

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF LOUISIANA

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5 IN RE: VIOXX PRODUCTS * MDL No. 1657
6 * SECTION "L"
7 *
8 PRODUCTS LIABILITY LITIGATION *
9 *
10 * NEW ORLEANS, LOUISIANA
11 * MAY 22, 2008
12 *****

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

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10 Bryan Calder, Executive Vice
11 President, U.S. Bank, and
12 President of Corporate Trust
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14 Orran Brown for the Claims
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23 Proceedings recorded by mechanical stenography, transcript
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P R O C E E D I N G S

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

5 THE DEPUTY CLERK: MDL Number 1657, In Re: Vioxx.

6 THE COURT: Counsel, make your appearances for the
7 record.

8 MR. HERMAN: Good morning, Judge Fallon, Russ Herman
9 for the Plaintiffs Legal Committee.

10 MR. MARVIN: Good morning, Your Honor, Douglas Marvin
11 for Merck.

12 THE COURT: We're here today in connection with our
13 monthly Status Conference. I met with Liaison Counsel and
14 received from them a couple of days ago the suggested agenda and
15 some additional matters to placed on the agenda. But, I'll take
16 it from the order in which you've entered the settlement.

17 First of all, I think we have the bankers here.

18 MR. HERMAN: Yes, Your Honor, we have.

19 Ms. Macchia will introduce the president of U.S.
20 Bancorp and they have a presentation to make concerning the
21 escrow of settlement funds.

22 THE COURT: The Settlement Agreement in this matter
23 calls for the defendant to place in escrow a certain amount of
24 funds periodically. The first escrow amount is due in the
25 immediate future, and the bank is here to tell us what they plan

1 to do with it. My concern from the Court's standpoint is to be
2 secure and safe in investing in appropriate securities so that
3 it will be safe.

4 I'll hear from the bank as to who they are and what
5 they plan on doing.

6 MS. MACCHIA: Good morning Judge. It's a pleasure to
7 be here in the courtroom. I am Nancy Macchia, consultant with
8 U.S. Bank. I have joining me our Senior Management Team from
9 Corporate Trust Bank as well as the bank, who will explain to
10 you our role with the settlement and our connection, how we work
11 with Brown Greer. And we'll also give an overview of the bank
12 so that there is some comfort with the settlement and what we're
13 doing with the funds. I would like to introduce you now to the
14 Executive Vice-President of U.S. Bank, and he is also President
15 of the Corporate Trust Division, Bryan Calder.

16 THE COURT: Okay, thank you very much.

17 MR. CALDER: Thank you, Nancy. Good morning, Your
18 Honor.

19 THE COURT: Good morning.

20 MR. CALDER: My name is Bryan Calder. As Nancy
21 mentioned, I'm the executive vice president of U.S. Bank,
22 currently president of the Corporate Trust Division. I would
23 like to take a few minutes this morning talking a little bit
24 about U.S. Bank to introduce you to the bank, to give you a very
25 high level overview of U.S. Bank, a few minutes on our Corporate

1 Trust Division and the role we'll play in the handling of the
2 cash and settlement in the investment of that cash. So, if
3 you'll turn to slide one. And we have extra presentations in
4 the back if anybody cares to take them with you after the
5 presentation.

6 First of all, U.S. Bank is headquartered in
7 Minneapolis. You can see from this slide that we have a retail
8 footprint in 24 states. We have Minneapolis in the West. We
9 have a national footprint in the wholesale banking and the
10 Corporate Trust Services, and we have a global footprint in our
11 Global Payment Services.

12 Next slide. U.S. Bank is the sixth largest commercial
13 bank in the country. We are listed on the U.S. Stock Exchange.
14 We have almost 15 million clients, or customers. We are very,
15 very active in the Corporate Trust business. We are the second
16 largest corporate trustee in the country and ranking in the top
17 five for our ABS and our NBS business.

18 Next slide on U.S. Bank. Total Assets and Market
19 Value. In term of assets, we are the seventh largest bank with
20 242 Billion Dollars in assets. In terms of market value, we are
21 a fifth largest bank in the country with 59 Billion Dollars in
22 market value.

23 In our performance metrics we are very proud of our
24 performance, particularly in these troubled financial times. In
25 the first quarter of '08, we ranked number one in our peer bank

1 group as far as return on assets with 1.85 percent return on
2 assets. In our peer group, you can see on the lower left hand
3 corner there all the major financial institutions and all the
4 major commercial banks in the country.

5 Return on common equity, we also rank number one with
6 21.3 percent. Again, the peer median of 8.5 percent. Our
7 efficiency ratio is 43.5 which also puts us in the top two. And
8 our net interest margin is also in the top two at 3.55 percent.
9 So, our performance in very difficult times I think has been
10 nothing but stellar.

11 Next slide, Profitability. This is a very busy graph
12 showing you our four-year return on equity and our return on
13 assets. And as you can see here again, relative to the peer
14 banks we are ranking number one against all the peer banks. And
15 the peer banks, it's -- I won't go through all 15, but we are
16 ranking against Wells Fargo, Wachovia, Bank of American, so we
17 are ranking ourselves against the top tier banks in the country.

18 Next slide, our Revenue Mix. For the past few years
19 we really have been focusing on growth in our fee revenue. And
20 as you can see, that's been successful. We've gone from our
21 total -- this is total revenue for the institution, 44 percent
22 in 2004 to over 51 percent in 2007. And that puts us in very,
23 very good stead, particularly in a market where rates are
24 compressing.

25 Credit quality, again, we're very proud of our credit

1 quality. We're a very conservative financial institution.
2 While we're not immune from the current credit markets -- as you
3 can see we've had a little bit of spike-up in the last quarter
4 of our non-performing loans and charge-offs, but it is still
5 less than one percent of our total assess in both of those
6 categories, and ranks us number one in safety and soundness
7 against our peer groups.

8 Our debt ratings from all the major rating agencies
9 are in AA rating categories or better, which is an indication
10 again of the financial strength and stability of U.S. Bank.

11 Capital Ratios. We meet or exceed all regulatory
12 capital ratios set out by the U.S. Government. In the first
13 quarter of '08 we are at 12.6 percent, the total risk base
14 capital.

15 If you are a shareholder of U.S. Bank -- and hopefully
16 after this presentation people will think about that -- you can
17 see that we've -- at ten years continuing to increase our
18 dividends to our shareholders, and our ten-year compounded
19 annual growth of dividends is almost 20 percent. And we have
20 increased the dividend in this current fiscal year as well.

21 Total Shareholder Return. In all the years we looked
22 at, Bancorp betters the S&P Bank Index and the S&P Index by a
23 wide margin. I think it speaks to U.S. Banks from capital
24 levels. Our low exposure to subprime credits, which is less
25 than two percent of total assets to the company. Our strong

1 core earnings group and our stable management group, who has
2 been able to navigate very well through very, very troubling
3 markets.

4 I'll turn very quickly to and give you little
5 information about the Corporate Trust Division, which is where
6 we will be working the group in the courtroom today. In
7 corporate trust we have over 46 offices nationwide, we have over
8 1600 employees, and we are a very significant component of U.S.
9 Bank. We've grown our business mostly through acquisitions.
10 This is a consolidating business, and US Bank has been a very
11 aggressive acquirer of corporate trust business for the past ten
12 years. And you can see a list of banks through the Corporate
13 Trust Divisions that we've purchased since 1992.

14 We offer a very diversified products mix in our
15 Corporate Trust business. And as you can see, our class action
16 and MDL settlement business is one of the products that we
17 offer. I'm very, very pleased working on this transaction.
18 Escrow services really are meant to meet every need, and that is
19 what we will be doing. And I'll spend a few minutes talking
20 about what we do in the class action and MDL settlement program.

21 I'm going to focus my comments on the trust
22 investments and cash management. We are extremely careful to
23 ensure that the investment of funds is in a safe and liquid
24 investment that is available at all times when disbursement when
25 needed. Preservation of principle is paramount in any

1 transaction that we get involved in, and clearly is very, very
2 important in this instance.

3 What we are planning to do currently is, we are
4 putting current investment into our First American Funds
5 Government Obligations. This is a fund that has 13 Billion
6 Dollars in assets. It's rated AAA by Standard & Poor's, AAA by
7 Moody's. It has daily liquidity. With the size of the fund
8 being 13 Million, it's very easy to move in and out of the fund.
9 The composition of the fund, the assets that the fund holds are
10 government agency securities, federal home loan banks, Fannie
11 Mae, federal home credit banks, or repurchase agreements
12 collateralized at 102% by U.S. governments in the fund. So, it
13 is the safest fund that we can offer for the cash that will be
14 deposited over the next few months.

15 There are other alternative investments we will
16 consider. We will do it in conjunction with dialogue and
17 agreement amongst plaintiffs and the defendants. And I won't go
18 through the funds, but I can assure you that what we will be
19 looking to do is ensure the safety and soundness of the funds as
20 we hold onto these escrow balances for the duration of the case.

21 I'm going to flip to slide 20, the Disbursement Agent.
22 Obviously, we will be holding the escrow and also disbursing the
23 funds when appropriate.

24 A little bit of background on some of the volumes that
25 we've handle in the past. We've disbursed over 13 Billion in

1 settlement proceeds to millions of claimants over the years. A
2 data base will be set up and the elements defined by Brown
3 Greer. There will be remote access interface. There is going
4 to be a very careful pre-distribution process in place that we
5 have in placed as governed by, not only the operative documents,
6 but our own internal controls. There will be a custom banking
7 interface to reconcile all counsel on a monthly basis. And all
8 distribution accounts are set up on a Positive Pay for
9 protection basis. We will be sending checks and aggregating
10 them by law firm.

11 In closing, some of the benefits of working with U.S.
12 Bank, obviously, the size of the bank, the stability of the
13 bank, the credit worthiness of our balance sheet.

14 We have a nationwide network of corporate trust
15 offices, so if need be, we can bring others into the process,
16 although I don't envision that in this particular case. We are
17 experienced in the business, both in the corporate trust
18 business and in the claims business. We have a wide array of
19 products and services to offer in the event that we have to pool
20 other assets to handle this case, so -- I went through this at a
21 very high level. I know the Court is very busy. If there are
22 questions, I'm more than pleased to respond to that.

23 THE COURT: No, I don't have any. I just wanted you
24 to be here to make a presentation, and also to explain who you
25 are and what you plan on doing with the money. I appreciate

1 your efforts and look forward to your working on the case. It's
2 very important that the funds be secure, safe. And that's the
3 main area that the Court is concerned with.

4 MR. CALDER: I assure you we'll do that. Thank you
5 very much.

6 MR. HERMAN: Your Honor, Andy Birchfield will do an
7 overview and introduce Brown Greer for its report.

8 THE COURT: All right.

9 MR. BIRCHFIELD: Andy Birchfield with the Plaintiff
10 Steering Committee. Your Honor, Brown Greer is serving as the
11 Claims Administrator for the settlement. And we have with us
12 today Orran Brown, who will report on the registration and
13 enrollment process, and then Lynn Greer will report on the
14 claims package process. Although it's in its early stages,
15 she'll give us a report on that.

16 MR. BROWN: Good morning, Your Honor, Orran Brown for
17 the Claims Administrator, Brown Greer & Richmond, and with me
18 today is Lynn Greer. We would like again today, Your Honor, as
19 we have done in the past, to run the numbers on where we stand
20 now and the information we're receiving from participants in
21 this program.

22 Before I start that, I would like the Court to know
23 that our team has met with a very strong team from U.S. Bank
24 very early on in this process to start the work and lay the
25 groundwork for our processors to make sure we coordinate on

1 being ready for when the payments are going to happen. There is
2 more planning that's underway now, as was mentioned, to make
3 sure that that's in place where we get down to when we're
4 actually paying claims in this program. And they are very
5 attentive to the process and we're enjoying working with them.

6 THE COURT: Like the Special Master, you ought to have
7 a dry run kind of a --

8 MR. BROWN: Yes, Your Honor.

9 THE COURT: So lets set something up like that so that
10 by the time you get to payouts you'll have had some experience
11 with it. You work out any kinks or details.

12 MR. BROWN: Yes, Your Honor, that's planned, and we
13 will make sure that happens.

14 We're going to talk to, as we do each time, about
15 where we are on registration for persons who have signed up for
16 the program, at least making themselves known in this
17 registration census, and then look at where we are on enrollment
18 with the actual materials coming in. And then Lynn will touch
19 on what claims packages we have received now.

20 We look at these numbers each time we're here, and
21 this shows us again where we are as of yesterday afternoon on
22 the number of counsel and their clients who signed up or
23 registered for the program according to the Court's order, which
24 required registration by January 15 of this year. And then the
25 parties have instructed us to keep receiving registrations after

1 January 15th. And we're still receiving them even today. We
2 have received 62 new primary counsel firms since May 5th who
3 have registered their clients in the program. There are
4 relatively smaller number of claimants in those groups now.
5 That's a total of 80 people. But, these numbers do creep up
6 each day. Each week we get additional information and we still
7 are having people register.

8 If we go down looking at the numbers, we end up with a
9 total now of this 59,135 folks who have identified themselves in
10 the registration process. And that fourth row, as we do each
11 time, we want to show the Court what it means when we take out
12 the folks who have told us they really don't qualify for the
13 program, though they signed up for it. And that number is
14 getting a little more precise as we go along because we've
15 always had some information from the claimant's spreadsheet that
16 was used in the registration process where they told us they had
17 in other injuries, non-qualifying injury. Some of those folks
18 that said that still might be required to be, and are eligible
19 for the program, and Merck is reviewing that information,
20 comparing it to this lawsuit information. Because if they
21 allege a heart attack or stroke in their lawsuits, they are in
22 the program.

23 We also now have the ability for counsel to tell us in
24 their online web page portals if they have certain claimants who
25 are not eligible for other reasons, whether it's another injury,

1 or they didn't have a lawsuit by November 9, '07 or Tolling
2 Agreement, or they're a non-U.S. resident. There are certain
3 other factors that can make a claimant not eligible for this
4 program. And so that number is getting a little more precise,
5 and gives us now a number that really is the target number of
6 49,849 of folks that look like, based on what we know so far,
7 are eligible for the program.

8 The number of 59,107 was 59 -- 59,135. Back when we
9 were hear on April 17 it was 59,842. So, those numbers are
10 growing up, keep going as we receive more information.

11 This is our enrollment picture as of yesterday
12 afternoon. We had 50,750 people represented by primary counsel
13 who have told us they would like to enroll. We have 495 pro se
14 claimants who are enrolling. And these numbers are also going
15 up each day as we received more information from and more
16 materials from these participants.

17 When we were here in April, the number in the top row
18 was 50,300 plus, and now it's up to 50,757. The numbers do go
19 up. We still have people enrolling, and the parties extended
20 the deadline for enrollment through June 30 of 2008. So we are
21 still encouraging counsel and pro se to send us their material
22 to sign up for the program, and send us the package that's
23 required to actually be enrolled in the program.

24 Again, here in row four we take out the folks who have
25 told that us that they're not really eligible, the same

1 criteria, other injuries, non-U.S. resident, and we end up with
2 a net number of 47,207 there in row five of folks who have
3 enrolled in the program thus far. And in comparing that to the
4 number of registrants, of people who step forward in the census,
5 it's now 94.7 percent of that population has enrolled in the
6 program. When we were here on April 17, that number was 93.3
7 percent. And so that's where we are on the enrollment picture
8 as of yesterday afternoon.

9 This is a slide we looked at last time as well,
10 because it's a reminder of what is required of claimants to be
11 enrolled in the program, to actually get in the program and then
12 be considered ineligible to file a claim and be considered for
13 points awarded in the program.

14 These are the components of that enrollment package
15 that counsel and pro se are now filling out and sending to us.
16 And we're still getting them, as I said, until June 30 now. And
17 we are going through each of those materials now to make sure
18 that everybody has it into us what they're suppose to have to
19 really be enrolled. It's worth pausing on the bottom --
20 contains here -- we mention a little bit more about them.

21 Each primary counsel who is enrolling claimants is
22 required to file a Certification of Final Enrollment to tell us
23 when they are finished enrolling. Those were due on May 1.
24 There was a deadline for those to be submitted, We'll see in a
25 second how many of those we actually received. We are still

1 receiving these Certifications of Final Enrollment, and the
2 parties have told us to tell counsel still send them in. If you
3 didn't get them in by May 1st, send them in to us as soon as you
4 can because it is the vehicle by which counsel tell us that
5 they've enrolled all of their clients who are eligible for the
6 program, or put them on an Exhibit A which the parties designed
7 for them to list clients that they have not been able to locate,
8 hadn't been able to talk to, but are still trying to locate and
9 will recommend to them that they join the program. And we've
10 received that information of Exhibit A, clients from a number of
11 firms by May 1st. But, we're still receiving the Certifications
12 of Final Enrollment, and we're asking for them to still send
13 them in, and the parties will determine what that means if they
14 came in after May 1st.

15 The second point at the bottom is, that all the
16 enrollment documents that we are receiving, and have received,
17 are still subject to review for completeness because they have
18 to be reviewed to make sure they're signed, signed by the right
19 person. There is a set of enrollment criteria, completeness
20 criteria that we work among the parties to adopt, beginning
21 several months ago, that specified the types of things that
22 these documents have to have to count. The release has to be
23 signed, the medical authorization has to be signed. And there
24 are other things about the notary section of the lease and other
25 aspects of the documents, the formalities they have to have to

1 be able to be a valid binding release. And we have a set of
2 criteria that define those. Merck's representatives are going
3 through those materials now and telling us their findings. We
4 review the findings. We agree that the findings are correct and
5 that the document is missing something material. Then we post
6 it to each firm on the firm's portal and explain to them what's
7 missing, what they have to do to fix it. And in each instance
8 the parties are given now 20 days to cure whatever the program
9 is and send us a corrected page. And in some instances it just
10 means telling us to fill in something. And it's not a lot of
11 activity required.

12 One of the areas here that always is a problem in one
13 of these -- not a problem, but a challenge -- in one of those
14 programs are claims of deceased claimants, and what type of
15 material is required to show that the persons who is bringing
16 the claim is authorized to bring the claim, pursue the claim.
17 And the parties recently worked out -- and I think are finishing
18 today a claim administration procedure, or cap that will define
19 the nature of this representative capacity crew that is required
20 of parties to move the claim along in the program, with the idea
21 being that all of the necessary formal documents that show
22 appointment by a Court of an executor or representative for an
23 estate of a deceased claimant is going to await the part of the
24 process where the claim is at the points determination, the
25 actual claims review. And before a claim can have a notice of

1 points award, downstream in the program, they have to have all
2 of that information cleaned up. But this procedure will allow
3 less proof on the front end to allow the claim to move through
4 the process until it gets to that point.

5 And we are about to publish this out and help counsel
6 understand it, beginning early next week on how this process
7 should work. Because, basically for a deceased claimant to
8 allow the claim to move, it will move forward if there is a Will
9 and the person designated as the representative of the estate in
10 the Will has signed a lease, then the claim can move forward.
11 And that's all that's required at this stage.

12 If there is also a surviving spouse, the surviving
13 spouse signs the release; it will move forward at this stage.
14 If there is no Will, then if the surviving spouse has signed it,
15 it will move forward at this stage. So there are certain
16 relaxed requirements -- is the best way to put it -- that will
17 allow these claims to move forward in the claims process before
18 all of that information is really pinned down at the points of
19 the risk stage.

20 THE COURT: That's an area where you've got -- you
21 know better than I -- that that's an area where the frustration
22 level is probably the greatest. I don't mean the deceased
23 claimants, I mean in the claims that come in that are not
24 sufficiently filled out and you send them back, that's where the
25 frustration levels gets high. If you see something that the

1 Court can do on that, you need to let me know.

2 MR. BROWN: Yes, Your Honor, we certainly will. And
3 it always is in every process, as the Court mentioned, one of
4 the challenges for all the parties, to make sure that the
5 documents are complete and binding, but the claims are also
6 moving along. And we will come to the Court for help if we need
7 to. Thank you, Your Honor.

8 To finish out the enrollment picture we looked at a
9 slide like this on April 17 to show us how many of the claimants
10 that said they wanted to enroll have actually gotten in their
11 materials. And Row 2 shows us again what is kind of the
12 centerpiece of the enrollment package, which is that release.
13 And we have 46,124 releases in the door now. When we were here
14 on April 17, that was 43,019, so we have got a lot of releases
15 in the time that's passed since then.

16 And the last row of claimants, of the 46,000 with
17 releases, we have 44,451 who have their whole package into us,
18 all the pieces of it that we just looked at. That number was
19 38,000 plus back on April 17. So, the parties and counsel are
20 getting the materials to us, and the numbers keep getting closer
21 to finish on the enrollment picture.

22 The last piece of enrollment information deals with
23 the CFE, or the Certification of Final Enrollment I mentioned
24 that were due on May 1. This shows what we got. We did get 839
25 of those final certifications from primary counsel by May 1st.

1 And that group of attorneys represents 45,138 people who were in
2 the program. We've gotten 22 of them since May 1st, and they
3 represent 3500 folks plus.

4 We have 145 firms who have not yet given us a
5 Certification of Final Enrollment. And that breaks down a
6 little bit. 24 of those firms have told us they don't have any
7 illegible claimants. All the people that they represent are
8 not eligible for the program under its terms. There are 19 of
9 those firms that have enrolled with one or more people, so we're
10 still working with them to finish. And then there are 102 firms
11 that haven't enrolled a single person. Generally, very small
12 numbers, a couple of firms that have more than ten claimants in
13 that category. As we can see, it's only 683 claimants that are
14 involved in that entire group of 145 firms who haven't given us
15 a CFE.

16 But, this is currently underway. We're still
17 receiving the Certification of Final Enrollment and working with
18 the parties to assess whether the firms are really finished on
19 enrollment and what pieces they have complete. I'm trying to
20 help them do that.

21 That concludes our registration and enrollment
22 phases, Your Honor. Do you have any questions of me before we
23 move on?

24 THE COURT: No, thank you very much.

25 MR. BROWN: Then Lynn will address quickly where we

1 are on the claims process.

2 MS. GREER: Good morning, Your Honor. Lynn Greer from
3 Brown Greer of the Claims Administrator's Office. The deadline
4 for claims packages submission is approaching. It is July 1st
5 of this year. And on or before that day we are looking to
6 receive complete claims packages from pro se claimants as well
7 as representative claimants. This is a process that is a very
8 time-consuming process for the firms. We know that everyone is
9 working very hard on gathering required records and submitting
10 them to us.

11 When we were here on April 17, the number of total
12 claims packages we received was 1300. So, in a month's time
13 that number has increased by 2000. Because of today -- as of
14 yesterday, we had received 3300 claims packages. And these are
15 claims packages that are accompanied by claims forms, and so
16 they are complete enough for us to be able to begin commencing
17 the reviews.

18 The claims form process is one that, as I mentioned to
19 the Court before -- it's online. The firms are able to log on
20 to access their portal and to be able to fill out the claims
21 forms and submit it with an electronic signature. The only time
22 that we require an original claims form is if a profile form had
23 not been submitted in the underlining litigation. The firm must
24 complete the Attachment A because it's a medical history and
25 risk factors, and then the claimant and the firm must find the

1 claims form.

2 We have, as of this week, sent an email blast to all
3 primary counsel helping them through the process. We had
4 received a lot of questions about the time it takes to upload a
5 claims package via the portal. A lot of these claims packages
6 are very, very large and firms have experienced delays in trying
7 to upload them, and actually being timed out of their own
8 servers trying to upload the claims packages. So we have sent
9 this week an email blast that gives the firm sort of an estimate
10 of how long it will take to upload based on the size of the
11 claims package file. We also encourage them that if it becomes
12 too cumbersome, they are able to submit these electronically on
13 a hard drive, on a CD or DVD. Anything that will work for them,
14 we can accommodate and accept.

15 The other thing -- and I believe you'll get a report
16 from the pro se curator. The pro se case is, not surprisingly,
17 a lot slower. We are working with the curator to send out a
18 communication to the pro se claimants to try to simplify the
19 process, We have come up with an alternative claims form that
20 is a little more geared towards their status. And within the
21 next week, we'll be sending out a package to all pro se
22 claimants trying to assist them through the process.

23 The last thing I'll mention is that we do know we have
24 heard antidotal comments of certain frustration assets that the
25 claimants were having to process. We encourage firms to let us

1 know what they are and we can work with the parties, and if
2 necessary, bring those problems to the Court to help us find
3 solutions.

4 THE COURT: When do you project the pay-out to begin?

5 MS. GREER: Well, Your Honor, we are working hard
6 towards being able to review 2500 MI claims by August 1st. The
7 sooner we get complete claims packages, again, it'll allow us
8 enough filing of claims that do past through. And the goal
9 would be to try to be able to issue payment shortly thereafter.

10 THE COURT: How are you going to interface with the
11 bankers?

12 MS. GREER: Well, we are working on that with the data
13 base and being able to work along with them. And as Mr. Brown
14 and U.S. Bank described, that planning and preparation is
15 continuous and will continue through the summer to make sure
16 that we have the dry-run process set up and that we're ready to
17 go, all of those quality control steps have been met, and that
18 payments will be ready to be issued.

19 THE COURT: All right.

20 MS. GREER: Thank you, Your Honor.

21 MR. BIRCHFIELD: Andy Birchfield on behalf of the
22 Plaintiff Steering Committee. That's a matter that we have been
23 focused on, both from the Plaintiff's Negotiating Committee as
24 well as Merck. We've been working very closely with Brown
25 Greer. The claims package process, the claims packages that

1 have been received now, they are being processed, and we feel
2 comfortable that we will reach that threshold amount of having
3 2500 that can be evaluated that will be the basis of making an
4 interim payment. So, from where we stand at this point, I feel
5 very confident that in August we'll have the initial payments.

6 THE COURT: And I would like to be kept in the loop on
7 those payments. In that regard, the Special Master is here. Is
8 there anything from your standpoint? We're getting to those
9 areas where your team is going to be in action?

10 MR. JUNEAU: Yes sir. In specific follow-up to the
11 inquiry you made earlier, Your Honor, interface with Brown
12 Greer, we anticipate having by your the next Status Conference,
13 I would have dealt with Brown Greer. We will have the mechanics
14 of the program that's going to be followed by the Special
15 Master, the Deputy Special Master in the evaluation process.
16 That will be the footprint, if you will, of what we'll do. If
17 it's then anticipated -- and we've already discussed this -- is
18 in July we're going to actually have the detailed run-through
19 with the Special Master of a sampling of cases at that time so
20 that when the case is actually formally clear, we are not going
21 to be delayed in connection with the disbursement of payments in
22 this matter. So, we're on target, consistent with the deadlines
23 and dates that have been made thus far by the parties.

24 THE COURT: Okay. Thank you very much.

25 MR. HERMAN: May it please the Court, Russ Herman,

1 Your Honor. Between November 9th, '07 and April 10, '08, Your
2 Honor has issued 12 orders. They are listed in the Status
3 Report. I'm not going to belabor the Court with a review of
4 those orders. However, I do, particularly for the listeners,
5 want to again advise them that all the orders are posted on the
6 Court's website at vioxx.laed.uscourts.gov, at Brown Greer's
7 website, browngreer.com/vioxxsettlement, and claims
8 administrative at [Brown Greer.com](http://BrownGreer.com). All have the pertinent
9 information which should be reviewed by attorneys or pro se's
10 who are interested in following the case and keep keeping up
11 with it.

12 There is one issue on May 6, 2008. The Provost
13 Humphrey Law Firm requested matters regarding a common benefit
14 be placed on the Court's docket today. We responded for the PSC
15 on May 15, and these matters do not directly involve Merck, Your
16 Honor.

17 THE COURT: All right. Just two things. First, the
18 Court has tried to emphasize transparency in this matter, and so
19 I have from the very start created a website and put everything
20 on the website, including the transcripts of these meetings.
21 When we get them, after a period of time we post transcripts of
22 the meetings on the website, as well as all of our forms and all
23 of the orders, and any links that will be of help. So anyone
24 who is not able to participate in these meetings has access to
25 all of that information.

1 With regard to Common Benefit, I should make a comment
2 about that. I am aware of the work and effort done by the
3 attorneys throughout the country on this matter, both the states
4 as well as the MDL, federal MDL. And, without their help,
5 without their work, without their resources, this would not have
6 been accomplished. I am aware of that. And I'm going to have
7 to focus on an appropriate method of compensating them,
8 reimbursing them for their costs.

9 Everyone needs to know that that decision will be made
10 by the Court. It's the Court's responsibility, and it's my
11 responsibility to make that decision. Now, having said that, I
12 intend to solicit the advice of counsel, or anyone who is
13 interested, to make suggestions and to give me some input. And
14 I consider that input significant. I'll listen to it and give
15 it great weight, but I will be making the decision. I will make
16 a decision on the percentages, or the percent of the fee, and
17 then I will eventually make a decision on how that fee is to be
18 parsed out among the parties who feel that they are entitled to
19 it.

20 With regard to the later, I've created a Settlement
21 Committee to collect information. I expect them to do so. I
22 expect them to invite people to make comments or give them
23 information, documentation, and I expect them to make some
24 recommendations. But they will only be recommendations. I will
25 make the final decision.

1 And the other thing I want to say is that, at this
2 point it's premature. I'm conscious of it. I'm aware of it. I
3 understand the work that's been done. I appreciate the work
4 that's been done. It's been very well done, states, federal and
5 compensation will be forthcoming for that work. But, first and
6 foremost, we need to solidify this agreement. It's not there
7 yet. It is not placed in stone. There are certain provisions
8 that had to be met, and everybody needs to cooperate to get them
9 met. And we have to focus on paying out to the litigants. The
10 lawyers come last; they don't come first. So we need to take
11 care of the settlement and put that to bed, so to speak, and
12 then make sure that the appropriate gates are gone through by
13 litigants. And then either by then or at the same time, I will
14 be focusing on the attorney fees and the Common Benefit cost.
15 But, it's too early at this stage for me to focus on that. I'm
16 spending all of my time making sure that the litigants receive
17 the proper process. And that's my focus at this time, and I ask
18 that you do likewise.

19 MR. HERMAN: May it please the Court, on behalf of PSC
20 and plaintiff lawyers and their clients, I want to thank the
21 Merck team, Doug Marvin, Ted Mayer, John Beisner, our good
22 friend, Phil Wittmann -- who has an argument elsewhere today --
23 for their cooperation in moving this forward.

24 I would like to ask if Doug Marvin and I could
25 approach the bench just for one second?

1 THE COURT: Certainly.

2 MR. WILLIAMS: Your Honor, on the fee issue coverage
3 --

4 THE COURT: Would you come up here -- Sure. Would you
5 come over to the lectern? We have some people on the telephone
6 who are monitoring these matters.

7 MR. WILLIAMS: John Eddie Williams, Williams Kherkher,
8 Your Honor. On the fee issue, we were the firm along with
9 Provost Umphrey and others who in the past had a motion to
10 enforce our 2% deal, the Court will recall. I agree with the
11 Court that we should focus on getting the money out to the
12 claimants.

13 The reason we sent a letter, when we wanted to mediate
14 this issue, or offered to mediate these issues -- and I don't
15 know how else to get in front of the Court accept to do it here.
16 This may be something we talk about in chambers.

17 THE COURT: Well, we can talk about in chambers, but
18 nobody is going to make that decision but me. Mediation is not
19 going to resolve any disputes; you can do what you want to do,
20 but I'm going to make the decision, no mediator.

21 MR. WILLIAMS: Well, Your Honor, then we'll -- I
22 understand that ultimately the decision may well be with this
23 Court.

24 THE COURT: It has to be with this Court. I'm telling
25 the defendants too. If this decision is not made with the

1 Court, then this whole program is going to be in jeopardy.

2 MR. WILLIAMS: Well -- Your Honor, but we thought we
3 would move things along by hoping to resolve things in
4 mediation. If the Court says not to do that, then obviously --
5 the PSC has rejected that.

6 THE COURT: I haven't talked to the PSC on that. I'm
7 not concerned as to what their view is on it, frankly.

8 MR. WILLIAMS: I understand, Your Honor. We're just
9 trying to get some guidance from the Court. And if the Court
10 would perhaps at some point let us sit down and talk about this
11 issue with the Court, if you have time.

12 THE COURT: I certainly will. I'm always willing to
13 talk with counsel, particularly experienced and competent
14 counsel. I hope the message is clear, folks, that it's going to
15 be my decision.

16 MR. WILLIAMS: Thank you.

17 THE COURT: Sure. Thank you very much for being here.
18 You want this on the record?

19 MR. HERMAN: No, Your Honor.

20 (Bench conference - Off the record out of the presence
21 of the court reporter.)

22 THE COURT: It's been called to my attention that I
23 have distinguished visitors among the lawyers, other
24 distinguished visitors, Judge Donovan Frank and Judge Arthur
25 Boylan from Minnesota. They have been working on the Guidant

1 case, and they're visiting with me today, and I appreciate your
2 being here. Thank you very much for being with us, and I look
3 forward to meeting with you after the meeting.

4 MR. MARVIN: Judge, before we leave the section on the
5 pretrial offer, I thought it might be advisable to bring
6 attention to recent matters which the Court put in place,
7 Pretrial Order 36. The Court established procedures there for
8 plaintiff's counsel to follow when seeking to withdraw, because
9 they have not found the plaintiff -- or the plaintiff fails to
10 respond to communication and counsel.

11 THE COURT: Right.

12 MR. MARVIN: And there are procedures in place that
13 counsel can follow.

14 THE COURT: Okay. And if anybody has any questions on
15 that, contact Liaison Counsel. We've got forms. I put out some
16 forms to be of assistance to anyone who needs some assistance on
17 that.

18 MR. HERMAN: May it please the Court, Chris Seeger
19 will introduce the lien issue.

20 THE COURT: Okay.

21 MR. SEEGER: Consistent with the parties, I'm going do
22 to do it quickly and efficiency. As you know, we've hired a
23 lien administrative to move the process along. I'm happy to
24 report that we're right on target. There is nothing happening
25 on that front that will slow down compensation for the claimant

1 when that point comes. And Mat Garretson is here to give a
2 detailed report for the Court.

3 MR. GARRETSON: Good morning, Your Honor, I'm Mat
4 Garretson with the Garretson Firm. As I mentioned, we are
5 making good process. I continue to be pleased that I'm able to
6 report that at each of these hearing, specifically this month,
7 we've made good progress with getting Medicare expectations on
8 how this process the going to work in line with the parties
9 expectations. More specifically, what we've been working on is
10 now honing in on that global reimbursement amount that will be
11 paid to Medicare, creating a system to apply that in the awards
12 of those claimants who are in fact Medicare entitled. And we're
13 doing that through very similar to the way the point system is
14 working, through the categories largely base upon the type of
15 injury and the date of injury in which the individual was
16 entitle to Medicare.

17 Our plan is to disclose those categories to the
18 claimants along with their points, and to marry up to the
19 appeals process a mechanism which would give the claimants an
20 opportunity to be heard by us as an the administrator if they
21 felt that that injury of category date of entitlement and date
22 of injury -- and they were somehow mixed and put into the wrong
23 category.

24 Equally important, with respect to Medicaid, we're
25 working to creating the documentation that becomes the document

1 that the claimant will have to show they did resolve their
2 allegation with respect to injury-related care on account of
3 their Vioxx claim. And so as you can imagine, dealing with the
4 Federal Government and agencies, there are a lot of people who
5 have to approve and put their eyes and signatures on that
6 document. But we're making great process in line with the
7 interim payment date.

8 My only caution to the usual enthusiasm is, we're 90
9 percent of the way there on the blue print, and hope to have the
10 mechanism in place soon for the last ten percent to get it past
11 the goal line. We're dealing with high profile set, and lot of
12 eyes, as I said, within the government on this. But everybody I
13 feel is -- understand the importance of the Court's objectives.

14 With respect to Medicaid, at the last three hearings
15 I've been reporting that we introduced upon good counsel from
16 the Court and Special Master Juneau, we came up with voluntary
17 protocol that we ask the states to adopt that would resolve
18 Medicaid's issues in the cost-efficient, uniform basis
19 nationwide.

20 As you all may recall, every time I've been here I've
21 talked about -- I'll restate it so that everybody understand
22 what those protocols are. One is a voluntary "holdback"
23 provision which would be a maximum "cap" under which every
24 Medicaid beneficiary would be resolved. And our objective would
25 be to resolve those liens and finalize within those maximum

1 "caps" and balance of those proceeds would be to plaintiff, and
2 that will do to immediately attribute monies to Medicaid
3 beneficiaries as of August 1st.

4 We've also recommended a procurement offset whereby
5 once we finalize that line amount that lien is further reduced
6 proportionately in recognition of the proportionate share of
7 attorney fees in cases.

8 A letter was sent to each state and territory on March
9 14 requesting their voluntary agreement of these proposed
10 procedures and protocols. As of this morning, I'm pleased to
11 say we're only waiting on one State to respond. And I should
12 note with that one state we expect a favorable response. It
13 happens to be the largest state involved in terms of Medicaid
14 benefits, and the largest Medicaid in the country, which
15 requires nine people to sign off. I think by Friday we should
16 be in a position to have everybody in the alignment.

17 With respect to Other Governmental Liens, the VA
18 TRYCARE and indigent health plaintiff's counsel, I know they
19 have a lot of other things on their plate, but we need to
20 reiterate so it doesn't get lost in the translation. We still
21 need to receive notice as counsel receives notice about these
22 claims. I have no alarm in saying that it's just a reminder
23 that the process people need to circle around and give you that
24 information.

25 I'm somewhat pleased about the process everyone

1 engage, and no need for the Court's involvement at this time.

2 But as I said, I will come to you if we in fact do.

3 THE COURT: Please do, and I'll get involved. One of
4 the advantages of an MDL process is to pull together all of the
5 cases so that you can deal with economy of scale. And this is
6 an area where it can be utilized. The liens are a miserable
7 thing as well for lawyers to handle. They get the settlement
8 funds and they can't deliver the settlement funds -- the lawyers
9 do -- and they can't deliver them because they have liens or
10 they have to work out liens. Clients have difficulty with
11 liens, and the advantage of an MDL process is there can be some
12 negotiation between all of the parties and that can be an
13 advantage for most of the lienholders, as well as the people who
14 were affected by the lien. So, we try to get out in front of
15 this problem early on. You've been a great help to steer this
16 endeavor.

17 MR. GARRETSON: Thank you, Your Honor.

18 THE COURT: In your usual and efficient way, you've
19 got at least a handle on it. If you have any difficulty, you
20 need to talk to me about it so I can get involved.

21 MR. HERMAN: Your Honor, Special Master Juneau has
22 already addressed the Court, and we'll move on. Mr. Marvin has
23 a report of the next two items.

24 MR. MARVIN: Your Honor, there is no change on the
25 State Court trial settings. There are no cases set for file

1 dates until June 30.

2 THE COURT: No cases set.

3 MR. MARVIN: Class Action. Your Honor, there are no
4 changes there as well. Discovery directed to their parties.

5 MR. HERMAN: Lennie Davis has been working on that,
6 and he'll report on ESI and FDA discovery.

7 MR. DAVIS: Good morning, Your Honor. Leonard Davis
8 from Plaintiff Liaison Counsel's Office. There are two matters
9 with respect to discovery directed to third parties. With
10 respect to the FDA, after the last Status Conference in mid
11 April, the FDA produced to us additional documents. We have
12 taken those documents, reviewed them as well as privileged law
13 that they've provided, and have recently written to the FDA
14 questioning some of their assertions of privilege as well as
15 some of the entries in the privilege law. I expect that we'll
16 be hearing back from the FDA. They just got that just a few
17 days ago, and we've had communications ongoing with the FDA
18 counsel. If there is something that comes up with respect to
19 that, we'll advise the Court, but I expect that we'll have
20 communications.

21 With respect to ESI, following the May 14th
22 conference, within 48 hours ESI produced data to us, and they
23 were paid for that data.

24 THE COURT: Okay.

25 MR. DAVIS: We are sorting through the data that ESI

1 provided and hope that we'll be able to get that data, sort it
2 out and deliver it to various plaintiff counsel. We're having a
3 little bit of difficulty with that. We're looking at it, and if
4 there is an issue, we'll get back to the Court.

5 THE COURT: I do appreciate the FDA's help on this
6 matter. If there is a problem with privilege before any motions
7 are filed, you need to let me know what the problem is and I'll
8 convene a conference with counsel and the director, or counsel
9 from the FDA, and we'll resolve it. With ESI, I appreciate
10 their cooperation. I enjoy talking with them on the phone. I'm
11 happy that matter has worked itself out.

12 MR. DAVIS: Thank you, Your Honor.

13 MR. HERMAN: Your Honor, Dawn Barrios with the State
14 Liaison Committee has her report.

15 MS. BARRIOS: Good morning, Your Honor, Dawn Barrios
16 for the State Liaison Committee. As usual, our report on the
17 pending remand. We presently have before you 747 cases with
18 pending remands. Some of those cases, Your Honor -- or some
19 cases have two remands, one that we filed in the transferor
20 court, or the State Court, and one filed again in MDL. But the
21 number stands at 747 of cases.

22 I have those remands on CD's to provide to everyone.
23 We've established a mechanism with Brown Greer to determine what
24 remands will be standing after the claims resolution is
25 complete. And, of course, we know because of the Gate Committee

1 and the appeal to the Special Master, we won't have a definitive
2 number for a while, but we hope within the next 60 to 90 days
3 we'll be able to give you a number that will be realistic. That
4 number would be how many remands you would have after the
5 resolution program.

6 With regard to the economic loss cases before Your
7 Honor, there are 54 of those cases pending before you. That
8 includes medical monitoring, third party payor, and consumer
9 cases. Ms. Elizabeth Cabraser of the Plaintiff's Steering
10 Committee is heading that up. I'm working with her on that. In
11 her absence today I will provide you with the information that
12 Judge Higbee is having a Status Conference on these matters
13 tomorrow. I personally visited with Judge Higbee and she said
14 she was going to get together with you because New Jersey and
15 the MDL are working very closely, as are California. We have
16 regularly scheduled conference calls on these, and we're moving
17 forward, anxious for the day that we get the nod from Your Honor
18 that you'll be ready to look at those.

19 THE COURT: What my thinking is, is that some time in
20 this summer when we're through with the settlement program -- or
21 at least people are being paid and when getting paid out of the
22 proceeds become simply an administrative function. I would like
23 to have a Status Conference. And I would like, if possible, the
24 judges from Texas, New Jersey and California, if we could all
25 get together and have a Status Conference and see in advance of

1 the Status Conference how many cases we're dealing with. And if
2 we can deal with them in some unified way I think that will be
3 helpful to everybody. Hopefully, we'll be able to put into
4 place, some game plan or way of dealing with them that's
5 consistent with everybody, that satisfies the states and also
6 takes care of the requirements of the MDL. But, I'm going to
7 shoot for the summer, some time there. And I'll talk with Judge
8 Higbee and Judge Chaney, Judge Wilson.

9 MS. BARRIOS: Yes, Your Honor. And the parties are
10 working together very cooperatively on the discovery. Mr.
11 Seeger is heading that up.

12 THE COURT: Okay.

13 MS. BARRIOS: Thank you, Your Honor.

14 THE COURT: Thank you very much.

15 MS. BARRIOS: I have a copy of everything for you
16 all.

17 MR. HERMAN: Thank you, Dawn. Your Honor, the law
18 firm Johnston and Hoefer was appointed as curator for the pro se
19 and they have a report to make.

20 THE COURT: Okay. In this matter we have a number of
21 pro se claimants, and to facilitate the pro se claimants and to
22 serve them, I've appointed a pro se attorney to be on standby to
23 answer any questions, assist them in any way that they need
24 assistance. So, I'll hear from that report now.

25 MS. SANTOYA: Good morning, Your Honor, Claudia

1 Santoyo. I'm here with Robert Johnston's office. As an initial
2 matter, I would like to point out to the parties and the Court
3 that although a motion to enroll with myself and another
4 associate has been pending for the Court, it has not yet been
5 granted.

6 THE COURT: Okay, well, I grant it now.

7 MS. SANTOYA: Thank you, Your Honor.

8 Since the last time we were here and the last status
9 report, we have received 60 additional requests from potential
10 pro se claimants who either claim to have not known about the
11 settlement at all or claim to had been represented at one point
12 and that the registration was not complete.

13 There is an initial question as to whether these
14 additional people may be eligible by the initial requirement of
15 having either filed a lawsuit qualify curriculum or enter into a
16 full agreement by the date of the agreement.

17 Of the returned mail that we have sent out, we have a
18 total now of 184 returned mail claims. All of those individuals
19 are being notified through the publication of legal notice to
20 run consecutively for three days in the newspaper in the last
21 known address, or where that's not known, the region; and where
22 that's not known, nationally. The publication has taken place
23 in quite a few cases, but unfortunately we have not yet received
24 any now contact information for any of the claimants for which
25 we've received returned mail.

1 THE COURT: Okay.

2 MS. SANTOYA: Additionally, there has been a certified
3 letter issued by defense counsel advising the claimants of the
4 Termination of Tolling Agreement. In order to reduce any
5 duplication of efforts, we have agreed with Mr. Marvin's office
6 to take possession of the returned mail he has received and to
7 forward it if we do in fact retrieve any contact information on
8 those individuals.

9 We've received approximately 90 of those letters
10 returned back. All but 29 were already persons that we are
11 publishing legal notices for. We've just added those other 29.
12 And should we have any new information we'll advise the Court.

13 The Claims Administrator advised briefly the revision
14 of some of the claim forms and claim admissions package for the
15 particular needs of the pro se. What we have recommended is to
16 sort of insert some claim language explanations or some legal
17 terms and medical terms. And the attachments have been reduced
18 to one single claim form. At this point we are very satisfied
19 with the drafts that have been provided by Brown Greer, and I
20 want to especially compliment them on both the speed and
21 efficiency which they have been able to do that.

22 There is a potential question that we would like some
23 guidance from the Court with regard to Pretrial Order Number 36.
24 The time delays that are involved in that Pretrial Order make it
25 apparent that there may be claimants for which attorneys are

1 attempting to withdraw, that the withdrawal order will not be
2 signed in advance of the July 1, 2008 deadline. It leaves them
3 in a sort of legal purgatory. On one the hand they're
4 considered represented because the order has been signed
5 allowing their attorney to withdraw. But at the same time they
6 have a July 1st deadline to submit their claims package
7 position. We have recommended in our status report that the pro
8 se version of the instruction cover letter and claims form be
9 submitted to those persons who's attorneys are in the process of
10 withdrawing so that they have every opportunity to complete the
11 process before the deadline.

12 THE COURT: And lets keep an eye on that. If there
13 are some people who fall through the cracks, we ought to be able
14 to deal with those.

15 MS. SANTOYA: Lastly, Your Honor, with regard to the
16 communications log, we are working again with Brown Greer to
17 have that available electronically. Within the next 30 days all
18 of our internal law will be uploaded and available through the
19 portal of Brown Greer's website. I will leave to it Brown Greer
20 to decide how and who can access that information. I'm sure it
21 is the same sort of information as every other portal. Within
22 the next 30 days, like I said, that will be updated and it will
23 continue to be updated on a rolling basis as new communications
24 occur.

25 The Status Report Number 2 for the curator was filed

1 yesterday electronically. If anyone needs a hard copy, we have
2 copies available to the Court.

3 THE COURT: Okay, and I'll put it on my website to
4 post it for everyone.

5 Thank you very much.

6 MR. HERMAN: Your Honor, I'm a great plagiarist. I
7 intend to use that term, "legal purgatory." Doug has a report
8 on Merck motions, and particularly the Vioxx suit statistics.
9 There is no issue relating to Pretrial Order Number 9.

10 THE COURT: Okay.

11 MR. MARVIN: Your Honor, there is no change with
12 respect to motions pending before the Court that Merck has
13 filed. On the Vioxx suit statistics, there are approximately
14 now 14,450 lawsuits pending which include approximately 32,925
15 claimants. Of that number, 9,200 are in the MDL, comprising
16 about 24,300 plaintiff groups. And there is approximately
17 12,760 claimants who have entered into Tolling Agreements.
18 Tolling, as you know, Your Honor, is now closed and the Tolling
19 Agreement has been terminated.

20 We should also point out that claims of more than
21 21,000, 21,000 claimants, have been dismissed as of March 31,
22 2008.

23 THE COURT: What's the percentage of the claimants
24 that have come in? I know there are different ways of figuring
25 the percentage, but what's the best percentage of claimants, the

1 highest percentage that have gone into the program?

2 MR. MARVIN: It looks like there are 95 percent right
3 now who have indicated that they intend to enroll. We actually
4 think that that number will creep up to 97 percent or more as
5 the additional enrollment come in.

6 THE COURT: Okay, all right. Thank you.

7 MR. HERMAN: Your Honor, Chris Seeger, co-lead
8 counsel, is going to deal with items 13, 14 and 15 on your
9 agenda at page 11 and 12.

10 THE COURT: With the MDL trial package, I'll do that
11 after this meeting. One of the advantages, as I've said before,
12 for the litigants of an MDL is that those who are not
13 participating in the settlement program of the MDL have the
14 advantage of a trial package. So, if they wish to try their
15 case, they can receive from the committees a ready-to-go trial
16 package that generally involves and focuses on general causation
17 and those aspects of the claim. And then they can put on their
18 individual cases by playing the trial package, utilizing the
19 documents that are attached thereto, or readily accessible to
20 them, and put their own witnesses on to deal with specific
21 causation. I've looked at one trial package and was very
22 impressed with it on the MI's. And today I'm going to review
23 the stroke trial package, and that will be ready.

24 MR. SEEGER: Judge, the only thing I'd add to what you
25 just said is that, for anybody who wants access to a package and

1 the terms of access are governed by your PTO 37. Also, if
2 people don't have PTO 37 and they want it, they can obviously
3 contact Liaison Counsel and figured that out.

4 But, one final note on the stroke package, it is a
5 culmination of everything that's happened in this case since
6 2002. It draws upon all our experience in the trials, and it's
7 really a turn-key operation, as you witnessed yourself, the
8 heart attack trial package. So, that will be presented to you
9 probably 30 minutes from now in chambers.

10 Judge, just briefly on the other litigations involving
11 economic loss and the third party payor litigation. At your
12 direction I think you've instructed me and John Beisner and the
13 Steering Committee to come up with some kind of a proposal with
14 how those cases might proceed in your court, and we can probably
15 do that next Status Conference, if that's okay with Your
16 Honor.

17 THE COURT: Yeah, you need to focus on how many and
18 how they can be dealt with. My thinking is, if we can get some
19 case that is indicative, or carries a lot of the elements of all
20 the other cases, and then I'll deal with that case; we'll try
21 that case and see if we learn anything from that case to be able
22 to step it out to all of the others.

23 MR SEEGER: Right. And that process is going on
24 in state courts, and John and I are involved, so we'll try to
25 harmonize that.

1 THE COURT: Okay.

2 The new item is the Foreign Individual Cases.

3 MR. MARVIN: Yes, Your Honor, the Court has already
4 ruled, and it did so some time ago on the class actions that
5 were filed alleging claims on behalf of foreign claimants
6 dismissing that action. Since then counsel have voluntarily
7 dismissed claims brought on behalf the individuals, but there
8 are a number of other counsel who have not yet dismissed those
9 claims. And so we have filed a motion for an Order to Show
10 Cause why the foreign individual cases that are still pending
11 should not be dismissed.

12 THE COURT: I really dealt with this in depth. I had
13 the benefit of counsel from various countries, their input and
14 defense counsel. I had a hearing on it. I understood the issue
15 and crafted an opinion. I listened to any comments, but I've
16 dealt with that issue, actually. It wasn't just in a class
17 action format, it was Forum Non Conveniens.

18 MR. SEEGER: Thank you, Your Honor.

19 THE COURT: Termination of Tolling Agreement, the next
20 item.

21 MR. MARVIN: Yes. As I mentioned earlier, Your Honor,
22 the Tolling Agreement has been terminated. With respect to
23 those claims coming into the settlement agreement -- settlement
24 program, the settlement agreement itself provides for the
25 remedies or the relief with respect to tolling there. As for

1 other claims that are not illegible for the program, there, the
2 Tolling Agreement has been terminated and anyone who has any
3 claims that they wish to file have 120 days from April 22nd --
4 I'm sorry, April 23rd to file those claims.

5 THE COURT: The Tolling Agreement, as you've heard me
6 say a number of times, I think it's a mechanism that's very
7 helpful, but it also carries some -- it also becomes
8 problematic, and hopefully we'll come up with a different
9 mechanism. I like the idea that someone does not have to file a
10 lawsuit, incur the expense, but at the same time can be a part
11 of the lawsuit. That's the concept, so that individuals, as you
12 reported, we have some 20,000 of them that have been able to
13 partake of that mechanism. And it tolls the statute of
14 limitations or prescription, as we call it here in Louisiana,
15 and allows them some breathing room in which to file a lawsuit,
16 at the same time they can participate in the case, and actively
17 participate in the case, and their attorneys to actively
18 participate in the case.

19 The difficulty comes when some of those cases are
20 dismissed and not -- and the others are not, it becomes a little
21 more problematic, but we've dealt with it and hopefully we'll be
22 able to get through it. But I had to terminate the Tolling
23 Agreement so that we could get them in and get them out.

24 MR. HERMAN: May it please the Court, the next matter
25 on Your Honor's Status Conference today is at page 13. It's

1 item 2008. It's a Motion to Modify and/or Suspend Pretrial
2 Order Number 28 which may be characterized generically as a Lone
3 Pine type of order. I understand Mr. Beisner will argue for
4 Merck, and co-lead, Andy Birchfield, and Arnold Levin for
5 plaintiffs.

6 As a chair of the Plaintiffs Negotiating Committee, I
7 do want to introduce this subject with one brief statement. And
8 that is, with the state of the law in class actions, defense
9 counsel and plaintiff counsel always find themselves like owls
10 going through the looking glass. And as a result, you really
11 are in the realm of quid pro quo. In this case the quid for
12 plaintiffs was no causation proof in regards to settlement.
13 That was a primary aspect, that and quick payment.

14 For the defendants, one of their primary
15 considerations was -- two of their primary considerations, while
16 they would only talk about MI, and after some time then ischemic
17 stork, and, secondly, Lone Pine-type orders. And I say that
18 because I think it's important for folks listening in to know
19 that these were important considerations in connection with the
20 negotiation of the Settlement Agreement.

21 MR. MARVIN: I take it you'll hear argument on that
22 afterwards?

23 THE COURT: Yes, I will. Let me finish up. We've
24 just got one other item on the agenda and then I'll get back to
25 that. We'll deal with the argument. The Third Party Payor

1 Motion?

2 MR. HERMAN: Jim Irwin is here to speak on behalf of
3 Brown Greer and U.S. Bancorp, Your Honor.

4 THE COURT: Okay.

5 MR. IRWIN: Good morning, Your Honor, Jim Irwin and my
6 colleague, Monique Garsaud, for U.S. Bank and for Brown Greer.
7 We would simply ask that the Court enter a Scheduling Order for
8 the convenient briefing and presentation of the Motion to Sever.

9 THE COURT: My plan would be to set this motion for
10 hearing at the next conference, which will be, by the way, on
11 June 27th. And then I'll issue the usual Scheduling Order that
12 backdates from that. If you need some more time, you need to
13 let me know and I'll deal with that.

14 MR. IRWIN: We would appreciate that. Thank you,
15 Judge.

16 MR. GRINSTEIN: Your Honor, Joe Grinstein with Susman
17 Godfrey representing the plaintiffs in that matter, and that's
18 fine with us.

19 THE COURT: Is that doable from your standpoint to
20 have the motion heard next Status Conference in June?

21 MR. GRINSTEIN: From our prospective, absolutely, Your
22 Honor.

23 THE COURT: Same way?

24 MR. GRINSTEIN: Thank you, Judge.

25 THE COURT: Okay. We'll do it that way in June.

1 Does that complete the agenda items? The next
2 meeting, as I say, is June 27, Friday, June 27, 2008.

3 MR. HERMAN: Your Honor, before you conclude this and
4 go to argument, as a point of personal privilege, I would like
5 to ask the Court if, for the July Status Conference -- which I
6 actually plan to attend. Ms. Thompson and I plan to be wed the
7 last week in July, so I appreciate it.

8 THE COURT: Congratulations.

9 MR. HERMAN: Lastly, I do want to say before
10 concluding today, I'm well acquainted with the abilities and
11 character of Mr. Kaiser, Mr. Williams, Ms. Oldfather, who have
12 brought matters to this court. And I know that they all act in
13 good faith. With regard to the fee issue, I commend all counsel
14 who are listening in and who are concerned with that. Judge
15 Fallon has made very early that he will be the determinative on
16 these issues. And you do well to review the Motiva Shell
17 decision issued by the Fifth Circuit since January 2008, as well
18 as Judge Fallon's decision in the Murphy Oil case, which has
19 also been issued in the last two months, which will provide all
20 counsel with the Fifth Circuit and this Court's thinking on
21 these issues at this time. Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. BECNEL: May I address the Court?

24 THE COURT: Sure.

25 MR. BECNEL: Your Honor, as you recall, you issued an

1 order saying don't contact you; don't talk to you. You just
2 asked us to talk to you about those very issues in terms of
3 resolution. I've never seen so much litigation as in the last
4 two years dealing with cases. And prior to that time, for 37
5 years in my career we had none. I would recommend that --

6 THE COURT: I remember those early years.

7 MR. BECNEL: Yeah, well, we just divided it up, and
8 everybody says, yeah, and you were the divider. I guess you're
9 still the divider. But, in any event, I would suggest maybe a
10 methodology to deal with these issues that now are consuming
11 judges' times, lawyers' times, is to maybe have either the ABA
12 -- which I've recommended to the incoming president -- that we
13 established some sort of specialized ABA/MDL forum where judges,
14 state and federal, where lawyers who practice before MDL courts
15 are, or in complex cases, get together and have roundtable
16 discussions and come up with some methodology to deal with the
17 issue that's never been dealt with before in the Manual for
18 Complex Litigation, even seminars by the MDL judges all get
19 together, but without the lawyers involved, you know, you can
20 issue the edict, but we've got to get together to get our hands
21 around this fee dispute problem, and how do you award fees.
22 Because every lawyer thinks he's done more work than the next.
23 And that what seems to be the -- but, I didn't know if you were
24 going to withdraw that order so that we can make some
25 recommendations to try to solve this problem.

1 THE COURT: In the first place, I agree with you. I
2 think that we need to all put our heads together concerning this
3 issue, either under the MDL or under the ABA, or simply locally
4 if we do some seminars and get some people throughout the
5 country to talk in seminars. I think that that's helpful. But,
6 I do agree, we need to do something with it.

7 From my standpoint, what I see -- what I intend to do
8 is that, hopefully, and not in the too far future to focus on
9 it. And I will look for guidance from counsel. I think that
10 the attorneys generally know better who did what. They really
11 do. They're in the foxholes, and I'm not anymore, so you know
12 best who did what. And, I think your input is vital. It's not
13 significant, it's vital. So, I will be meeting with counsel. I
14 will be talking with counsel. I will be inviting counsel to
15 comment on it. And I'll put it out, and I'll have a hearing and
16 I'll invite counsel to comment on it. And, I'll get counsel,
17 all counsel in open court and we'll do it do it transparently.
18 I'll issue my views, and that will be transparent. But, I'm not
19 going to do it without the benefit of experienced attorneys
20 commenting on it.

21 MR. BECNEL: Thank you, Your Honor.

22 THE COURT: Thank you for bringing that up.

23 MS. OLDFATHER: May it please the Court?

24 THE COURT: Yes.

25 MS. OLDFATHER: Good afternoon -- or good morning,

1 Judge Fallon. My name is Ann Oldfather, and I just want to
2 briefly introduce myself to the Court.

3 THE COURT: I appreciate you being here.

4 MS. OLDFATHER: And I certainly appreciate the kind
5 comments of Mr. Herman. When the time does come to address the
6 Motion to Suspend or Modify PTO 28, I would very much appreciate
7 it if the Plaintiff's Steering Committee and the Court would
8 allow me to present the motion when it was going to be filed.
9 So, I didn't want to -- I was kind of surprised when Mr. Herman
10 said that the PSC would be addressing the motion. I hadn't
11 realized that they would.

12 THE COURT: No, I didn't think that -- no, I thought
13 you would be -- it's your motion and I'll hear from you, but
14 from the PSC's standpoint, as I understood in our telephone
15 conversation with counsel when I set the telephone conversation
16 and then set the matter for today, that the comment was that if
17 it's your understanding that the PSC had some obligation to do
18 something in general discovery. And since the PSC wasn't on the
19 line at the time, it was just you and defense counsel, I felt
20 that the PSC ought to have an opportunity to weight in on this.
21 Because you're saying they have responsibility, then they ought
22 to respond to whether or not they do have a responsibility.

23 So, it's your motion. You present the motion, it's
24 simply that they will respond or comment as to what their role
25 is.

1 MS. OLDFATHER: I'm for whatever the Court wants to
2 hear, I just want to let Your Honor know I was here.

3 THE COURT: Sure.

4 MS. OLDFATHER: Thank you.

5 THE COURT: Okay, we can do it right now.

6 MS. OLDFATHER: Oh, okay. Well, Your Honor, I face
7 two significant challenges this morning. The first is perhaps
8 not so obvious, and that's courtesy of Delta Airlines, I arrived
9 last night but my luggage did not. And my luggage contained not
10 only my papers, but all of my clothes and makeup. So, I'm sure
11 that everyone here is grateful for Wal-Mart. I know that I was
12 at 6 o'clock this morning.

13 THE COURT: I wouldn't have known that your make up or
14 your clothes... (laughter) You look very well.

15 MS. OLDFATHER: You wouldn't have noticed makeup,
16 Judge, if I hadn't had on the clothes, I can guarantee you that.

17 The second challenge, Your Honor, is that I'm in the
18 unenviable position of having apparently the PSC opposed to my
19 motion and Merck. My ally there, rather than Wal-Mart, I hope
20 is in fact the Court. Your Honor had said in our telephone
21 conference that you do not want to stop anyone from coming
22 forward. And I've heard this morning at least several comments
23 about the salutary purpose of the Multidistrict Litigation and
24 the economy of scale. And, in fact, we're seeing played out in
25 this courtroom the very benefit of multidistrict litigation in

1 that the parties were able to put together a settlement in which
2 apparently -- according to Mr. Marvin -- 97 percent of the
3 eligible, the eligible participants are going to participate.

4 But that 97 percent figure, Your Honor, is somewhat
5 misleading because it doesn't include fully -- apparently from
6 the presentation that I saw from Brown Greer -- it doesn't
7 include approximately 20 percent of the persons who have filed
8 Vioxx claims. According to what I saw this morning there are
9 about 9,000 out of 50,000 claims that are not eligible to
10 participate in the settlement.

11 And those people, Your Honor, I know this Court does
12 not regard them as second class citizens. I know they're not
13 step children, but they are people who alleged claims that were
14 not MI or IS claims. And the PSC made a very understandable
15 decision early on that at the beginning of this litigation it
16 was going to focus on MI and IS claims. And I was even involved
17 in a very peripheral degree towards the definition of the
18 Plaintiff Profile Form of the persons who were required to file
19 the Plaintiff Profile Form. And, it was limited to people with
20 cardiovascular events. There was a lot of back and forth about
21 how that would be defined.

22 But the persons who had claims other than MI and
23 IS weren't addressed early on. And we were all told -- and the
24 pleadings are ripe with these representations -- that they would
25 be addressed later. And the Plaintiff's Steering Committee set

1 out -- again, understandably. I do not fault this -- to deal
2 with a very large chunk of these claims.

3 Now, Judge, I'm really here to speak to two classes of
4 people that are affected by PTO 28. Me, personally, I only have
5 nine people, so I flew down here from Louisville to talk on
6 behalf of nine people. And indirectly, I think, since the
7 PSC isn't doing it, to talk on behalf of these other 9,000. In
8 that class, Judge, there are the 9,000 people who were not
9 eligible -- 9,000 or more. Lets just say ten, 10,000, who were
10 not eligible to participate in the settlement. There are the
11 three percent of the eligible people who didn't participate.
12 They've chosen not to participate.

13 So, in those two groups, Judge, I've got eight people
14 in one, and one person in the other that are in this MDL
15 proceeding. I would say that the first group, the Group A,
16 where they are eligible but they chose not to participate, those
17 people present slightly different issues than the people who
18 were not eligible and could not participate. And I would like
19 to break down all of this to talk about those two classes
20 because I think they're affected differently.

21 I heard Mr. Herman say this morning, Your Honor, that
22 these Lone Pine Orders that are embodied in PTO 28 were a
23 critical trade-off in the settlement with Merck. They weren't
24 the Court's trade-off, Your Honor. That was not the Court's
25 trade-off. And if the PSC agreed in negotiations that it was

1 going to ask -- that it would not object to the entry of PTO 28,
2 that does not bind Your Honor. I did not know this until I
3 heard it this morning, but it doesn't surprise me because I was
4 one of the people that tried to dial in on November 9 to listen
5 to what I thought was a regular Status Conference, and I never
6 could get through. And it was that morning that the Settlement
7 Agreement was announced. And it was also that morning, Your
8 Honor, that you were presented with, I think four Pretrial
9 Orders that Your Honor did sign because you were requested to do
10 so by both sides. But those Pretrial Orders were not submitted
11 by motion ahead of time, as the counsel around the country had
12 no idea what they contained. I certainly didn't know what they
13 contained.

14 I can't imagine that the Court would somehow bound
15 those orders just because Merck had had the Plaintiff Steering
16 Committee, who are a lot of the same people that are on the NPC,
17 agree they would submit it. And I'm here to ask Your Honor to
18 look at PTO 28 -- not all of it -- because the preservation
19 requirements have been met, the interrogatory requirements have
20 been met by those people that didn't file PPS. Those are all
21 fine. I'm here to ask Your Honor to look at the requirement
22 that a 26(a)(2), a 26(a)(2) report be filed by these people who
23 we just learned on May 16 that the Plaintiff Steering Committee
24 is not going to take any further steps to develop their case.

25 Your Honor, I cannot accept that that comports with

1 the way an MDL is suppose to work, and I can't believe and do
2 not believe that this Court would want it to work that day. The
3 order that Merck -- and I brought my laptop up here because it's
4 one of the few things that had any of my paperwork on it, Judge,
5 so I'm just limited to a few things that I had on the plane.

6 But the order that Merck tendered, Merck and the
7 Plaintiff's Steering Committee tendered on the morning of
8 November 9th, requires these folks, the ineligible folks -- and
9 the folks who didn't participate in the settlement -- it
10 requires those people to come forward with a Rule 26 (a)(2)
11 disclosure statement that says, that we'll say this -- and this
12 is critical to my motion:

13 "A case-specific expert report, or medical expert
14 attesting to a reasonable degree of medical
15 probability that the plaintiff suffered an
16 injury."

17 If that's all we were talking about, Judge, that would
18 not be a problem. Then we go to 2 ii:

19 "And that Vioxx caused the injury. The
20 case-specific expert report must include an
21 explanation of the basis for the attestation
22 that Vioxx caused the plaintiff or claimant to
23 suffer the injury. An identification of any
24 other causes that were considered in formulating
25 an opinion, a description of specific injuries

1 allegedly suffered [et cetera], an
2 identification of all documents relied on by the
3 expert in forming his opinions."

4 Your Honor, this type of report was not required by
5 you on any MI or IS plaintiff accept those that proceeded to
6 trial, and then only when they were set for trial. The default
7 provision in the Federal Rules of Civil Procedure is for this
8 type of report to be required 90 days out from trial. This is
9 not the type of report, Judge, that is necessary for Your Honor
10 to manage these remaining -- and 9,000 are not in your court. I
11 know those figures were nationwide, but lets say that 5,000 of
12 those claim are in your court. This is not the way the Court
13 treated case management for the IS and MI claimants. And who is
14 to say that this set is any less deserving?

15 THE COURT: Okay, let me just comment on some of the
16 things you made. First of all, from the standpoint of the
17 Pretrial Orders, nobody ever presents a Pretrial Order to me and
18 I sign it the first time. The Pretrial Orders that I sign are
19 either drafted by me or discussed with me long before they're
20 presented to me. So, it's not something that I saw at the
21 eleventh hour and signed. And I might say that it's the same
22 Pretrial Orders that the State court signed, but they signed
23 them not when they were presented with them. These were
24 discussions that I was in on for a long period of time.

25 The other thing that I think has to be noted, is that

1 these cases have been going on seven years in the states; four
2 years in the MDL. We've had discovery. Thousands of
3 depositions have taken place. To ask a claimant to submit a
4 report that says they have a condition, and the condition is
5 caused by Vioxx -- I'm not asking for a Daubert report; I'm not
6 asking for even a witness report; I'm not asking for someone to
7 come forward and say, we're going to call this doctor as a
8 witness. But, for a plaintiff lawyer to have a case for four
9 years and not have any access to a report that says this
10 claimant's injury results from the taking of Vioxx, after seven
11 years if you don't have that in your file, it's a problem, I
12 think.

13 Now, you only had nine cases. You're very fortunate.
14 I really feel sorry for the individual who has a thousand cases
15 from a lawyer's standpoint, or 2000 cases from a lawyer's
16 standpoint. What do they do with the cases? They've had them
17 now for seven years. They haven't done any work. They don't
18 have any proof. They don't have any letter from somebody. It's
19 difficult for me to understand the difficulty that a lawyer has
20 in getting such a report. I'm not saying -- I'm not looking for
21 a report from somebody who the lawyer is going to call as a
22 witness, I'm just trying to find out what a viable case is. And
23 you know and I know that in MDL's there are a lot of cases
24 filed. Many of them are viable, but a lot of them just are not,
25 and there has to be some way of culling them out, some way that

1 -- frankly, it's been my experience that the plaintiff lawyers
2 are the biggest advocates of the Lone Pine at this stage of an
3 MDL, because they don't know what to do with the cases. You
4 only have nine. If you have a thousand, you know and I know,
5 those people call every single day. You don't have the
6 resources to take care of them. You've got to do something with
7 their cases, and you can't get out of them because you told them
8 they had a case.

9 MS. OLDFATHER: Well, I'm glad I only had nine.

10 THE COURT: I think that's why you're here, and the
11 people who had thousands of them are not.

12 MS. OLDFATHER: I don't know, Your Honor. Let me,
13 first of all, apologize. I did not, certainly did not intend to
14 imply that you were a rubber stamp.

15 THE COURT: No, no, I understood.

16 MS. OLDFATHER: I did not know that the Court had seen
17 PTO 28 before November 9th.

18 THE COURT: You need to know that I've seen every
19 order long before it's presented to me to sign.

20 MS. OLDFATHER: And, of course, on all the other ones,
21 I've seen them come up for motion and had them discussed
22 previously. And on that one I had not, and it was -- obviously
23 it was part of the whole settlement.

24 THE COURT: It seemed reasonable to me. And, also, I
25 had in there that if the date is a problem, for good cause, I

1 move the date.

2 MS. OLDFATHER: Well, let me talk, Judge, if I could
3 on how it plays out. Because it didn't seem that unreasonable
4 to me when I saw it either when it first came across the wires
5 on November 9. It plays out differently if you are an eligible
6 plaintiff who decided not to get into the settlement than it
7 does if you are someone who did not qualify to get into the
8 settlement. And on that first class of people, the three
9 percent that Mr. Marvin mentioned that will not participate in
10 the settlement, those people do need to file one of these
11 reports. They are going to be able to do that, they just can't
12 do it on this time line. And that's --

13 THE COURT: See, the time line doesn't concern me,
14 because if there is a time-line problem that's why I have in
15 there "for good cause shown." If you can't do it; you can't do
16 it, and you give me some reason other than the fact that you've
17 had other things to do for seven years.

18 MS. OLDFATHER: No, Judge, I wouldn't say that. First
19 of all, we filed all of our cases in 2005. I don't want to say
20 that two and a half years is less egregious than seven. I think
21 we have the same obligation whether it's two and a half or
22 seven.

23 But, no, everyone has been focused on the resolution
24 program. This Court has, all of these counsel have. It has
25 been extremely demanding putting together the claims package.

1 And we've tried to do a good job with Brown Greer's forms.

2 THE COURT: I know you have. The problem that I'm
3 having is, that I've got to deal with these individuals. As you
4 say, there are 9,000 or thereabouts. They deserve some
5 recognition. I've got to deal with them.

6 MS. OLDFATHER: I have a suggestion. And the
7 suggestion --

8 THE COURT: Would you want to represent all 9,000?

9 MS. OLDFATHER: Well, I actually --

10 THE COURT: I would consider that if you --

11 MS. OLDFATHER: I actually --

12 THE COURT: If you commit to the Court that you will
13 use resources, and you'll invest the resources and do it, I'll
14 consider doing something of that sort for you.

15 MS. OLDFATHER: Judge, actually my request is the
16 Court does appoint a subcommittee to represent this group. You
17 know, Your Honor, was very careful about the Plaintiff Steering
18 Committee when you selected them, and you gave them specific
19 duties. And part of their duties were to --

20 THE COURT: Look, if you will take the -- you will be
21 the subcommittee of one, I'll ask that you to get the 9,000
22 reports.

23 MS. OLDFATHER: Judge, are you teasing me with this?

24 THE COURT: No, no, seriously. I need to work this
25 matter out, but it doesn't seem fair to me to just ignore them,

1 but it's not going to -- as a practical matter, some of these
2 matters don't want to go to court. They don't want a trial.
3 They don't have a case. And how do I get to the bottom it?
4 How do I separate the wheat from the chaff in these matters
5 other than to say, get me a report from somebody who says,
6 assuming all of this to be true, I think my patient's problem is
7 due to Vioxx? That might past muster.

8 MS. OLDFATHER: Well, Judge, I think you've given us a
9 template to answer your question. You've shown us exactly how
10 to get to the bottom of it, exactly what you did with the MI and
11 the IS. Appoint a subcommittee. If it has to be me as a
12 subcommittee of one, I'll work with Merck to try to identify how
13 many people we're talking about. Am I a lone voice crying in
14 the wilderness, or does anyone else care about this? I mean, I
15 think that's all that I would ask the Court to determine. Are
16 there people with other claims who would like to see the general
17 causation developed? And the Fifth Circuit has told us in the
18 Knight case that the general causation has to come first.

19 THE COURT: But the general causation has been
20 developed now for four years.

21 MS. OLDFATHER: Not on --

22 THE COURT: The problem that you have is that you're
23 going to get -- you're going to get "Daubertized. You're not
24 going to have a case.

25 MS. OLDFATHER: Well, Judge, don't we owe them the

1 responsibility of finding that out? I mean, the Daubert
2 hearings, Your Honor, has already conducted concluded that there
3 was a path of physiology of Vioxx sufficient to cause these
4 clotting events.

5 THE COURT: Are there any doctors out there that
6 -- these cases have been seven years now. Nobody has gotten a
7 doctor to say that this problem -- the nine cases that you have,
8 you don't have one doctor to be able to write a report saying
9 your clients are sick, or whatever it is, because of taking
10 Vioxx?

11 MS. OLDFATHER: Your Honor, I have a consultant that I
12 worked with before I filed the suit.

13 THE COURT: Why don't you have a report from them?

14 MS. OLDFATHER: Because that's not what this order
15 requires. This order requires a lot more than that. And the
16 consequence of this order is a dismissal. Judge, this order is
17 a Motion for Summary Judgment in other clothing. This is what
18 this is. And, the Lone Pine, the Superior Court of New Jersey
19 where Lone Pine came down in 1986 -- we've got better precedent
20 right now in the Federal Courts. The Morgan case, which I cited
21 to Your Honor, 2007, United States District Court.

22 "The economy of scale in a multidistrict
23 litigation argues against this quasi-Summary
24 Judgment practice."

25 That's what this is. My --

1 THE COURT: The Fifth Circuit has supported Lone Pine
2 through a number of cases, particularly in a proceeding that has
3 been going on this long.

4 MS. OLDFATHER: Judge, the part about this is -- and I
5 know it's been going on for a long time, long before Your Honor
6 got it. The part about it is, the Plaintiff's Steering work has
7 done work on 80 percent of the claimants. They were going to,
8 as far as all of us know, get to the other 20 percent later.
9 They have decided -- communicated to us last week that they are
10 not going to take that on.

11 THE COURT: Well.

12 MS. OLDFATHER: How can we then just step back and
13 say, now all the rest of you are on your own when we've been
14 brought to this court by Merck. I mean, I filed my cases in
15 State Court. My obligation is to allege a prima facie case.

16 THE COURT: I understand your argument, but let me
17 hear from the Plaintiff Steering Committee then, because you've
18 said something that they should be able to respond to. But, I
19 do understand your argument. I'll give you an opportunity to
20 rebut after Merck has had an opportunity.

21 MS. OLDFATHER: Thank you, Judge.

22 THE COURT: Thank you very much.

23 MR. BIRCHFIELD: Your Honor, I understand that you
24 have a firm grasp with issue. You had a hearing by conference
25 call, so I'm going to limit my comments this morning to the role

1 of the PFC with this process.

2 As Ms. Oldfather acknowledged, from very early in this
3 litigation, the PSC has focused on the MI cases and the ischemic
4 stroke cases. That's the predominant number of claims from this
5 litigation. That is the predominant injuries that's associated
6 with Vioxx, and was where our obligation lied with the
7 plaintiffs, and that's the course we've pursued. We've made
8 that clear, and she acknowledged that that was made clear from
9 the very beginning. But that does not mean that we did not
10 assist and facilitate the pursuit of other claims.

11 As the Court is well aware, there have been
12 individuals that were pursuing other injury claims, and they
13 have come to the Court over the course of these years that this
14 MDL has been going on, and the PSC has made available to them
15 the depository. All of the discovery that has been conducted in
16 this litigation pertains to all the injuries. The clinical
17 trial settings that have been produced pertain to all of the
18 injuries. The PSC in developing a trial package has focus on
19 the predominant injuries, but we have made the depository which
20 includes a searchable data base that would allow a plaintiff or
21 a plaintiff's lawyer to come in and go through the documents and
22 to zero in on a particular injury. All of that has been
23 accessible to the plaintiff's lawyers for years in this
24 litigation.

25 And I think that it is -- I think it's misleading to

1 suggest that there is 20 percent of the claims out there that
2 involved these other injuries. While there are, in the report
3 that we saw today, there are stated ineligible claimants, but
4 that is not limited to those with other injuries. It includes
5 foreign plaintiffs; it includes folks who did not file on the
6 date of the settlement, so I think that's a little bit
7 misleading.

8 But the PSC, first and foremost, when we were
9 discussing, the Negotiating Committee, we were discussing with
10 Merck a proposed order to present to the courts. We looked at
11 this, at the issue of the timing. And we recognized the
12 longstanding litigation, the extensive discovery that was
13 available, and the opportunity that plaintiff lawyers have had
14 to utilize that depository to pursue other injuries. And then
15 we looked at what is asked for here, a report supporting
16 specific causation. And we are now six months after the injury
17 that we think that that is, that that provided in the order,
18 adequate time to comply.

19 So we have not -- the PSC did not ignore the other
20 injury claims out there. We fought to protect those claims, but
21 we did think that the lawyers -- we've made it very clear the
22 claims that we felt obligated to pursue, and we've made that
23 clear to the plaintiff's lawyers and provided them access and
24 materials and discovery to pursue to the other claims if they
25 saw fit.

1 THE COURT: What do you see as to, how do I handle the
2 other claims? Ms. Oldfather says that if we want to proceed on
3 the same basis, that we ought to have a committee appointed or
4 use the same committee to deal with those claims.

5 MR. BIRCHFIELD: Your Honor, I think that the approach
6 that the Court has implemented is the appropriate first step,
7 requiring the Lone Pine -- implementing the Lone Pine order as
8 you set out allows the Court to sift through, you know, what are
9 the claims that have the adequate support to take the next step.
10 And at that point when you see what claims are out there. If
11 there is a significant number of claims on one injury, then the
12 Court can assess, is this a matter that supports appointing a
13 committee to pursue it further or not, and then advance to the
14 Daubert hearings.

15 MR. HERMAN: May it please the Court, I've had an
16 opportunity to discuss with Mr. Marvin. He could speak for
17 Merck about a reasonable extension. And I can say unequivocally
18 the document -- the depository is open. The documents necessary
19 to provide an expert with material an expert will need is
20 available. Merck is agreeable to an extension, a reasonable
21 extension. Our recommendation will be that we will facilitate
22 any of the lawyers that have the 9,000 cases, and we'll put Ms.
23 Oldfather right in line. We've got 25 computers. We've got a
24 searchable data base. And this is the same offer that we've
25 made to others that have wanted to pursue other injuries other

1 than MI and ischemic stroke.

2 THE COURT: When is the dead line? When is the
3 deadline due?

4 MS. OLDFATHER: Today.

5 THE COURT: Today?

6 MS. OLDFATHER: You extended it today. It was May
7 1st, Judge.

8 THE COURT: Yeah, I suspended until today. I'm going
9 to do this, I'm going to suspend it to 60 days, and I'm going to
10 set a Status Conference. And I would like Ms. Oldfather and the
11 defendants, and somebody representing the Plaintiff's Committee
12 to be at the Status Conference. I'm going to talk about the
13 method of resolving these particular claims.

14 We may all be on the same page. The point that I make
15 to you is, I need to now direct my attention to those claims
16 because some of claims, certain types of claims have been
17 resolved, but that doesn't mean that every claim has been
18 resolve. So, I need to focus on those other claims that are
19 outside of the MI and outside of ischemic stroke. And we need
20 to come up with a method of doing that. And, I hear Ms.
21 Oldfather and her concern about it. I will take all of that
22 into consideration.

23 But, I'll suspend it for 60 days. In the next 30 days
24 -- the next two weeks I'll have a Status Conference with the
25 parties. Before the Status Conference, I'd like to get some

1 statistical analysis of these claims; how many claims there are;
2 what categories the claims fall into, so that we'll have some
3 methodology we're dealing with it.

4 MR. HERMAN: Your Honor, I would request that Ms.
5 Oldfather get together with Mr. Davis right now while we're here
6 and reserve the dates that she wants access to the depository.
7 And with regard to a meeting, I know that this particular issue
8 was hard fought by Merck as essential consideration for
9 Settlement Agreement. And I will ask that one of the co-leads,
10 if not both, are present with Merck to facilitate Your Honor's
11 pronouncement.

12 MS. OLDFATHER: I want to just thank Your Honor. I
13 will do whatever the Court directs and I will make myself
14 available in that timeframe.

15 THE COURT: Thank you.

16 MS. OLDFATHER: And I just once again want to
17 apologize, Your Honor. I did not know because I haven't been in
18 the process, that that PTO had been reviewed in detail by you.
19 I have the highest respect for all the work done on this case.

20 THE COURT: Thank you very much.

21 MR. LEVIN: Your Honor, with regard to that last
22 statement, this Pretrial Order Number 28 did not come about by
23 some distraught process. It was negotiated, presented not only
24 to Your Honor, but to the State Judges, and Your Honor and the
25 State Judges made changes to the original presentation. It was

1 then presented to Judge Wilson via telephone, and he made
2 changes.

3 So, the Courts did have an integral part of that
4 Pretrial Order before any of the four courts signed it.

5 MR. BEISNER: Your Honor, John Beisner from Merck. I
6 just want to ask for a clarification and the nature of the
7 suspension, because I suspect there are counsel out there
8 basically trying to decide now should they be proceeding in
9 trying to get these expert reports together on this. I
10 understand the Court is saying it's suspended for 60 days. But,
11 out concern it would be further delay on this.

12 THE COURT: I would like to get the reports, but I
13 mean I'm not going to dismiss anything --

14 MR. BEISNER: Okay.

15 THE COURT: -- any case that fails to submit the
16 report, I'm going to suspend the dismissal aspect for 60 days.
17 Have you gotten any reports from anybody?

18 MR. BEISNER: We've gotten some in, Your Honor, but I
19 suspect since the suspension occurred before the deadline,
20 people probably didn't go ahead and file. So, I'm not sure that
21 tells us whether people have them ready or not, but I just
22 wanted to have the clarification that the Court's assumption is
23 that people would be going ahead and --

24 THE COURT: The dismissal part not the accumulating
25 reports. Anything else? Anything from anybody.

