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Official Court Reporter: Toni Doyle Tusa, CCR, FCRR
500 Poydras Street, Room B-406
New Orleans, Louisiana 70130
(504) 589-7778

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PROCEEDINGS

(January 18, 2008)

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3 **THE DEPUTY CLERK:** Everyone rise.

4 **THE COURT:** Be seated, please. Good morning, ladies
5 and gentlemen.

6 Call the case, please.

7 **THE DEPUTY CLERK:** MDL 1657, In Re: Vioxx.

8 **THE COURT:** Counsel make their appearance for the
9 record.

10 **MR. HERMAN:** May it please the Court. Good morning,
11 Judge Fallon. I'm Russ Herman for the plaintiffs.

12 **MR. WITTMANN:** Phil Wittmann representing Merck,
13 Your Honor.

14 **THE COURT:** This is our monthly status conference. I
15 met with liaison counsel previous to this. I'll take the
16 material in the order in which it appears on Joint Report 31.

17 First, the settlement agreement. Anything to
18 report?

19 **MR. HERMAN:** Yes, Your Honor. The settlement
20 contract between the parties was entered November 9, 2007. In
21 connection with that, Pretrial Orders 28, 29, 30, 31, 32, 33,
22 and 34 were entered on the Court's Web site and on the other
23 Web sites, as well as made part of the record.

24 On January 7, 2008, Your Honor extended the
25 Pretrial Order 28 deadline to mail record preservation letters

1 to health care providers and pharmacies by 30 days, which
2 should give additional time for that material to be sent by
3 individual law firms on behalf of their clients.

4 There were revisions to Exhibits A and B to
5 Pretrial Order 29. Those were also posted and a notice went
6 out.

7 Pretrial 30 stays, with very few exceptions, all
8 activity in the MDL. Mr. Wittmann and I will be reporting on
9 the activity that has been stayed and matters that are going
10 forward.

11 Pretrial Order 31, there were revisions on
12 December 4, 2007 and December 14, 2007, basically clarifying
13 registration affidavits and the claim spreadsheets, which were
14 clerical matters suggested by all parties.

15 Pretrial Order 32 was an appointment made by
16 Your Honor, as stated and posted.

17 Pretrial Orders 33 and 34 direct pro se
18 contacts. You'll receive two reports, one from Brown & Greer
19 on registration, and then later today I'll give Your Honor a
20 report. I have provided to Bryan and a copy to Your Honor of
21 those individuals who have requested an attorney be appointed
22 to represent them with all pertinent information. There are, I
23 believe, 78 of those.

24 Attorney Ronald Benjamin has an appeal to
25 Pretrial Orders 28 and 31 in the Fifth Circuit. Both Merck and

1 the PLC have requested that the Benjamin appeal be dismissed on
2 the basis that it's procedurally incorrect and substantively
3 wrong.

4 Your Honor, at this time, if I may, I would like
5 to ask Orran Brown and/or Lynn Greer both to step up and give
6 Your Honor on the record a report.

7 Excuse me. I'm sorry. Thank you, Phil.

8 **MR. WITTMANN:** Mr. Marvin is going to discuss the
9 amendments to the Pretrial Order.

10 **THE COURT:** All right.

11 **MR. HERMAN:** Mr. Birchfield, on behalf of the
12 negotiating committee, after Mr. Marvin speaks to those
13 amendments, will have some comments about the amendments, and
14 then I understand a representative of the Texas delegation will
15 speak.

16 **MR. MARVIN:** Good morning, Your Honor. Douglas
17 Marvin for Merck. Your Honor, the parties would like to
18 announce that they have agreed on certain amendments to the
19 settlement agreement. These amendments, Your Honor, are
20 largely clarifications of the parties' original intentions.
21 The amendments fall into three basic categories.

22 The first addresses the extraordinary injury
23 fund. The original agreement, Your Honor, placed a cap on
24 individual awards of \$600,000. In reviewing cases and talking
25 to counsel, we understand that there may be some cases out

1 there -- relatively few -- that would exceed that amount in
2 terms of on reimbursable damages. Accordingly, we decided to
3 remove the cap on the individual awards under the extraordinary
4 injury fund.

5 **THE COURT:** Why don't you explain to us what the
6 extraordinary injury fund is. It's an extra fund.

7 **MR. MARVIN:** Certainly, Your Honor. Yes. All
8 claimants, once they pass through the gates, are eligible for
9 compensation according to the number of points that they have.
10 There is then a fund that has been set up to compensate those
11 individuals according to those points.

12 **THE COURT:** There's no limitation on that individual
13 fund, although there's a limitation on the aggregate.

14 **MR. MARVIN:** That is correct, Your Honor. Now, there
15 may be some instances where the person has sustained
16 extraordinary damages. There are certain criteria that can be
17 followed for those individuals who sustained those
18 extraordinary damages. Once they meet those criteria, they can
19 then go ahead and submit an application for funding or
20 compensation from the extraordinary injury fund that will go to
21 the claims administrator to review and determine whether they
22 have meet the criteria and what the award would be recommended
23 to be.

24 **THE COURT:** That is in addition to what they received
25 under the regular fund.

1 **MR. MARVIN:** Yes, it is, Your Honor, exactly. Thank
2 you.

3 So while the overall caps remain the same, we
4 think that this is a way to address those relatively few cases
5 that have the extraordinary injuries.

6 The second category, Your Honor, relates to
7 Sections 1.2.8.2 [*sic*] and 11.1.5. These deal with
8 participation in the program. Section 1.2.8.1 is -- I'm sorry.
9 I said "1.2.8.2." It's actually 1.2.8.1.

10 We have amended the agreement to take account of
11 this, but each enrolling counsel is expected to exercise his or
12 her independent judgment in the best interest of each client
13 individually before determining whether to recommend enrollment
14 in the program. That has been the parties' intentions all
15 along. We think it important that it be expressly stated here
16 in the agreement so that it is clear that each client is and
17 will be receiving the best judgment of the attorney
18 representing that client individually.

19 The second amendment is to Section 11.1.5, and
20 there the date has been changed. That has been changed so that
21 there can be no mistake that there is a sufficient period of
22 time for counsel to discuss the program with their clients and
23 make their decision as to whether to enroll in the program.

24 The third category of amendments is basically
25 miscellaneous. An important one, Your Honor, is that we have

1 amended the agreement so that your title is now "Judge Eldon
2 Fallon."

3 We have also made a clarification with respect
4 to the administration of the program when dealing with smoking,
5 for example. There was some confusion as to whether a person
6 who was an excessive smoker would be deducted once for smoking
7 and then a second time for excessive smoking. We clarified
8 that to mean no, we only meant the one deduction for the
9 excessive smoker to be that deduction designated for an
10 excessive smoker.

11 Your Honor, we have also amended the common
12 benefit fund provision so that people not only who participated
13 in working with respect to the four coordinating jurisdictions
14 are eligible, but also those from other states as well.

15 So those, basically, are the amendments. They
16 will be posted on the Brown & Greer Web site. We will also
17 make those available to the Court for its Web site as well as,
18 I believe, the plaintiffs' and Merck's Web sites as well.

19 **THE COURT:** On that last issue, with a common
20 benefit, that means that any plaintiff attorney who feels that
21 he or she is entitled to receive some common benefit funds,
22 they have the right to petition the Court for that.

23 **MR. MARVIN:** That is correct, Your Honor.

24 **MR. BIRCHFIELD:** Andy Birchfield for the plaintiffs'
25 committee. Mr. Marvin has given the details of these

1 amendments. If I could take just a moment to give a background
2 of how these amendments came about.

3 Following the announcement of the settlement on
4 November 9, the Plaintiffs' Negotiating Committee held a number
5 of conferences and meetings with lawyers across the country.
6 We met in New York, Philadelphia, Atlanta, Houston, Denver,
7 Los Angeles, and here in New Orleans. Through the course of
8 those meetings -- and there were nearly 1,000 lawyers that
9 attended those meetings -- as we focused on the settlement
10 agreement and we talked to lawyers who were reading and
11 understanding the agreement and attempting to understand and
12 make sure that they appreciated the details of the agreement,
13 we saw some areas where concerns had arisen and we knew that
14 there needed to be clarity provided.

15 Some of the things we recognized immediately
16 after the settlement, not long after it was signed, that it
17 didn't reflect what we had intended, like with the
18 extraordinary injury fund. There were some provisions about
19 the claims administrator versus the special master, so we knew
20 immediately that there needed to be changes made in that
21 regard.

22 As we met with lawyers and we heard from
23 lawyers, we saw some concerns that were raised regarding the
24 ethical implications of the settlement agreement. I'm very
25 encouraged at how diligent a number of lawyers were in making

1 sure that this settlement agreement in no way impinged on their
2 ethical obligations to their clients. It was never the intent
3 of the parties for the settlement agreement to in any way
4 interfere with a lawyer exercising independent judgment to his
5 client. It was never an intent of the parties for us to
6 impermissibly restrict the practice of law, for example.

7 As these questions arose, we recognized that we
8 needed to provide greater clarity in the agreement to make sure
9 that that was the intent of the parties and make sure that it
10 accurately reflected our intention in that regard and so we
11 began those discussions. Now that we have had this amount of
12 time, we have talked with the lawyers over these months, we are
13 confident that we have addressed these issues and provided the
14 clarity that is needed. I want to thank Merck's counsel for
15 working with us to provide the clarity needed here. Thank you,
16 Your Honor.

17 **THE COURT:** All right. Thank you very much.

18 **MR. WILLIAMS:** John Eddie Williams, Williams Kherkher
19 law firm. We filed, along with other Texas firms, an emergency
20 motion, which we have now withdrawn, that addressed three
21 issues, ethics, a timing issue, and fees.

22 The fee issue we will reserve for another day,
23 appropriately, I believe. The ethics issue, our ethics counsel
24 have all informed us that they are now satisfied with the
25 language changes. We appreciate the hard work of the

1 negotiating committee, Merck, and Merck's counsel in reaching
2 that.

3 One caveat: One or more of our firms from Texas
4 just got the information, wanted just a little bit of time to
5 make sure that they have dotted the I's and crossed the T's,
6 but I think I can represent to the Court that the ethics people
7 have signed off on it. I think I speak on behalf of my firm,
8 Williams Kherkher; Ranier, Gayle & Elliot; Provost Umphrey; the
9 Watts firm; the Kaiser firm; Kathy Snapka's firm; Fibich
10 Leebron law firm; the Mithoff law firm; Doug Allison's law
11 firm; and Dave Matthews' law firm.

12 The ethical issues were tough ones, Your Honor,
13 and obviously we wanted to make sure that we did it correctly.
14 That was of utmost importance. There may be some time where we
15 may have to say, "Judge, help us." If so, we will come back to
16 you because we all want to make sure we dot the I's and cross
17 the T's in that area.

18 **THE COURT:** You feel it has been done?

19 **MR. WILLIAMS:** Our ethics experts have told us and we
20 have negotiated on this, as you heard, for weeks and we do feel
21 that it has been done.

22 **THE COURT:** Thank you very much. Thank you for your
23 help in this matter and thanks for coming today and addressing
24 the Court.

25 I might say that I'm, of course, familiar with

1 the document. I know that it was crafted by counsel over a
2 number of months. For the last part of it, the state judges
3 were kind enough to come to New Orleans and meet with me. We
4 went over the document into the wee hours of the morning.
5 There were some changes and some tweaking that was necessary at
6 that time. Early on that morning -- 6:00 or 5:30, whatever it
7 was -- I was back with counsel dealing with some issues that
8 needed to be addressed.

9 It's not surprising to me that, in that type of
10 process, there would be some aspects of the agreement that
11 perhaps needed to be clarified. I was kept advised of the
12 negotiations. I know early on in the negotiations the
13 Plaintiffs' Negotiating Committee retained an ethicist to look
14 over the matter and participate in its drafting. The efforts
15 focused on the ethics involved in the agreement.

16 It was always the intent of the parties
17 representing the plaintiffs, as well as parties representing
18 the defendant, to recognize the interest, responsibility, and
19 duty of the private attorneys in this matter. I am happy that
20 the amendment so provides in clear language that each enrolling
21 counsel is expected to exercise his or her independent judgment
22 in the best interest of each client individually before
23 determining whether to recommend enrollment in the program.

24 I do feel that nothing in the settlement
25 agreement, including the amendment, contemplates or even

1 requires the attorney to undertake any action that would
2 violate the Rules of Professional Conduct. Nothing in the
3 Vioxx agreement prohibits a lawyer representing multiple
4 claimants to exercise independent professional judgment when
5 advising each client with a Vioxx-related claim. I'm satisfied
6 that nothing in the agreement imposes upon a lawyer any
7 impermissible restriction on the practice of law.

8 Some of the reports that have been made to me
9 are that a large percentage of people have expressed an
10 interest at least in registering for this program. I think the
11 program will work and that it will be in the best interests of
12 all concerned.

13 Let's move to the next item.

14 **MR. HERMAN:** May it please the Court. Your Honor, I
15 want to amplify one thing. There will be an additional
16 conference, mainly directed to enrollment, with Mr. Blizzard,
17 Mr. Birchfield, myself, and Mr. Garretson discussing lien
18 issues on January 27. In addition to that, Mr. Levin has been
19 requested by the PLC to provide an up-to-date briefing on the
20 preemption issue, which will be provided to all registering law
21 firms between now and enrollment.

22 One other issue, may it please the Court.
23 Your Honor issued an order requiring lawyers to file individual
24 lawsuits rather than a combination of claims and under one
25 caption. On November 8 four suits were filed, Your Honor has

1 advised, that do not conform with the order. On September 14
2 two were filed and on November 11 one was filed. We will
3 undertake to notify those law firms that they must comply with
4 Your Honor's order.

5 **THE COURT:** That's a troubling situation, and I know
6 that it's troubling particularly to plaintiffs' counsel. I'm
7 not satisfied that we have the right approach for all times on
8 this. The difficulty that a court has -- and it's not only my
9 court, it's courts throughout the country -- is that filing a
10 complaint in federal court costs about \$300. Now, I know that
11 for an attorney who has 1,000 cases, it's a hefty amount to
12 have to pay \$300,000 to file a lawsuit. The difficulty is that
13 if one attorney has 1,000 cases and files one case with 999
14 cases behind it and pays \$300 and another attorney has three
15 cases and files them separately, of course, then that attorney
16 has to pay \$900, and that is inherently unfair. That's one
17 issue. That is not as much of a concern as the other aspect of
18 it because some adjustment can be made.

19 The other aspect of it is that oftentimes these
20 cases that are filed with the 999 claimants are not even listed
21 alphabetically. As the case proceeds, some of those claims are
22 subject to dismissal, but they are embedded in cases. The
23 clerk's office has difficulty finding the individual person in
24 that situation and in drawing a line through that particular
25 pleading. You can't dismiss the pleading because the pleading

1 is under one individual's name and that has not been dismissed.
2 Now, if that individual's name is dismissed, then the issue is:
3 Is everybody else on that pleading dismissed? There's some
4 logistical problems that are very difficult to handle in a case
5 where you have 30,000 claims filed. It's just rather
6 difficult.

7 Now, initially I allowed people to join in group
8 cases. We got to a point where that seemed not to be necessary
9 as the proceedings moved on. I announced in open court months
10 ago that I would be doing this and then I did it after a period
11 of time and we are at this point. It is a troubling problem.
12 I think that the courts, particularly the MDL transferee
13 courts, are going to have to focus a little bit more on this
14 issue.

15 Okay. Let's go to the registration.

16 **MR. HERMAN:** Yes, Your Honor. At this time I would
17 like to call Orran Brown and Lynn Greer to address the Court on
18 the registration process.

19 **MR. BROWN:** Good morning, Your Honor. I am Orran
20 Brown, from Brown Greer in Richmond, the claims administrator.
21 Also present today is Lynn Greer of our firm who is with me.

22 We would like to give the Court and the parties
23 an update on the registration and materials we have received
24 thus far; and then also to look beyond that a little bit to the
25 next phases in the settlement program and what has to happen

1 next; and then, of course, answer any questions the Court may
2 have of us as we go through this.

3 First of all, on the registration phase, when we
4 were here on the 14th of December, the Court referred to this
5 as a census where the law firms and the unrepresented claimants
6 needed to come forward and sign up for the program and identify
7 themselves. For primary counsel, the Court's order required
8 filing of a registration affidavit and a claimant's spreadsheet
9 to identify their clients by January 15 of this year. It also
10 required unrepresented claimants to submit, if they were doing
11 it by mail, by January 8 and gave them, as well, to January 15
12 to send in their materials to register for the program.

13 We have been receiving those materials from law
14 firms and unrepresented claimants since within a couple days
15 after this settlement was announced publically on November 9 of
16 last year. We have continued to receive them through the 15th.
17 We received almost 200 law firm submissions that day alone.

18 After we got past the 15th, these are the firms
19 and the claimants that we have heard from. We have
20 registration affidavits and materials from 814 law firms who
21 submitted them as primary counsel. We received separate
22 submissions from 286 unrepresented claimants. Once we look at
23 all of those and have done the process you need to do to take
24 out what appear to be duplicate people submitted by the same
25 firm more than once or by more than one firm, as of this

1 morning we have 57,067 claimants who have been identified in
2 this process and have submitted the materials to us from those
3 814 firms and 286 unrepresented folks.

4 We are still getting the materials after the
5 15th. We have heard from another 11 law firms and another six
6 unrepresented people for another 100 claimants. If you put all
7 of them together, the people that we have heard from, the total
8 is 57,167 people.

9 **THE COURT:** That's about what, 95 or so percent of
10 the potential claimants in this case?

11 **MR. BROWN:** Yes, Your Honor. As I understand it, the
12 parties originally thought there would be about 60,000 people.
13 That in and of itself I think is a little bit of a rough
14 number, trying to count plaintiffs in multiple cases as the
15 Court just referred to, but I think that was the sort of number
16 people had in mind.

17 It's important, also, to remember that our
18 57,000 number will continue to change some for a couple of
19 reasons. One, there's still some cleanup that has to be done
20 with the law firms in their spreadsheets. We are going back
21 and forth with the law firms now to identify any places where
22 there's information missing, because the spreadsheet required
23 answers to about 70 data points on each person. We are going
24 back with the firms to fill in where they didn't fill in.

25 There were some law firms, about 16 of them, who

1 sent us attachments that we really couldn't use. We couldn't
2 open them or they were just electronic images of a spreadsheet
3 and not a live Excel spreadsheet. Where we could, we counted
4 their people. They are in the numbers I have just given you,
5 but we have also had some others where the spreadsheet just had
6 zero people in it or they failed to attach all the information.

7 So we will continue to have this number move
8 about a little bit as we do that cleanup process and work with
9 the firms to identify people that were put in the wrong place
10 or spreadsheets that we couldn't use. We still expect it to
11 move for that reason. In addition, we are still receiving
12 these materials from firms and unrepresented claimants.

13 I think we are, as we do that, encouraging law
14 firms, if they haven't sent in their materials yet -- and
15 unrepresented claimants, if they haven't sent in their
16 materials yet -- to do so as soon as possible because we are
17 still receiving them. We are still counting them and putting
18 them into the system. It will be ultimately up to the parties'
19 efforts and the Court's decision as to the consequences of not
20 getting them in to us by the 15th, as the Court's order said.
21 I think at this stage we are, when people ask us, still
22 encouraging them to send in materials, if they haven't done so
23 already, as soon as they can.

24 **THE COURT:** Yes. I want to reinforce that. If
25 anybody has not done it and it's an opportunity that they have

1 missed, let's send it in now. I would like to at least have
2 them counted in that number.

3 **MR. BROWN:** Yes, Your Honor. Beyond that, looking to
4 the next stages, we have the enrollment phase, which is upon us
5 now, as well, and beyond that submitting claims packages.

6 First, about enrollment, the next important
7 deadline is February 29 of this year for parties to send in
8 their enrollment packages for each claimant to move further
9 into the program. There takes for each person seven forms
10 potentially to enroll in the program and move forward. Three
11 of those forms are uniform forms, a release, a medical
12 authorization form, and an employment authorization form, to
13 receive employment records, if you are seeking the
14 extraordinary injury payments that the Court referred to
15 earlier today.

16 We prepare those forms for the law firms and for
17 unrepresented claimants using information that they gave us in
18 the claimant's spreadsheet. We can prefill the forms with the
19 claimant's name, the law firm's name, and provide those to the
20 forms, which we create from our system, with a unique bar code
21 on each form. Then we have created for each law firm and an
22 unrepresented claimant, if he or she wants it, a private Web
23 site portal on our system where that firm, with a secure
24 password, can go to their own private space or private Web site
25 and look up any of their claimants and receive forms from us,

1 download them, print them, and then have their clients sign
2 them and send them back to us. That process is the favored or
3 preferred way right now that we are sending information and
4 documents to the firms and for them to send information back to
5 us.

6 As of last night, we had created over 157,000
7 forms for law firms to use for their clients for that purpose,
8 and we have also sent them to all the pro se people,
9 unrepresented people. We have sent them the forms by mail,
10 which is generally the way most of those folks are wanting to
11 communicate with us. They can use the Internet and the Web
12 site, too, if they wish.

13 We are already getting back some of these
14 enrollment forms. There are people already enrolling in the
15 process. We have enrollment materials from 21 different law
16 firms already. We, for example, received 3,165 releases
17 already. So law firms and some of the unrepresented people are
18 already moving into the enrollment phase to send us the
19 documents necessary to proceed in the program. We are
20 encouraging people to do that as soon as they can. The
21 deadline, as I mentioned, is February 29. It is always best
22 that not everything comes in at the deadline. We would like to
23 receive these materials as soon as the law firms and the
24 claimants get them ready.

25 Beyond that, we are already working on the

1 claims process because the first important deadline after the
2 29th is July 1, under the settlement agreement, where the
3 claimants and the law firms have to send in a claims package
4 that consists of a claims form and their medical records that
5 the settlement agreement requires and some other materials. We
6 are already receiving some of them. We have actually gotten
7 ten claims packages already that we are reviewing.

8 We are setting up our own processes to make sure
9 that we process and review and evaluate those claims according
10 to the criteria in the settlement agreement, as to the initial
11 gates that a claim must pass to move forward; and then if they
12 do, the process for evaluation of the points and what the
13 claims will actually end up with as a point value.

14 On that aspect of the settlement, we are also
15 trying to make it as easy as possible for claimants/law firms
16 to submit this information. We have created an online version
17 of the claims form. The law firm can go to this secure Web
18 site. They can search by their claimant name or claimant
19 number that we have given them. They can show all of their
20 claimants and then go to a preprepared claims form that we set
21 up for them, for each person, with information already filled
22 in it so they won't have to type it over -- the demographics,
23 the name and the address -- from the claimant's spreadsheet
24 they have already given us. Then they can fill out the rest of
25 that form online and download it and print it and have it

1 signed. That information that they type in in that method is
2 already on our server, so it collapses that data entry step and
3 saves a lot of time and money for everybody.

4 That system is up and running right now for all
5 the law firms we have heard from and also includes the two
6 authorization forms. They can make changes, if the information
7 has changed, online to that form and download it and print it
8 with the bar code and send it in. All these steps, we are
9 trying to make it as simple as we can and as fast as we can for
10 law firms and unrepresented claimants to move through each step
11 of the program. Thus far, we think it's working quite well.

12 Does the Court have any other questions?

13 **THE COURT:** No. I just want to verify the purpose of
14 the registration aspect of the case is to get a census, to find
15 out how many claims are out there, and also find out from those
16 claims how many are covered by this agreement, that is to say,
17 the MI's and the strokes and so forth. Once that's done, then
18 those individuals, if they are interested, can enroll in the
19 program to go to the next step.

20 In that regard, then their claims are evaluated,
21 and that's done by a special master. I have appointed
22 Patrick A. Juneau of Lafayette, Louisiana, to be the special
23 master.

24 I have also met with Judge Higbee from the
25 Superior Court in New Jersey, and she recommended Judge Marina

1 Corodemus and I appointed her to be a deputy special master.
2 The deputy special master will be of assistance or will help
3 the special master carrying out his tasks.

4 I talked with Judge Victoria Chaney of the
5 Superior Court in California, and she recommended that I
6 appointed Justice John Trotter, a retired justice, to serve as
7 a deputy special master; and in the event Justice Trotter is
8 unable to serve, that I appointed Justice Edward Panelli, a
9 retired justice, to also be a special master.

10 Therefore, I have appointed Special Master
11 Juneau and the deputy special masters to assist him. I have
12 asked Special Master Juneau to contact the deputies and to
13 begin familiarizing them with the program so that they can be
14 aboard with him during this evaluation process.

15 **MR. BROWN:** Yes, Your Honor. On those lines, we have
16 already met with the parties and Special Master Juneau. We
17 have another meeting scheduled. We have set up a process to
18 make sure that that information flow back and forth works
19 smoothly.

20 **THE COURT:** Thank you very much.

21 **MR. BROWN:** Thank you.

22 **MR. HERMAN:** Your Honor, I would like to call
23 Matt Garretson to address you regarding Medicare and Medicaid
24 and VA liens.

25 **THE COURT:** In a matter of this sort, particularly

1 with this type of drug, that is to say, a drug that targets
2 musculoskeletal problems, it's not unusual for the census of
3 that drug to include older individuals. Oftentimes, in that
4 census these individuals have obtained Medicare or Medicaid and
5 Medicare and Medicaid have statutory liens that have to be
6 dealt with. I'll hear from the parties at this time on that.

7 **MR. GARRETSON:** Thank you, Your Honor. Just to give
8 a general update, if I could, about the process today and where
9 we are going from here, we have met so far several times with
10 the claims administrator, Brown & Greer, to review our process,
11 procedures, and timelines. We have also now had the
12 opportunity to meet with Special Master Juneau to speak with
13 him about those processes, procedures, and timelines so that we
14 are all moving in appropriate lockstep.

15 Also, as Your Honor is aware, this morning we
16 had signed the qualified protective order that will now allow
17 for HIPAA compliant transfer of data to 53 state and territory
18 agencies and to CMS. We are working today, now with the
19 qualified protective order signed, to get all the data
20 formatted in a way that the agencies each like. That will go
21 out starting today, through the weekend, and on into Monday, so
22 by Monday all of the states and territories and federal
23 agencies will have a listing in the appropriate format of the
24 enrolling claimants.

25 We have also had several meetings to date with

1 CMS, the Centers for Medicare & Medicaid Services. I'm pleased
2 to report that they are very engaged with us in this process.
3 I'll be meeting with them in their home offices in Baltimore in
4 just a couple short weeks to review the progress and where we
5 are to date with them.

6 Further, yesterday we met in Houston with the
7 Veterans Administration. As Your Honor mentioned, because of
8 the demographics of this population, there is a high percentage
9 of veterans that will be in the settlement program. We want to
10 establish the appropriate framework with the VA that we have in
11 place with Medicare and Medicaid.

12 From an informational standpoint, we have
13 finalized with the NPC and the claims administrator the
14 frequently asked questions for attorneys regarding this
15 process. It explains to them what our role is and what the
16 procedures will be. Similarly, we have finalized a client
17 education piece that all the claimants can see and review to be
18 instructed about what is being done on their behalf with
19 respect to governmental authority liens. All of that
20 information will be prepared.

21 We spoke this morning with the claims
22 administrator and we are prepared to list that both on their
23 Web site and then we will have vioxxlienresolution.com as a
24 separate Web site where this material will be kept and also
25 made available and updated as required.

1 So all those things are occurring, as I have
2 mentioned today, with respect to data exchange, which puts us
3 in a nice position to report to you at the next hearing the
4 number of states that have responded to us, the federal
5 agencies that have responded, and the rate at which we are
6 getting in the appropriate claims histories so we can start
7 dissecting what we need to dissect. So at that time, at the
8 next hearing, Your Honor, I would also be able to share with
9 you any relevant statistics, based on our analysis of what we
10 have received in-house at that time, and then just report
11 progress in general.

12 **THE COURT:** Thank you very much. One aspect of a
13 case of this sort is not only to locate the liens and to find
14 out the amount of the liens, but when you're dealing with this
15 many liens, oftentimes the lien holder is willing and able to
16 reduce their liens when it's approached globally. So the
17 individuals have some benefit from that aspect also. Thank you
18 very much.

19 **MR. HERMAN:** May it please the Court. With respect
20 to nongovernment health care providers such as Blue Cross and
21 Blue Shield, Brown & Greer, as well as the liaison counsel and
22 the PNC, have received correspondence from various
23 nongovernment health care providers. We will ask the
24 individual law firms who have registered not to undertake to
25 provide information to any nongovernment health care provider

1 at this time. We intend to do that uniformly in order to
2 secure the best situation we can for claimants. We'll be
3 coordinating that with Brown & Greer and with Matt Garretson.
4 We'll report to the Court at the next status conference and
5 attempt to have by then all such nongovernment health care
6 providers meet at one place and one location in order to
7 orderly handle the progress.

8 **MR. WITTMANN:** Your Honor, I think next is your
9 introduction of the special master, if you want to do that.

10 **THE COURT:** Right. I have already dealt with the
11 special master. Do you have any report?

12 **THE SPECIAL MASTER:** No, sir. I think Mr. Brown and
13 Mr. Garretson adequately described what we have done thus far.

14 **THE COURT:** Thank you very much, Mr. Juneau.

15 **MR. WITTMANN:** Your Honor, on the state court trial
16 settings, the only case that's currently set is the *Smith* case
17 in West Virginia, which is set to go to trial on May 19. The
18 other cases have either been continued or are in the process of
19 being continued. That's the only one that's actively set right
20 now.

21 **THE COURT:** The next item on the agenda is Item VI,
22 class actions. Anything on that?

23 **MR. WITTMANN:** Nothing new, Your Honor. You have
24 those motions under submission.

25 **THE COURT:** VII is discovery directed to Merck.

1 Anything on that?

2 **MR. WITTMANN:** That was all stayed pursuant to
3 Pretrial Order 30.

4 **THE COURT:** The reason that I stayed the matter is
5 obvious. We need to focus on this aspect of the case. I need
6 the energy of all the parties to be directed to this aspect of
7 the case so that the claimants and the litigants on both sides
8 have the attention of their attorneys on this aspect of the
9 case. After this aspect of the case clarifies itself, after
10 the dust settles a bit, then I will be meeting with counsel to
11 determine what's left, if anything.

12 After we determine what's left, I'll try to
13 group those issues, those areas, if they can be grouped, and
14 then I will talk to counsel about the most efficient way of
15 dealing with those groups. We can either bellwether try some
16 aspects of the group or we can deal with them in some other
17 way. The point is that now I've stayed everything, with the
18 exception of a couple areas, to give everybody an opportunity
19 to direct their full attention on this aspect of the case.

20 **MR. WITTMANN:** Your Honor, I understand from
21 Mr. Herman that there will be a limited lifting of the stay
22 with respect to the FDA to allow some discovery go forward
23 there.

24 **THE COURT:** I have done that in some aspects of the
25 case.

1 Discovery directed to third parties.

2 MR. WITTMANN: The same situation, Your Honor.
3 There's a stay of all the deadlines that were set previously
4 pursuant to Pretrial Order 30.

5 THE COURT: What about the records that we talked
6 about last time from Express Scripts?

7 MR. WITTMANN: I think Mr. Herman can report on that,
8 Your Honor.

9 MR. HERMAN: Yes, Your Honor. May it please the
10 Court. We have been in contact and negotiation with
11 Express Scripts. We expect to reach an agreement with them
12 very shortly. That agreement will make available 90 percent of
13 the ESI records on claimants on a cost basis rather than a
14 private profit basis. Hopefully, we will be able to present
15 something to Your Honor next week.

16 THE COURT: I do urge the parties, particularly
17 Express Scripts, to get this material as quickly as possible.
18 We are dealing with deadlines, and it's not going to be helpful
19 if they wait until the eleventh hour to produce the material.
20 So I urge them to do so. If that's not forthcoming, I direct
21 counsel to let me know so I can get involved in it.

22 MR. HERMAN: Yes, Your Honor.

23 THE COURT: Deposition scheduling is IX.

24 MR. WITTMANN: Your Honor, those were postponed by
25 agreement, and the parties are working together now to try and

1 reselect some dates.

2 **THE COURT:** X is state/federal coordination.

3 Anything from liaison counsel?

4 **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios
5 for the State Liaison Committee.

6 Recognizing your comments at the last status
7 conference with regard to the economic classes pending in the
8 MDL that are really not touched by the settlement and
9 recognizing your comments today on the need for a stay, we
10 certainly are following that. However, I can't remain idle.
11 What I have done, Your Honor, is I have put together a list
12 that I would like to give to your new law clerk, Bryan, and
13 welcome him to this litigation.

14 It's a list of 41 cases that we were able to
15 pick out through PACER that appear to me to be economic classes
16 or third-party payor cases to give you a sense of scope and
17 number of cases pending before you. I will reach out to these
18 attorneys for verification of this information and just, with
19 your permission, continue to comply with that so when the time
20 comes we'll have that information ready for Your Honor.

21 **THE COURT:** That's fine. Think about grouping them
22 in some way that makes sense so that we don't have to try every
23 case. See if they can be grouped into various categories and
24 then deal with one case in each category if that's possible.

25 **MS. BARRIOS:** Yes, Your Honor, I will endeavor to do

1 that. I will also present Bryan with our two-disc set of the
2 remand motions. I did not prepare another disc on the ten
3 cases that we call the "double remand cases" because they
4 remain the same. We haven't found any additional ones.

5 **THE COURT:** Thank you very much.

6 **MS. BARRIOS:** Thank you, Your Honor.

7 **THE COURT:** Anything on the pro se claimants?

8 **MR. HERMAN:** Your Honor, to supplement the report
9 from Brown & Greer without repeating it, there were 1,160
10 pro se. They each were sent certified letters and e-mails.
11 546 contacted our office in one or another, either through
12 submitting 286 registrations or requesting assistance and
13 information. 138 of the 1,160, we have been unable to trace
14 addresses or e-mails or other ways to notify them and the
15 information has come back to us. 78 have requested that the
16 Court consider appointing attorneys to represent them. We
17 provided the Court and Merck with a list of those individuals.

18 **THE COURT:** Okay. I'll be meeting with counsel to
19 determine that. My thinking is we can appoint somebody to
20 represent people who do not have representation. Those pro se
21 claimants that have not responded, I will in time appoint
22 someone as curator to try to reach them. We'll try to reach
23 them at the last known address. We'll try to post something in
24 the newspapers to have them call. We'll do whatever is
25 necessary to get the information out to them that they need to

1 call in. If they still do not call in, then I will entertain a
2 motion from the defendants to dismiss the cases.

3 **MR. HERMAN:** I should make it clear to Your Honor
4 that there are two types of pro se issues. Individuals that
5 wanted substantive legal advice, because of our position as
6 liaison counsel, we would not be engaged by them because it
7 might portend a conflict. Those individuals have requested
8 that a lawyer be appointed to advise them on substantive
9 rights. We have undertaken approximately 600 advices on the
10 technical issues of registration. Then there are another
11 category of individuals, approximately 138, whom we have had no
12 contact with.

13 **THE COURT:** Okay. What I'll be doing with counsel is
14 to discuss the potential of appointing somebody as standby or
15 advisory counsel. I'll discuss that with counsel and also get
16 from them some suggestions as to the names of such a party.
17 We'll deal with that in time.

18 **MR. HERMAN:** Yes, Your Honor.

19 **THE COURT:** Merck's motions, XII.

20 **MR. WITTMANN:** Your Honor, the motions that are
21 listed you have under advisement right now. There's nothing
22 new to report on those.

23 **THE COURT:** There are several motions that the last
24 time I was asked to withhold ruling on them.

25 **MR. BIRCHFIELD:** Your Honor, we would ask you to

1 continue to withhold ruling for a short while if you could.

2 **THE COURT:** I'll do it for a short while, but I do
3 have to rule on the matters. I will withhold ruling.

4 XIII, issues relating to Pretrial Order 9.

5 **MR. HERMAN:** There are no further comments,
6 Your Honor, necessary on that.

7 **THE COURT:** Anything on the Vioxx suit statistics,
8 which is the next item on the agenda?

9 **MR. WITTMANN:** The new suit statistics will be out
10 January 30, Your Honor, but there's not going to be much change
11 from the statistics reported in the status report from the last
12 time, so there's really nothing new to report on that.

13 **THE COURT:** I'm glad to hear that because one problem
14 that I think MDLs traditionally have faced is that, once a
15 settlement is announced, there are oftentimes a great number of
16 cases filed after settlement to get in on the settlement. I
17 expressed my concern about that. I'm going to be, as I
18 mentioned the last time, skeptical of suits filed in mass
19 numbers subsequent to the settlement announcement. I'm glad
20 that that concern has been heeded and I hope that it continues
21 to be heeded.

22 Motion to conduct case-specific discovery.

23 **MR. HERMAN:** Your Honor, the PSC will not proceed
24 with case-specific discovery and it may not be necessary to do
25 so. We will delay that matter at least until after the

1 enrollment period and the satisfaction of the contract
2 requirements with Merck.

3 **THE COURT:** Okay. The next item is Dr. Farquhar.

4 **MR. HERMAN:** We have resolved that matter,
5 Your Honor.

6 **THE COURT:** It can be taken off of the agenda, then.

7 The next item is XVII, PSC MDL trial package.
8 Anything on that?

9 **MR. HERMAN:** Yes, Your Honor. One of the attorneys,
10 Mr. Stratton, asked for some oral information and indicated
11 that he was going to register and recommend enrollment to his
12 clients, but what would happen if this Court in a single case,
13 for example, directed him to continue with representation with
14 a claimant that did not elect to enroll; would he, under those
15 circumstances, be able to get a trial package. I indicated he
16 would; if this Court directed counsel to continue with a
17 nonenrolled claimant, they would certainly be entitled to the
18 trial package.

19 As Your Honor knows, the MI trial package is
20 complete. I confirmed with Mr. Meunier, Mr. Rafferty,
21 Mr. Tisi, and Ms. Sanford this morning that by the time the
22 next status conference meets that Your Honor calls we will have
23 the stroke trial package complete and available, Your Honor.

24 **THE COURT:** The next item is other motions. Anything
25 on that?

1 **MR. WITTMANN:** Your Honor, those have all been
2 resolved, I believe.

3 **THE COURT:** The last item is --

4 **MR. SEEGER:** Your Honor, I just wanted to note that I
5 have been in contact with Joe Danis and John Carey. They are
6 in the group that filed the motions in Illinois. We have had
7 numerous discussions and they have had legitimate concerns
8 about what things said and didn't say, and the amendment that
9 has been signed this morning has gone a long way to clarify
10 their issues. I was informed this morning that they intend to
11 pull their motions down in state and federal court, which
12 pretty much mirrored the motions that were filed by John Eddie
13 Williams' group from Texas.

14 **THE COURT:** All right.

15 **MR. HERMAN:** Your Honor, that just leaves the
16 *Oldfather* motion, and we are working with them to try and
17 resolve that matter.

18 **THE COURT:** The last item on the agenda is
19 third-party payor cases. Anything on that?

20 **MR. HERMAN:** No further discussion on that.

21 **THE COURT:** Any new business that comes before the
22 Court?

23 **MR. HERMAN:** No, Your Honor.

24 **MR. WITTMANN:** No, Your Honor.

25 **THE COURT:** The next status conference, then, will be

1 on February 21.

2 **MR. BIRCHFIELD:** Your Honor, if I could just add one
3 comment to what Mr. Herman raised. When he said we are working
4 with them to resolve that, all that means is that we will give
5 them, as it will be posted on the Web site, these amendments.
6 Since their issues mirror what have been previously raised, we
7 are confident that it will satisfy their concerns as well.
8 That's where we are with it.

9 **THE COURT:** February 21 is the next date. Court will
10 stand in recess.

11 **THE DEPUTY CLERK:** Everyone rise.

12 (WHEREUPON the Court was in recess.)

13 * * *

14 **CERTIFICATE**

15 I, Toni Doyle Tusa, CCR, FCRR, Official Court
16 Reporter for the United States District Court, Eastern District
17 of Louisiana, do hereby certify that the foregoing is a true
18 and correct transcript, to the best of my ability and
19 understanding, from the record of the proceedings in the
20 above-entitled and numbered matter.

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Toni Doyle Tusa, CCR, FCRR
Official Court Reporter