrator, who we'll hear from later, Matt  
14 Garretson, to begin the statutory lien resolution process.

15 It also provides the information that is necessary  
16 for the lawyers and the clients to have access to records that  
17 have been obtained through the course of litigation by Merck and  
18 are now being made available to the lawyers free of charge.

19 So those are the reasons why it's important to get  
20 the clients registration process completed early, and lawyers  
21 have been responding. We're encouraged by that.

22 Then the next deadline is for the enrollment, which  
23 is February 29th. BrownGreer has received the registration form  
24 and has generated the releases and made those available to  
25 lawyers, along with the disclosure letter that was prepared by

1 the ethics expert that can be used as a letter by a lawyer  
2 communicating to the client the terms of the deal. The ethics  
3 expert also prepared a description of the settlement that can be  
4 used to meet the, meet our disclosure obligations to the clients.  
5 Those are available on the plaintiffs' website, which is official  
6 vioxxsettlement.com, that can be downloaded, can be modified if  
7 the lawyer chooses to meet his style. But the bottom line is if  
8 we have the negotiating committee and other members of the PSC  
9 have been actively engaged in getting information about the  
10 settlement and the response has been overwhelming, and to be  
11 30 days out, we have a tremendous response thus far and it's a  
12 very favorable report to the Court.

13 THE COURT: That's fine. One of the problems in a case  
14 of this sort is to get a handle on the census. In a class  
15 action, be it a statewide class action or national class action,  
16 there is not as much emphasis on that as far as those who do not  
17 opt in, or those who do not opt out are out, and so they are shut  
18 out in that sense. This is not a class action. So, you have to  
19 deal with the census in a little bit different way.

20 The census is the registration aspect of it.  
21 Somebody registers, but if they don't like the settlement, they  
22 don't like the settlement. But at least they are accounted for.  
23 If they haven't registered and later on down the line they try to  
24 get into that number, they will have problems, because other than  
25 perhaps a Rip van Winkle situation, they will have a great deal

1 of difficulty explaining why they didn't register. So that's a  
2 mechanism for at least getting the census. And then once the  
3 census is established, then the 85 percent of that census  
4 requirement can be met and then a lot of other things happen.

5           But this is the first step, and as I understand the  
6 first step in the process, there are no strings attached to the  
7 first step. You're not giving up anything. You're simply  
8 saying, This is a client or my client who has a claim resulting  
9 from Vioxx. I'm not admitting as a lawyer by registering that I  
10 agree with the settlement, or disagree with settlement, or will  
11 advise my client positively for the settlement, or will not  
12 advise him positively. I'm just saying, This is my client, and  
13 she or he has a claim. Is that your understanding?

14           MR. BIRCHFELD: Yes, Your Honor. That is correct. In  
15 fact, that is the purpose of submitting the order. It will  
16 change the registration affidavit. Because the registration  
17 affidavit did not make a commitment on behalf of the clients but  
18 it did as to whether or not the lawyer would recommend the  
19 settlement agreement.

20           And during the course of our discussions, we've  
21 heard lawyers saying, We need additional time. And so we're  
22 proposing that the Court enter this order that would delete that  
23 provision from the registration affidavit, and that commitment  
24 from the lawyer will come at the time of the enrollment.

25           THE COURT: That's fine, okay.

1           MR. MARVIN: Doug Marvin for Merck. We're pleased to  
2 hear that the program is being well received. We're also  
3 encouraged by the number of claimants that are already  
4 registered. And in that respect we agree with Mr. Birchfield  
5 with respect to the order that has been handed up to Your Honor  
6 this morning that would separate the registration process from  
7 the enrollment process.

8           We've also been working with Brown and Greer along  
9 with the plaintiffs' group to develop an efficient process and a  
10 smooth process for the processing of these claims. And I guess I  
11 understand that Your Honor will be hearing from Brown and Greer  
12 about that and they'll be making a report. Thank you.

13           THE COURT: I would like to hear. One of the key  
14 problems in a matter of this nature, because of the scope and  
15 because of the numbers involved, is just the administrative  
16 difficulties that such a settlement poses.

17           And we're fortunate to have with us on this  
18 particular case experienced people who have been down that road  
19 before and have distinguished themselves in this area, so I'll  
20 hear from them at this time.

21           MR. HERMAN: May it please the Court, I introduce to the  
22 Court, Orran Brown of Brown and Greer who will make a report to  
23 the Court.

24           MR. BROWN: Good morning, Your Honor, I'm Orran Brown.  
25 It's a pleasure to be here and with me today is Lynn Greer, who

1 is back there with me. We are the Brown and the Greer of  
2 BrownGreer in Richmond, Virginia. And we are quite honored to be  
3 the claims administrator on this program. The parties involved  
4 in this and the Court and the other courts involved in this have  
5 put in a lot of hard work to get this settlement program  
6 underway. And we're going to do justice to that work by  
7 continuing to keep it moving in a way that makes this program  
8 successful.

9           Our job at this point is to do what we've already  
10 done, is hit the ground running. We want to make sure that there  
11 is plenty of room at the inn when all these folks show up to  
12 register for the census, and we've already started the process in  
13 the last month to make that work.

14           And what I want to do this morning briefly is  
15 summarize for the Court what we've done in the last month since  
16 the settlement was announced on November 9th.

17           Our job is to make this work promptly, correctly,  
18 and efficiently. And we've done that in other settings. We have  
19 been doing this kind of work, designing and implementing  
20 resolution programs, since 1989, beginning with the Dalkon shield  
21 trust funds out of the Robins bankruptcy in Richmond where I  
22 served as their outside counsel. Lynn was in-house counsel at  
23 that trust fund. We've handled the legal and practical aspects  
24 of that facility and two other trust funds created in that  
25 bankruptcy until we closed the last trust in 2000.

1           We have been working throughout at that time on  
2 other settings like this one. We have worked in the Wyeth  
3 fen-phen diet drug class action settlement. We're not the trust  
4 fund in that; there is a trust fund in Philadelphia that is  
5 handling that administration, but our job in that setting has  
6 been to try to make that process work better. We have been doing  
7 that for the last seven years. And we handled a program very  
8 much like this one for the settlement of about 60,000 opt-outs  
9 from the diet drug settlement on behalf of Wyeth, and that  
10 program we felt worked very smoothly and is finishing out now.

11           We have handled the claims administration in the  
12 Sulzer, about a billion dollar class action settlement out of  
13 Cleveland.

14           We handle this type of work in large personal  
15 injury settings, smaller personal injury settings and in  
16 nonpersonal injury cases where there is some resolution program  
17 and a process to move a claim from start to finish as quickly as  
18 possible and correctly.

19           Briefly, Your Honor, this is what we've done in  
20 this setting so far. As the Court has already heard, as of last  
21 night, we have received registration materials from 63 law firms  
22 for almost 10,000 claimants in those spreadsheets that we've  
23 gotten so far. It's a little under 10,000 right now. We have  
24 two unrepresented claimants who have sent in their registration  
25 affidavits.

1           And so far, obviously we're focusing on the  
2 registration phase and then what immediately follows on its  
3 heels, the enrollment phase, designing processes right now to  
4 allow the participants access to us, access to information about  
5 what they are supposed to be doing and by when. And we have been  
6 working with the parties to put all of this in place as quickly  
7 as possible.

8           We have established a Vioxx settlement website on  
9 our website, which is now, I think, going to be the central  
10 repository for official documents, official forms, helpful  
11 checklists that we developed to help people make sure that they  
12 have followed each of the steps, instructions about each of the  
13 steps in the process and how to begin the program, what they need  
14 from us down the road to have their claims evaluated in the  
15 program. We set up our own toll-free number dedicated to this  
16 settlement. It is on our website. We staffed that with people.  
17 It's not an automated system. We have our employees answer those  
18 phone calls. We have our own rules that if you get a phone call  
19 and don't get the person right at that moment, we return those  
20 calls within 60 minutes or less during the business day, first  
21 thing the next morning if they come in late.

22           We have, as the registration orders required us to  
23 set up an e-mail box, [claimsadmin@browngreer.com](mailto:claimsadmin@browngreer.com), we've set that  
24 up immediately. That's where we are now receiving registration  
25 materials. We also in that e-mail address, we get lots of

1 questions from law firms about the process and how it works. We  
2 answer those within 60 minutes or less if they come in during the  
3 business day or first thing the next morning.

4           We attended four of these informational meetings  
5 that the Court heard about to give some public face to the claims  
6 administrator so that when people ask us a lot of questions at  
7 those sessions.

8           We've worked a lot on the forms that are needed  
9 right now for the registration affidavit, the claimant's  
10 spreadsheet, and then the forms that are needed for the  
11 enrollment package to make them as user-friendly as we could.  
12 For example, in the claimant's spreadsheet, we took the one that  
13 was attached to the settlement agreement and created an Excel  
14 version that had a lot of drop-down lists and instructions and  
15 things that we could program into it to help the flow of data  
16 entry for the people using it, and it also helps us when we get  
17 it back that we could input it correctly.

18           And we're already exchanging that information with  
19 law firms, many of whom we've worked with before in other  
20 programs to make the system work as smoothly as we can.

21           We have commenced the planning for each of the next  
22 steps of the program. As soon as we get a registration affidavit  
23 and a spreadsheet from a law firm sent to our e-mail address, we  
24 assign a claims administrator contact, a CA contact, we're  
25 calling it, a person in our office who is assigned to that law

1 firm for the duration of the program. And that's the person that  
2 that law firm can call for any type of question about it or  
3 e-mail any type of question about it throughout the process, and  
4 a lot of our employees have worked with a lot of these firms  
5 before in other programs and already know each other.

6           So we think that that works very well so that  
7 people always know whom they are supposed to call if they have a  
8 question or e-mail if they have a question or a problem.

9           We've begun the planning for the next steps for  
10 claims review, the work that happens after enrollment. We are  
11 already developing the processes for that. We want this to run  
12 smoothly throughout on the timetable that the settlement  
13 agreement contemplates, unless that's extended for some reason.  
14 We want this to work on the timetable by January 15th to have  
15 people registered by February 29th, to have people enrolled, and  
16 we are, we want to create systems that make it work easier.

17           For example, if someone has to enter information,  
18 we only want that entered once. Name, address, claimant. Once  
19 it's entered, we use that throughout the system. We can pre-fill  
20 in the forms for the participants so that they don't have to redo  
21 them. And on certain forms, where there is a lot of data entry,  
22 what we want to drive people to do is make those forms available  
23 at a secure website that a firm would access by a password that  
24 we issue them. They can enter the data online. It's already on  
25 our servers, it saves time and money so that we're not entering

1 data ourselves. We want this to work electronically in as  
2 sophisticated a way as we can, the firms can use and feel  
3 comfortable with.

4 We're prepared at any time to give the Court any  
5 information the Court would like about how it's going, and if the  
6 Court has any further questions of us this morning, we would  
7 happy be answer.

8 THE COURT: No, I would like you to meet with us on a  
9 monthly basis, at least for the immediate future so that we can  
10 get a handle on what's happening and what problems you're having,  
11 if any, so that you can announce them and I can either deal with  
12 them at our monthly status conference or put them on the web or  
13 do something to keep matters moving.

14 MR. BROWN: Yes, Your Honor, we would be delighted to do  
15 that.

16 THE COURT: It would be helpful if periodically you  
17 would file or at least deliver to us a list of people who have  
18 been registered so that we have a running list of that.

19 MR. BROWN: We would be happy to do that, too,  
20 Your Honor.

21 MR. BIRCHFELD: Your Honor, if I could comment very  
22 quickly. As Mr. Brown expressed, they have committed to working,  
23 making this process work. They have been available to work with  
24 us at all hours to, you know, to make changes, adjustments to the  
25 forms to make this work very efficiently.

1           As the program is kicked off and we've had these  
2 meetings, we've received calls, a number of calls from lawyers,  
3 you know, with questions, and as they have been interacting, you  
4 know, with BrownGreer, it's been true for, you know, for my  
5 office. I know the same is true for Mr. Seeger and Mr. Blizzard  
6 and I'm sure others that have received calls from lawyers, it has  
7 been, without exception they have been very complimentary of how  
8 responsive BrownGreer has been to their questions. They have  
9 assigned an individual at BrownGreer that is the permanent  
10 contact for lawyers, and that has worked extremely well. And the  
11 lawyers have gotten prompt and accurate responses to their  
12 questions, and I think that is facilitating the implementation of  
13 this program to a tremendous degree. And, Judge, I had mentioned  
14 earlier, the lien resolution aspect of this, and --

15           THE COURT: I would like to hear from the lien  
16 administrator. One issue that we have in a program such as this,  
17 and it's becoming an increasingly prominent issue with recent  
18 legislation in mega cases and that issue is governmental liens,  
19 such as Medicare liens, Medicaid liens. That, as we all know, is  
20 a requirement, a debt so to speak that Medicare feels they are  
21 owed by both the litigant as well as the litigant's attorney. So  
22 this is a very significant issue in these types of cases and in  
23 other cases. And so we are fortunate to have someone experienced  
24 in this area to address from the outset the various governmental  
25 liens. I'll hear from him at this time.

1           MR. BIRCHFELD: Your Honor, Matt Garretson, the service  
2 and lien administrator.

3           MR. GARRETSON: Thank you, Your Honor. My name is Matt  
4 Garretson. I'm with the Garretson Law Firm. With me in the  
5 courtroom today is Jason Wolf, with our firm, who runs our  
6 operations. The governmental liens under the master settlement  
7 agreement that we'll be addressing, Your Honor, are the Medicare  
8 and Medicaid as you mentioned, as well as other governmental  
9 liens with statutory interests, Tricare, Champus, VA liens,  
10 Indian health and perhaps others.

11                       We expect 70 to 80 percent of all registered  
12 claimants to have these liens. With the assistance of the  
13 plaintiffs' steering committee, we accessed a study group that  
14 works with the government to find out how many of the  
15 beneficiaries or how many of the participating claimants are, in  
16 fact, beneficiaries.

17                       But despite that number, we have a good head start.  
18 We have been working very diligently with the Centers for  
19 Medicare and Medicare Services, both in a testing, hypothetical  
20 phase earlier on to look at this study group, as well as very  
21 regularly since this settlement program was announced.

22                       We are communicating with the states here at the  
23 year end regarding the processes and the procedures that we'll be  
24 using. And as I'll speak in a moment, they're very familiar with  
25 this process. We have gone down this road with them before.

1           We have been working with the claims administrator,  
2 BrownGreer, just as recently as yesterday to synchronize our  
3 timelines, our processes and procedures, and we've had the good  
4 fortune of working with them before on other complex projects.

5           I think what's important to say, because Jason will  
6 shoot me if I don't mention it, it's critical at this juncture  
7 that we communicate to every plaintiff attorney who represents  
8 registering claimants to not make contact with Medicare, Medicaid  
9 and the other statutory lien holders on their own at this point  
10 because it could create confusion because we're trying to funnel  
11 all this and aggregate these claims in a very deliberate fashion,  
12 Your Honor.

13           We will be communicating this process and these  
14 instructions through BrownGreer to all the attorneys who register  
15 claimants and receive their release packages.

16           THE COURT: I would like to emphasize that point because  
17 the whole purpose of trying to do this globally is to give the  
18 litigants the benefit of numbers. And when it's done globally,  
19 each individual profits from that, and also the Medicare program  
20 profits from it because they can get their hundreds or thousands  
21 of liens or whatever it is worked out.

22           It's better for the individual if the individual is  
23 part of the group effort from the liens standpoint. And so  
24 that's another benefit for registration.

25           MR. GARRETSON: Yes, Your Honor. We are confident in

1 the timetable that's been outlined and the procedures we have in  
2 place to ensure that money can move to these program claimants  
3 consistent with the timelines laid out by the master settlement  
4 agreement.

5           Not all liens will be finalized, but we have  
6 procedures in place to allow for a holdback, Your Honor, that  
7 would enable, while we tighten down the final lien amounts, to  
8 have money moving in a meaningful way to all of the claimants  
9 consistent with the timeline.

10           Your Honor, we're not handling the private liens  
11 that may be through the claimants' employers or through policies  
12 they retained on their own or through supplemental policies they  
13 may have purchased; however, we are providing written educational  
14 materials to all the attorneys and to the enrolled claimants, and  
15 a questionnaire and other tools to assist them in understanding  
16 what obligations they might have under such plans.

17           Your Honor, I think that I would just like the  
18 Court to understand that we're committed to the process. This is  
19 a large project, but we are used to, as a firm, running 40 to 60  
20 thousand claims through our shop a year to verify and finalize  
21 these statutory liens.

22           We've had the good fortune of serving many of the  
23 attorneys here in the courtroom through the diet drug  
24 settlements, through various waves of the Rezulin settlements and  
25 the Oxycontin settlements, and most recently concluding 26,000

1 Zyprexa liens in this fashion that I've laid out for the Court  
2 today.

3 We're honored to serve the parties, the Court and  
4 most importantly to make sure that this settlement is as  
5 meaningful and beneficial in terms of what actually happens to  
6 the claimants in their net proceeds at the end of the day.

7 I'm happy to answer any questions the Court may  
8 have.

9 THE COURT: Thank you very much. I appreciate your  
10 help.

11 MR. HERMAN: Matt, thank you.

12 THE COURT: Let me hear more on the settlement  
13 agreement.

14 MR. HERMAN: Just a couple of notes, Your Honor.  
15 Initially we've taken the position that as regards the  
16 nongovernmental statutory liens, that we're not in a position to  
17 entertain those until those entities, private entities provide us  
18 with authorization of who represents them, with the insurance  
19 policies in which they claim there is a subrogation right, and  
20 until they are prepared to talk about causation and produce their  
21 own records as to medical issues.

22 In terms of BrownGreer, as Your Honor knows, we  
23 have noticed 1,160-plus pro se individuals that we are receiving  
24 about 30 to 40 calls a day, either from pro se or attorneys that  
25 have claims, and BrownGreer has been extraordinarily responsive.

1 I echo what Andy and Chris have had to say about that.

2 MR. SEEGER: Your Honor, I'm sorry, to jump in like  
3 that. I want to make it clear so nobody picks up this transcript  
4 and misreads it. At this point, we don't acknowledge any private  
5 third-party liens or claims, but the deal does not in any way  
6 interfere with their rights under their insurance agreements. I  
7 just wanted to have that for the record.

8 THE COURT: Anything more on the settlement?

9 MR. WITTMANN: No, Your Honor.

10 THE COURT: Let's go to the state court trial settings  
11 and report on that.

12 MR. WITTMANN: Yes, Your Honor, there are a number of  
13 state court trial settings that were outstanding at our last  
14 conference that have been vacated now. There are only two cases  
15 in state court for which we have trial settings.

16 We have the *Zajicek* case set in Texas on  
17 February 11, 2008, and the *Frederick* case, which is set in  
18 Birmingham, Alabama, for March 10th in Jefferson County, Alabama.  
19 Those are the only two trial settings that I'm aware of right  
20 now.

21 THE COURT: Class actions is the next item on the  
22 agenda.

23 MR. HERMAN: Your Honor, at page 3, I want to indicate  
24 to the Court that the interlocutory decrees filed in the  
25 Fifth Circuit will receive our Motion to Dismiss next week.

1                   No further issues on class actions, Your Honor.

2                   THE COURT:   What about discovery directed to Merck,  
3 number 4 on the agenda?

4                   MR. HERMAN:   Your Honor, we're not requesting that the  
5 stay be lifted in terms of Merck discovery.   Folks need time to  
6 register and evaluate the settlement document.

7                   THE COURT:   Discovery directed to third parties is  
8 number 5.

9                   MR. HERMAN:   Your Honor, I'm in discussions with  
10 Mr. Wittmann and representatives of Merck regarding the FDA  
11 discovery in connection with preemption, and we will be moving  
12 the Court to request a stay insofar as the FDA discovery limited  
13 to the preemption issues be lifted.

14                   MR. WITTMANN:   As matters now stand, Your Honor, on the  
15 issue of stay of pre-trial order number 30 staying all deadlines,  
16 we'll wait and see that motion.

17                   THE COURT:   I'll wait to receive it and give you an  
18 opportunity to respond.

19                   There is also another item mentioned is  
20 [officialvioxxsettlement.com](http://officialvioxxsettlement.com).

21                   MR. HERMAN:   Yes, Your Honor, that's a rogue listing.  
22 It has misinformation on it.   It appears at face value to be some  
23 sort of solicitation of cases.   We would like the stay lifted so  
24 we can investigate it.   We have been in contact with the firm  
25 that listed this site.   They have not agreed to voluntarily at

1 this point take it down. We've also been in touch with at least  
2 one lawyer whose name is listed in connection with this site who  
3 did not know his name was even listed. So we would like the stay  
4 lifted so that we can have discovery directed to this issue and  
5 then present the proper motion to the Court.

6 MR. WITTMANN: We have no objection to lifting the stay.

7 THE COURT: Do a motion for that and I'll lift the stay  
8 for that purpose. I'm interested in whether we discover the  
9 issue so that I can determine whether an injunction is in order.

10 MR. HERMAN: Your Honor, the next issue on stay involves  
11 a prescription benefit manager, acronym PBM, the Express Scripts,  
12 Inc. These organizations generally negotiate with employers and  
13 pension plans, and contract to get a reduced drug order ability  
14 for members of pension plans or employment units. Express Scripts  
15 has advised a number of lawyers that they will charge \$1,500 for  
16 pharmacy records. That's a bit larger than the \$50 that they  
17 usually charge, and, Your Honor, we would like very much to be  
18 able to have the stay lifted so that we can take depositions of  
19 Express Scripts on this issue, as well as subpoena their records  
20 where necessary in order to determine whether or not \$1,500 is  
21 realistic to furnish three or four pages of pharmacy records.

22 MR. WITTMANN: And we have no objection to lifting the  
23 stay.

24 THE COURT: File the necessary motion. Those  
25 organizations do a good service in collecting the information,

1 and they do deserve to be recognized and paid for their service;  
2 on the other hand, their charges have to be reasonable under the  
3 circumstances. If they are not reasonable, then I will consider  
4 issuing Subpoena Duces Tecum requiring them to deliver the  
5 material into the registry of the Court, and I'll have it as part  
6 of the court record, and I won't even pay the \$50. So let's  
7 discover that situation and hopefully it will work itself out. I  
8 recognize that they do a service, and I think they should be paid  
9 for it, but the payment ought to be reasonable.

10 MR. HERMAN: Thank you, Your Honor.

11 With respect to deposition scheduling --

12 THE COURT: Which is the next item on the agenda, six.

13 MR. WITTMANN: Those have all been postponed,  
14 Your Honor.

15 THE COURT: On state/federal coordination, liaison  
16 counsel, anything from you?

17 MS. BARRIOS: Yes, Your Honor. Good morning,  
18 Your Honor, Dawn Barrios for the state liaison committee. I  
19 would like to take a moment to thank the negotiating teams for  
20 both the plaintiffs and the defendants. It is so wonderful to  
21 have such a resolution and the overwhelming support that  
22 Mr. Herman, Mr. Birchfield and Mr. Seeger spoke about, I can also  
23 attest to because we've gotten so many calls about the  
24 settlement.

25 And I say this as a compliment. The only complaint

1 that I get is because not every Vioxx claimant is allowed into  
2 the settlement. As Your Honor is aware, there are deadlines for  
3 eligibility, but if that's the only complaint that we've heard,  
4 that speaks well of the settlement.

5           Also, I want to compliment the Plaintiffs' Steering  
6 Committee for the various seminars around the country. I've been  
7 able to direct people to attend the seminars. Everyone has found  
8 them particularly helpful. Mr. Birchfield and Ms. Leigh O'Dell  
9 have really done a spectacular job of explaining the settlement  
10 to the late attorneys who are not all that familiar with Vioxx.

11           I do have a question, Your Honor, because I know  
12 there are a lot of people on the line with this issue, I would  
13 like to address it, particularly to Mr. Birchfield. For those  
14 claimants who are not going to be eligible claimants,  
15 particularly in states like Florida, who have a four-year  
16 statute, should they file a registration form?

17           MR. BIRCHFELD: It's been our position we're encouraging  
18 lawyers to, if they are subject to the jurisdiction of the Court,  
19 then they are to register. They should register each of those  
20 claims, just list the Vioxx claims in which they have an  
21 interest.

22           THE COURT: I think it's one of those situations where  
23 it's kind of like chicken soup; it can't hurt. They are not  
24 giving up anything. They are not doing anything to prejudice  
25 their clients in any way, and it may well help their clients, but

1 they are not going to hurt them as I see it. So when in doubt, I  
2 think registering is a good move.

3 MR. BIRCHFELD: Your Honor, Ms. Barrios pointed out that  
4 they may not be subject to the jurisdiction of the Court. And  
5 that is true if a lawyer does not have any Vioxx, you know, case  
6 filed, but if a lawyer has a single Vioxx claim that is filed or  
7 told in the MDL or has a claim filed in New Jersey, California or  
8 Texas and they are subject to the registration order, in that  
9 event, they should list each Vioxx claim in which they have an  
10 interest.

11 That's the position that we think that that was  
12 what was contemplated by the terms of the settlement agreement  
13 from our perspective; is that correct, Mr. Marvin?

14 MR. MARVIN: Yes, it is.

15 MS. BARRIOS: I appreciate that, Your Honor, because  
16 that is a question that we've gotten so many times.

17 In connection with the settlement, I have received  
18 some calls from attorneys particularly in Washington state and in  
19 New York who have cases that are pending here. They have pending  
20 remands, and their cases are economic cases only. Particularly  
21 *Pagan and Brown versus Merck*, MDL case number 05-0515, and  
22 *Robert Waitt, et al. versus Merck*, and that is number 05-5318.

23 Both of these cases are economic classes statewide.  
24 One is against, the *Waitt* case is against Merck for wanting to  
25 get full refund after the voluntary withdrawal alleging that a

1 full refund for unused Vioxx was not given and the other is for  
2 return of the purchase price.

3 I have spoken with these two attorneys and they've  
4 asked me to ask Your Honor if you would entertain a motion to  
5 lift the stay that you imposed in pretrial order number 30, to  
6 allow these two cases to have their remand orders heard.

7 I then did a survey, a very informal survey of my  
8 remand information, and there are about six or seven other cases  
9 pending on our remand docket of state court cases with economic  
10 issues only. I've spoken with Mr. Dugan about his Louisiana AG's  
11 case. We also have one from D.C., Attorneys General of Montana,  
12 New York, New Jersey, and Utah.

13 I am going to do a thorough search of those types  
14 of cases with the PSC. I've been in touch with Mr. Davis about  
15 that, and we are going to present or these attorneys will present  
16 a motion for Your Honor to lift the stay for the cause shown.

17 THE COURT: Let me address those. My thinking on the  
18 litigation at this stage is that I think once the smoke clears on  
19 the settlement and we get a better feeling on it, like for the  
20 next month or two months, so that this is moving along properly,  
21 we ought to then figure out what's left. And then we have to  
22 devise a plan for what's left, how to deal with it.

23 With the economic cases, we may find it helpful,  
24 useful to try one of those cases, to pick one of the cases that's  
25 sort of similar to all of the other cases and try that and see

1 how that shakes out, how it works.

2           It's somewhat of a bellwether approach in the  
3 economic cases or in the cases that are left in some way. My  
4 reluctance to send them back at this stage is because I don't  
5 feel that I've done enough to give those cases some information  
6 that they can utilize when they go back. We have been focused on  
7 the personal injury cases and the causation elements and all of  
8 that sort of thing, preemption elements in those particular  
9 cases, but when we are finished with that, and it won't be long,  
10 we have to then see what's left and see how we can devise a  
11 system for resolving those cases.

12           I'm not going to just abandon those cases. That's  
13 the next step, to resolve those cases, and we may have to,  
14 hopefully we will have learned something from the others, but I  
15 do, I am beginning to focus on it and to come up with some  
16 mechanism for dealing with those cases in somewhat similar ways  
17 at least to try them, at least try one of them so we'll see what  
18 we can learn from it.

19           MS. BARRIOS: Thank you, Your Honor, I appreciate that.

20           I have given to Merck and to the plaintiffs and I  
21 presented to your law clerk this, I'm happy to say this holiday  
22 season we have a three-box DVD set. We have updated Vioxx remand  
23 statistics. We have total pending remands 739. A second CD is  
24 the 10 cases that have been removed twice. We call those the  
25 double remand, and the third CD are those cases that I spoke

1 about with the economic impact.

2 THE COURT: And they still want to go back, is that it?  
3 They don't want a part in the settlement?

4 MS. BARRIOS: I have not heard anyone who has a claim  
5 who would be eligible for the settlement and wants to go back.  
6 I'm hearing from the people who on its face will not benefit at  
7 all.

8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 MR. HERMAN: May it please the Court, pro se claimants,  
11 pursuant to Your Honor's order, on December 12th, our office sent  
12 to all pro se claimants that we knew about and that we had any  
13 e-mail or mail addresses, approximately a thousand, not only the  
14 agreement but a letter based upon advice from ethics experts  
15 explaining the settlement, and a checklist developed by our  
16 office.

17 We've had a number of responses on a daily basis.  
18 So far, the pro se's are filling out forms, two of them have  
19 already registered. We anticipate at some time in the future  
20 that it may be necessary for Your Honor to appoint a curator ad  
21 hoc, but we haven't reached that point yet.

22 Yesterday I received an e-mail from Ms. Barrios  
23 indicating that she would be happy to assist us with the pro se.  
24 At this point, it's well in hand, but should we need additional  
25 assistance, we thank Ms. Barrios for her offer.

1 I did want to say in connection with the six  
2 seminars, Mr. Blizzard, of course, Chris Seeger, Arnold Levin,  
3 Tom Girardi, from my office, Len Davis, Steve Herman have all  
4 participated in those seminars, and there are several upcoming  
5 seminars. I think there are three listed that are members of the  
6 PMC firms will be attending and making the presentations.

7 MR. WITTMANN: Your Honor, Merck's motions, which are  
8 the next item, we have nine cases in which the plaintiffs have  
9 moved for reconsideration of the judgment you entered last month.  
10 I understand you're not going to hold oral argument on those.  
11 They will be decided under submission.

12 THE COURT: Right.

13 MR. WITT MAN: On the preemption motion that Your Honor  
14 and I had summary judgment on in the *Arnold* and *Gomez* cases, you  
15 have under consideration our motion for certification for  
16 interlocutory review, and the Court has it under advisement and  
17 that's the report on that.

18 MR. LEVIN: Arnold Levin, we're taking discovery along  
19 those lines, Your Honor.

20 THE COURT: All right. Issues relating to pretrial  
21 order number 9? Anything on that?

22 MR. HERMAN: No, Your Honor.

23 THE COURT: Vioxx suit statistics.

24 MR. WITTMANN: Your Honor, we've gotten a joint report  
25 of the suit statistics as of October 9, 2007. Those are the most

1 recent statistics we have. We expect to get some later this  
2 month I believe. But there has been very little change since  
3 October in the statistics.

4 THE COURT: Motions to conduct case specific discovery  
5 is the next item.

6 MR. HERMAN: Your Honor, there is nothing new on that.  
7 We're still discussing those issues. At the present time,  
8 because of the registration under the master settlement  
9 agreement, there has been no action undertaken in that regard.

10 THE COURT: How about Dr. Farquar?

11 MR. HERMAN: Your Honor, we've asked permission for  
12 myself as plaintiffs' liaison counsel to speak with Mr. Wittmann  
13 and Mr. Arbitblit about this matter.

14 THE COURT: Any problem with that?

15 MR. WITTMANN: No, Your Honor. We would be happy with  
16 that.

17 THE COURT: Let's arrange that. If you need the Court's  
18 assistance, let me know.

19 The MDL trial package.

20 MR. HERMAN: Yes, Your Honor. Your Honor, the MI trial  
21 package is complete. The stroke package, we had a committee  
22 conference call on that. It's underway, should be completed in  
23 January.

24 We have had two requests for the trial package.  
25 Primarily, Mr. Stratton, Michael Stratton requested a release of

1 the trial package. I responded on behalf of the PSC and the  
2 trial package committee that we had been exploring security  
3 issues because we did not want the strategies which include lines  
4 of direct and cross examination suggested vulnerabilities in what  
5 we perceived Merck's case, vulnerabilities which we perceived in  
6 plaintiffs' cases, how to handle those vulnerabilities,  
7 et cetera, strategy items, we did not feel that they should be  
8 released because we don't have any way of protecting it. But  
9 that with all of the public materials, that is, the 17 trial  
10 transcripts, the deposition cuts, the documents offered in  
11 evidence by both sides, catalog, would be provided to  
12 Mr. Stratton on a disc.

13           And several times I e-mailed him that we would be  
14 available in our office in New Orleans, Mr. Seeger in New York,  
15 Mr. Birchfield in Montgomery, Mr. Girardi's office on the west  
16 coast, virtually also Mr. Rafferty's office in Pensacola and we  
17 would provide a lawyer and he could come and take notes of what  
18 the strategies were, who we thought the best experts were,  
19 et cetera, and we got no response other than a motion which said  
20 that we never offered.

21           That motion is filed before you. It's not set. I  
22 want to renew on the record to anyone who wants to look at the  
23 trial package, it is available. We've also filed under seal our  
24 early retention of a security expert. We now have concrete  
25 proposals which have been filed under seal. A number of

1 Mr. Stratton's inquiries and our responses on the AAJ list serve,  
2 which is a security protected list serve, and so those materials  
3 are also filed under seal and we would be delighted to have that  
4 matter set at Your Honor's schedule and are prepared to argue it.

5 THE COURT: I've had an opportunity to see the trial  
6 package, and the trial package includes a number of things. Some  
7 of the matters are public record, the depositions and clips and  
8 things of that sort; but other areas include what I would feel  
9 would be attorney-client privilege, and the difficulty with  
10 attorney-client privilege is that it can be waived. And the  
11 difficulty of exposing that type of material without proper  
12 security is catastrophic on the rest of the people who utilize or  
13 intend to utilize the trial package because then it gets into the  
14 public domain or it's at least discoverable, and then the trial  
15 package that took a lot of experienced lawyers a lot of time to  
16 prepare is rendered meaningless or at least partially  
17 meaningless.

18 So it seems to me that the material that is in the  
19 public domain can be given to someone who requests it, who is in  
20 the litigation, but with the other material, up until there is  
21 secure devices to ensure the total security of this material,  
22 it's problematic for everyone, including those who have not as  
23 yet requested it, that this material be given.

24 So I'm not in favor of the material being given. I  
25 do recognize that the attorneys should be given access and

1 whatever convenience that can be extended to them, I would expect  
2 the committee to do that. But I am not in favor of having that  
3 sent without the proper security devices placed on that.

4 MR. HERMAN: Your Honor, Mr. Stratton has also filed  
5 naming Merck and the individual, of the plaintiffs' negotiating  
6 committee as defendants in a declaratory judgment action in  
7 United States District Court, District of Connecticut. The  
8 matter was allotted to Judge Underhill yesterday. Judge  
9 Underhill, with representatives of Merck and representatives of  
10 the PNC, conducted a hearing, and the result of that hearing is  
11 that Mr. Stratton will file on Monday any supplemental brief that  
12 he wishes to file on the issue of whether there is a controversy  
13 or not.

14 By Monday afternoon by 5:00, Merck and the  
15 individual defendants named will file a 1404A motion to transfer  
16 before Judge Underhill, and by Friday, next Friday, in the event  
17 that Merck or the individual named PNC members feel the necessity  
18 to reply to Mr. Stratton's supplemental brief, our brief will be  
19 due at 5:00 Friday.

20 It would be improper for any lawyer to represent to  
21 the Court what Judge Underhill may or may not decide, and I guess  
22 we won't know that until we get an order, but Judge Underhill did  
23 indicate that he was going to deal with this matter very swiftly,  
24 as soon as he had briefing before him.

25 THE COURT: Thank you.

1 MR. HERMAN: The last matter on this agenda, other than  
2 Your Honor setting a new date for us to meet, is yesterday  
3 afternoon, Mr. Kaiser, whom Your Honor is familiar with, he tried  
4 a case in the MDL, joined by other attorneys, filed motions and  
5 papers yesterday basically requesting relief or modification of  
6 three, primarily three different aspects: One dealing with their  
7 view of the ethics issues. Secondly, deadlines, and lastly, for  
8 some special committee to be appointed to renegotiate  
9 modifications to the agreement.

10 And the matter is not ripe. They did file an  
11 emergency, a request for emergency hearing on it. On behalf of  
12 the PNC, we request that we be allowed until next Friday at 5:00  
13 to respond to those pleadings.

14 MR. RANIER: May we be heard on that, Your Honor?

15 THE COURT: Sure.

16 MR. WITTMANN: Your Honor, we would make the same  
17 request on behalf of Merck. We have until next Friday to file a  
18 response.

19 THE COURT: All right.

20 MR. RANIER: Drew Ranier. Your Honor, we filed motions  
21 and we're prepared to go ahead today. Depending on Your Honor's  
22 pleasure, we have professor Charles Silver from the University of  
23 Texas, an ethics professor there who is prepared to discuss the  
24 key issues in the motion relating to, especially the hundred  
25 percent recommendation rule and the problems that it creates,

1 particularly in Texas, but everywhere. So whatever your pleasure  
2 is.

3 THE COURT: I won't hear it today but I'll give you 10  
4 days, I'll take it, I'll look at it and then I'll set it for  
5 hearing. We'll set aside perhaps maybe three days on it. I'll  
6 hear the, I'll give you-all an opportunity to discover it before  
7 the hearing, take the depositions of whomever you need to, give  
8 it to me and then I'll deal with it. Meanwhile we'll go forward  
9 with the matter. But I'll give 10 days to hear a response and  
10 then I'll set a discovery schedule and I'll set a hearing  
11 schedule.

12 MR. RANIER: Thank you, Your Honor. Now that Your Honor  
13 has indicated that you will modify Exhibit A and the affidavit or  
14 the registration form, that of course changes some of the issues.  
15 We briefed that and moved for that in our motion. And we thank  
16 you for that. But we still have, and that takes a little bit of  
17 the pressure off of the deadline, but we still have the  
18 enrollment deadline at the end of February, and I'm speaking for  
19 firms that have approximately 5,000 cases, so the sooner this is  
20 done, the better. And we appreciate your handling it quickly.

21 THE COURT: Okay.

22 MR. RANIER: Thank you.

23 THE COURT: Thank you very much.

24 MR. HERMAN: Your Honor, my only very quick comment is  
25 that we will, of course, abide by order, but the modification

1 that Mr. Marvin spoke of and presented to the Court, I want the  
2 Court to know it was done after a series of discussions and  
3 negotiations. It just didn't come out of the ether. The last  
4 thing that I have to say is that I'll withhold any remarks about  
5 that and I await Your Honor's determination as to when we will  
6 meet again.

7 THE COURT: We'll have the next meeting January 18th.

8 MR. WITTMANN: The time?

9 THE COURT: The time, same time, at 9:00. I'll meet  
10 with the committees at 8:30.

11 Folks, thank you very much, and everybody have a  
12 good Christmas.

13 THE DEPUTY CLERK: Everyone rise.

14 (WHEREUPON, the proceedings were concluded at  
15 10:17 a.m.)

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## REPORTER'S CERTIFICATE

1  
2  
3 I, Cathy Pepper, Certified Realtime Reporter, Registered  
4 Professional Reporter, Certified Court Reporter, Official Court  
5 Reporter, United States District Court, Eastern District of  
6 Louisiana, do hereby certify that the foregoing is a true and  
7 correct transcript, to the best of my ability and understanding,  
8 from the record of the proceedings in the above-entitled and  
9 numbered matter.

10  
11  
12 /s/Cathy Pepper

13 Cathy Pepper, CCR, RPR, CRR  
14 Official Court Reporter  
15 United States District Court  
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