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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX PRODUCTS \* Docket 05-MD-1657-L  
LIABILITY LITIGATION \*  
\* October 23, 2009  
\*  
This Document Relates to All Cases \* 9:00 a.m.  
\* \* \* \* \*

STATUS CONFERENCE BEFORE THE  
HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 Greer. Orran Brown and I are here today to make the 22nd  
2 claims administrator report to the Court about the claims  
3 administrator activity in the Vioxx Settlement Program.

4           Since we were here last month, a major milestone  
5 has been reached in the program. On September 30, we were able  
6 to issue, through the work of a lot of people, the final  
7 payment instructions to the escrow agent, U.S. Bank, for the  
8 distribution of the final payments for the heart attack claims.

9           We submitted that to U.S. Bank on September 30.  
10 U.S. Bank then took several days to process the payments. As  
11 you can imagine, the paperwork and the technology demands of  
12 issuing these payments were great, but U.S. Bank on the 7th of  
13 October -- so a week later -- put checks in the mail to 293  
14 firms who had requested that they receive payment by check. At  
15 the same time, they sent to us directly checks for *pro se*  
16 claimants so that we could stuff those in envelopes and submit  
17 to the *pro se* claimants explanatory materials about payment.

18           On the 8th of October, wire transfers were made  
19 to 400 firms who had requested payments by wire. So by the end  
20 of the day on Thursday, the 8th of October, payments had been  
21 issued on schedule and without incident.

22           Your Honor, some details about this payment:

23           \$1.7 billion was actually issued to the firms on  
24 behalf of claimants. There was an additional \$700 million,  
25 approximately, withheld for various withholdings such as liens,

1 the common benefit fees and costs, and attorneys' fees pursuant  
2 to PTO 49. So a total of about \$2.4 billion was processed,  
3 either paid or withheld, in this payment.

4 Over 20,000 MI claimants have been paid to date.  
5 Some did not receive a final payment because they had been  
6 special marker claimants who did not have a final payment  
7 forthcoming, but over 20,000 claimants have been paid their MI  
8 final payments or their payment. About \$3.1 billion has  
9 actually been issued on behalf of heart attack claimants in the  
10 program.

11 Your Honor, the payment went out. There have  
12 been questions that have arisen since the payment has been  
13 distributed, and this slide is an attempt to show counsel --  
14 and for those listening on the phone, these slides will be  
15 available on our Web site this afternoon.

16 One of the issues that has arisen from attorneys  
17 is how to calculate the common benefit fees and costs and  
18 attorneys' fees out of the check that they sent to their  
19 claimant. A lot of this may be old news because we trust the  
20 payments have now gone out, but there is a disbursement  
21 schedule on the Court's Web site, as well as our Web site, that  
22 guides counsel through the different steps and considerations  
23 they need to take when calculating common benefit fees and  
24 costs and their attorneys' fees.

25 We have also set up just for convenience an

1 e-mail that has a BrownGreer name on it, but it actually is  
2 monitored by members of the NPC, and they have responded to  
3 questions that attorneys have submitted. That e-mail address  
4 is npc@browngreer.com.

5           The second issue that has created some questions  
6 are just the various withholdings on the various liens. You  
7 can imagine that this is complicated. The LRA has done a  
8 fabulous job being responsive to these questions. We do have a  
9 section on our firm's portal, each firm's secure portal, that  
10 is an LRA page where firms can go and get very specific,  
11 detailed information about liens. The lien resolution  
12 administrator also has a call center, and they have been  
13 fielding calls and questions. The number here is  
14 (877)774-1130.

15           The third area or question was just on an  
16 individual claimant level. There were some questions from the  
17 firms based on claimants wanting to know various aspects of  
18 their payments. We did submit to the firm on the 6th of  
19 October a payment report that showed the firm each of its  
20 claimants, the various withholdings, the total amount that  
21 would be forthcoming, so that is a resource for the firm.

22           The other thing that we did was to provide to  
23 each firm individual reports by claimant that, if they chose,  
24 they could print and send to their claimants that explained the  
25 various aspects of their payment.

1           This is an example, although rather hard to  
2 read, of one of those individual claimant's summary reports.  
3 Again, the goal was to just create a very generic report, but  
4 one that was focused on the plaintiff specifics. You'll see  
5 the final award. This is where the claimant was reminded again  
6 of the final point value, \$1,865.01 per point, and their point  
7 award. This particular example, which is not a live one,  
8 121.49 points, it then walks through for the claimant all of  
9 the various withholdings for previous payments that have been  
10 made.

11           The other report that we provided for the firm,  
12 if they chose to give it to their claimant, was a very detailed  
13 lien report. This was where each of the liens was listed.  
14 Resolution categories were provided. The claimant was told  
15 whether the lien resolution was complete or whether it was  
16 still pending. So these reports are available/were available  
17 to firms if they so chose to send them on to their clients.

18           There's still a few wrap-up issues for MI  
19 claims. One very small one, although it is a little over 100  
20 claims, the special marker claimants who elected to go into  
21 special review, those claims are now being reviewed by the  
22 special master. These were all claims with MI point totals  
23 less than 10 points, and we expect payments to be issued on  
24 those claims in November. The special master is working hard  
25 to review those.

1           The other thing that we wanted to assure  
2 everyone of is that the lien amounts that have been withheld --  
3 that are not complete and they are not final, that still show  
4 as pending -- the lien resolution administrator will speak to  
5 this, but there are efforts underway every day to resolve the  
6 liens.

7           If they get resolved in an amount lower than  
8 what we withheld, those balances will be remitted on a monthly  
9 basis. What we will do is, at the end of each month, we will  
10 see what liens have been resolved, and we will put those on a  
11 payment report and they will be issued the following month.  
12 Those payments will come out on the normal monthly payment  
13 cycle, which is usually the third week of the month. In  
14 October, those balances will actually be remitted on the 30th  
15 of October, so a week from today. That is also when the IS  
16 payments will be paid this month rather than this week.  
17 Because of the MI final payment, we needed to bump that to next  
18 week, but those will go out next week.

19           Your Honor, this is now a historical slide. It  
20 does reflect where the different MI injury levels ended up in  
21 terms of average points. I will not go through this level by  
22 level, but this is across the population the MI claims that  
23 reached the level of points award. These are the average  
24 points award per claim.

25           Turning now to the strokes, we have now turned



1 our attention to the stroke reviews. This slide shows where we  
2 are in terms of the gates process. There are no stroke claims  
3 currently in the queue for us to pick up and review for the  
4 first time.

5           There are 309 stroke claims that have been found  
6 preliminarily ineligible; but when we sent the notice out to  
7 the firms, the claimants have been able to submit additional  
8 documentation. So those 309 claims are those that we are  
9 reviewing, in essence, for a second time with new information.

10           There have been 7,710 gate claims that have  
11 passed for points review. The next, Row 4, A and B, are claims  
12 that are right now ineligible. So there are 8,850 where  
13 notices of ineligibility have been issued.

14           It's important to note, though, Your Honor, that  
15 these are preliminary denials. These are claims that have not  
16 yet gone to the gate committee or they are still within their  
17 time where Merck is considering whether to push those. So  
18 these are ones that there is a subset of these claims that will  
19 ultimately be found payable. It's just that we have found  
20 them, under our rigid criteria, to not pass the gates.

21           There are 725 that are currently with the gate  
22 committee for review and for voting. The total IS claims now  
23 in the process -- and this number has stayed constant -- is  
24 17,594 stroke claims that are under review.

25           Through October we will have paid over 3,000

1 stroke claims. There are another 724 where we have issued the  
2 notice of points award, and these are ones that could  
3 potentially be payable in November when those payments are  
4 made. You will see that 147 of those are definitely to be paid  
5 in November. Another 506 could accept between now and the end  
6 of this month to be paid in November.

7 71 are on appeal. We are finding that the  
8 appeal rate for the stroke claims is virtually the same as it  
9 was for the heart attack claims. Around 15 percent ultimately  
10 get appealed to us or then on to the special master.

11 There are 126 claims where we have finished what  
12 we need to do but there is some issue that is holding up the  
13 issuance of notice of points award, be it receipt of lien  
14 information, some of these are under audit review, but these  
15 are claims that we expect will be reviewed and released  
16 shortly.

17 A large number, 2,575, are pending what we call  
18 QC. These are ones that have gone through our initial review.  
19 This is our focus now. We are going back now and doing our  
20 second review so that we can move these along to payment.

21 973 have been found incomplete for us to be able  
22 to finish the points review. This number represents a higher  
23 percentage than we found in the heart attack claims. About  
24 22 percent of each claim that we pick up, of the stroke claims  
25 that we review, are found incomplete. That's a big number. It

1 means that, in essence, one out of every four we have to stop  
2 and go out to the firm.

3 **THE COURT:** That's not a good situation. The  
4 attorneys have to focus on that because that's going to really  
5 slow up matters. They have to be able to comply with the  
6 requirements. To just put this on the back burner is not going  
7 to work.

8 **MS. GREER:** I think the focus that we now have,  
9 Your Honor, and everybody I think needs to have is that we are  
10 now reviewing the strokes, we are in the throes of it, and  
11 everyone needs to do what it takes to get these claims paid as  
12 well.

13 **THE COURT:** Let's keep a close eye on that. If it  
14 hasn't gotten better by the next meeting, you are going to have  
15 to let me know, and I'm going to have to get involved with it.  
16 Now, perhaps people are just either exhausted because of the MI  
17 claims or they have done a lot of work and they are catching up  
18 now. If it's a trend, I'm going to have to get involved in it.

19 **MS. GREER:** I think, Your Honor, it may be that in  
20 the efforts before the Settlement Program more progress had  
21 been made in gathering heart attack records versus strokes, so  
22 it may be that it's just naturally lagging behind.

23 Row 6 and 7 just show stroke claims: 148 where  
24 we are reviewing those, doing our initial review, and 31 where  
25 we have not yet reviewed the claims for stroke.

1           These are the average points by injury level for  
2 stroke. One thing that I also wanted to mention, because we  
3 have heard some questions about it, it appears when you compare  
4 this slide to the same slide on the heart attack claims that  
5 these points are lower. The reason for that in large part is  
6 because the grids were different. There were different grids  
7 that governed. The MI grid, for the most part, had higher  
8 point totals on it. We don't want to alarm anyone by thinking  
9 that the stroke claims are inherently worse claims; it's just  
10 that they are governed by different point structures.

11           This slide shows the dollars that have been  
12 paid. It's the same claims, 3,133, that will be paid through  
13 October. The total amount that will go out through that date  
14 is over \$96 million. Through November, if a lot of these  
15 claims accept and get paid, the number that would be paid out  
16 on stroke claims would be in excess of \$112 million.

17           We are now at a point where we can project when  
18 the final payments for stroke claims will be. A lot of this  
19 depends on completion rates of claim packages, depends on the  
20 pace of the reviews, but we are confident that the final  
21 payments for stroke claims will be by the end of the first  
22 quarter of 2010. We are on pace to do that and do not foresee  
23 any problems at this point in reaching that goal.

24           It is important, though -- and this goes to what  
25 we were saying earlier -- for everyone to focus in on the

1 deadlines that have governed this process from the beginning.  
2 I did want to reiterate that there are certain deadlines that  
3 apply to each aspect of these reviews. Counsel are very aware  
4 of them, but we wanted to reiterate what they are.

5           When a claim first gets a notice of  
6 ineligibility, the claimant has 21 days to respond. If we  
7 review the claim for points and we have to stop the review, we  
8 issue a notice, and the firm has 14 days to respond. If a  
9 notice of points award is issued and the firm wishes to appeal  
10 the award, they have to do so within 15 days. They also have  
11 to submit whatever additional documentation they need for  
12 consideration on the appeal within 15 days. If they have  
13 received our notice of postappeal review and they wish to go on  
14 to the special master, they have to decide that in five days.

15           This is one of the things that we learned in the  
16 heart attack claims: It's imperative that these deadlines be  
17 adhered to. It runs very smoothly. We have tried to tailor  
18 these deadlines to reflect what counsel really needs to be able  
19 to comply with them and feel like these deadlines are  
20 reasonable.

21           **THE COURT:** Good.

22           **MS. GREER:** These are the consequences for not  
23 meeting the deadline. I will not go through these, but  
24 basically the message is that if the deadline is not met, the  
25 consequence is that the claim keeps going with whatever we have

1 and goes to completion that way.

2           Finally, Your Honor, we have received -- and I  
3 know firms have received them and the Court has as well --  
4 questions from claimants who did not get paid, questions from  
5 claimants who failed gates and were ultimately denied from the  
6 program. We wanted to announce it here but will also issue an  
7 e-mail blast. We have drafted a letter, with the help of the  
8 parties and the review of the Court, to explain the different  
9 levels of due process that were inherent in this program, the  
10 different levels of review by us, by the gate committee, by the  
11 special master, and we have templates of those letters available  
12 on each firm's secure portal.

13           This is the page where firms can go to if they  
14 wish to use this letter with any of their claimants. Number 2  
15 here, this is the main claims page that firms are very familiar  
16 with. Number 2 is where firms can go to find copies of the  
17 letter. One is a Word template that if a firm wants to  
18 customize the letter to his or her client to talk about what  
19 happened in that claim, they may do so. There's also an Adobe  
20 pdf that's more of an official letter from us that just  
21 outlines the various stages of the process.

22           So these are tools for counsel to use. They  
23 certainly do not have to, but we found it helpful in responding  
24 to questions from unrepresented claimants to describe for them  
25 the levels of care and detail that each claim has received.

1           **THE COURT:** I know we are dealing with about 50,000  
2 or thereabout claims, and not everybody is going to get through  
3 the gates. This is a program that is a voluntary program. You  
4 don't need to join if you don't wish to join; but if you join  
5 it, then you have certain requirements, duties, and  
6 responsibilities. People have decided to take advantage of the  
7 program, but not everybody gets through all of the gates. The  
8 best that the Court can do and the best that the parties can do  
9 is to give them some due process. In this particular matter,  
10 we have had three levels of due process:

11                       We have the administrative review, which the  
12 claims administrator conducts, and they do at least two reviews  
13 at the administrator stage to make sure that the Settlement  
14 Program is carried out to the letter.

15                       Then, if people proceed further, they can have  
16 an attorney review. The attorney review is a body comprised of  
17 plaintiff and defendant attorneys who again look at the case.

18                       The final review is a review by judges and  
19 excellent lawyers who I have appointed to review this. They  
20 are third parties. They are not associated with either  
21 plaintiff or defendant. They look at it. That's the best you  
22 can do from the standpoint of a claimant.

23                       The claimants write in and they ask about  
24 things. Sometimes they can get some assistance from the  
25 standpoint of money, but oftentimes they just didn't get

1 through the gates. They need an explanation, kind of a  
2 shirtsleeve explanation of why they didn't get through the  
3 gates. If you give them that and explain it to them, they may  
4 be disappointed, but at least they don't feel like nobody is  
5 responding. When I get these letters, I pass them out to the  
6 appropriate parties so that they can respond, and then you get  
7 involved in it, your office. That's the best, from that  
8 standpoint, that we can do.

9 I think one of the things we have all tried to  
10 do and certainly the Court has tried to do in this particular  
11 case is give it maximum transparency. I put everything on my  
12 Web site. It's accessible to everybody, not just lawyers in  
13 the case. They can look at this. They can read transcripts of  
14 these hearings. They can know all of the motions that have  
15 been filed, all of the briefs, all of the forms. I think that  
16 that goes a long way to giving people some confidence that  
17 things are proceeding.

18 This case originated in the MDL in February of  
19 2005. Within three years, with the help of the lawyers, the  
20 case was settled. Now, within four years, almost \$4.5 billion  
21 has been paid out. I think that's a tribute to all of the  
22 people who have worked on the case. You played a big role in  
23 it, and I appreciate it.

24 **MS. GREER:** Thank you, Your Honor. We have also a  
25 dedicated team at BrownGreer in Richmond who have been



1 dedicated to this, and they deserve a lot of the credit for  
2 getting through the claims. Orran is going to speak to other  
3 aspects of the final payments and others who helped get us  
4 there and also on the Extraordinary Injury Program. Thank you,  
5 Your Honor.

6 **THE COURT:** Thank you.

7 **MR. BROWN:** Good morning, Your Honor. I'm Orran  
8 Brown, and I'm happy to be here. What I want to report on  
9 today, Your Honor, are a few takeaways from the MI final  
10 payment progress that we were able to achieve and then update  
11 the Court on where we are on the Extraordinary Injury Program,  
12 which is the other segment of the program that is underway  
13 right now and we have to finish. First, a few takeaways or  
14 thoughts about the final payments:

15 The parties asked us if we could come up with  
16 some examples or illustrations from other multiple-claim  
17 facility programs to try to key in on the progress and the  
18 efficiency of this program, so we have done this. It's  
19 difficult to draw direct comparisons because all the programs  
20 and claim facilities, voluntary and coercive class action  
21 settlements, all have their different issues, different  
22 injuries, different benefit structure, different proof  
23 requirements, so it's hard to make apple-to-apple comparisons.

24 You can get a feel, as to looking to other  
25 programs, as to how successful this phase of the program has

1 been. We put together this slide, which does not identify any  
2 of these other programs by name because the goal is not to be  
3 critical of any other program. They each have their individual  
4 challenges, and a number of these we have worked on ourselves.  
5 This shows us some barometer of this program and the success  
6 which it has achieved so far because it gives us an idea, by  
7 looking at other programs, about how long it took between the  
8 time the parties agreed to some settlement and money going out  
9 to the claimants, to the beneficiaries of the program, both in  
10 an initial payment level and a final payment level.

11           On this slide we have identified eight different  
12 other programs and the number of claims involved in them; some  
13 very large, some not as large as this one. The peach color on  
14 those cells indicates where some initial money went out.  
15 Usually, it's a quick pay. It's a lower-proof option where  
16 claimants can submit a simplified form to get a quick pay; it's  
17 not a full evaluation. That's what usually happens. In this  
18 instance, we were able to achieve interim payments to claimants  
19 within the first year after the Settlement Agreement was signed  
20 that were based on a full review and another instance in which  
21 this program was ahead of the game.

22           The sort of lavender or purple color shows us  
23 when final payments are made in the programs. For most of  
24 these, they have yet to occur or happened years after the  
25 Settlement Agreement. Here we were able to achieve the final

1 payment on the heart attack claimant segment of the program  
2 within two years from the November 2007 Settlement Agreement.

3 This is in a program where there are over 30,500  
4 MI claimants who submitted material. The final payments to  
5 that group of claimants happened within 11 months of the last  
6 date to enroll in the program, October 31, 2008. Those  
7 payments went out within nine months of the last time to submit  
8 a claims package. The final claims package materials deadline  
9 was December 31, 2008.

10 This is in a program that had several phases,  
11 like they all do, from registration, enrollment, submission of  
12 materials, our review of those materials, review by the gates  
13 committee, appeals to the special master, an audit program to  
14 detect fraudulent claims, and then getting to the point of  
15 finalizing those claims and getting the money out.

16 In a program where we have received over  
17 1.4 million separate images -- and each one of those could have  
18 hundreds of pages in them. It's millions of pages of documents  
19 and 3.7 terabytes of data, which if you tried to transfer it to  
20 CDs would be 6,600 CDs. So it's a lots of information, a lot  
21 of program, but we are very happy that those final payments  
22 went out to claimants on schedule in September and early  
23 October.

24 There are a few takeaways from that about how it  
25 happened, how so much was paid to so many in what is relatively

1 little amount of time, and I want to mention them briefly  
2 because there are lessons learned for us for the remainder of  
3 this program and for other programs in the future.

4           The first thing is a tribute to the design of  
5 the Settlement Agreement. The lawyers and the parties involved  
6 in crafting the Settlement Agreement were aware of a lot of  
7 these other programs and had seen pitfalls in those programs  
8 that did lead to taking more time or delay, so they devised a  
9 Settlement Agreement structure here that avoided a lot of the  
10 instances or the prompts for delay in these programs.

11           I think a couple of key ones there are having a  
12 system that is as objective as possible. Making these medical  
13 decisions based on contemporaneous medical records rather than  
14 after-the-fact created documents was a key to allow our review  
15 to go smoothly. It also was designed to have these steps that  
16 I mentioned -- from registration, enrollment, submission,  
17 review -- not to have to happen in a linear way. It didn't  
18 have to follow in that order on every claim. It all happened  
19 concurrently, so everything happened within that compressed  
20 time period. The design of the Settlement Agreement was really  
21 the predicate for making this happen on that kind of schedule.

22           Another thing, Your Honor, was the diligence of  
23 the people involved in this for the parties. Merck and its  
24 counsel, the PNC, the lead negotiating claimants counsel,  
25 worked with us every day on making this work, giving us

1 guidance and instructions in what they intended this program to  
2 do. The spirit of cooperation that we saw between those two  
3 sides of this agreement really lent a lot to making this  
4 happen. They were committed to reaching common ground, and  
5 that does not happen in every program. Where it does not  
6 happen, conflict leads to delay. Here we had none of that.

7           Going through the rest of the players in this,  
8 Your Honor, it's really a tribute to all the players who have  
9 made this happen:

10           The gates committee and the members of the gates  
11 committee who reviewed thousands of claims through that process  
12 on time and on schedule and allowed them to keep moving in the  
13 process;

14           The three special masters, Special Master  
15 Juneau, Corodemus, and Trotter, who had to learn the program,  
16 learn how to use the portal, reviewed thousands of claims of  
17 three different types of appeals from the gates committee  
18 decisions, from points awards, and the nonsubmitting program  
19 claimants that were out of the program and could appeal to the  
20 special masters.

21           We had to have answers on all of them for the MI  
22 claimants to be able to reach the final payments in a pro rata  
23 system, and they did a remarkable job.

24           We have to mention the primary counsel, the  
25 lawyers for all these claimants, who had to round up all this

1 information, send it into us, get the releases cleaned up to  
2 enable us to pay, claims materials, react to elections and  
3 notices from us. It took a lot of work by the lawyers involved  
4 in this and over 1,100 firms to keep this program moving.

5           The lien resolution administrator, Mr. Garretson  
6 and Mr. Wolf, have done a remarkable job mastering the  
7 governmental liens, resolving them in all of the jurisdictions,  
8 the private lien program and making it work, and working with  
9 us hand in hand to get that data correctly reported to  
10 U.S. Bank to get these withholdings and the payments done  
11 correctly.

12           U.S. Bank, the escrow agent, has done a  
13 remarkable job, as well, of mastering all of the information we  
14 give them. They have really worked hard to make what seemed  
15 impossible possible to get this money out to the claimants.

16           The *pro se* curator. There are a lot of *pro se*  
17 claimants that are involved in this process and received these  
18 payments. The *pro se* curator has shepherded really well a lot  
19 of those people through the program.

20           Then, of course, Your Honor, the Court's  
21 guidance and direction, encouragement, instructions keeping us  
22 all on task and making this program work.

23           All of those factors went into permitting us to  
24 reach the lavender payments within two years of the Settlement  
25 Agreement and really within nine months of when the claims had

1 to come in for the MI claimants. We are committed to making  
2 the rest of the program just as successful as we have seen in  
3 the MI world. Lynn has reported on where we are on the stroke  
4 and our projection for final payments on the stroke claimants.

5 I want to mention briefly the EI world,  
6 extraordinary injury claim. We have these two phases of the  
7 Settlement Agreement left to finish: The stroke claims and the  
8 extraordinary injury claims.

9 This slide shows us how many extraordinary  
10 injury claims we received by the September 1 deadline for  
11 submission of claim forms and documentation to support them.  
12 It gives them to us by type because there are claims for past  
13 lost wages and income, claims for past medical expenses, claims  
14 for special medical injury not adequately reflected on the  
15 underlying injury grids as the Settlement Agreement describes  
16 it. You could submit claims for additional extraordinary  
17 damages, which were futures, future lost wages, future medical  
18 injuries, medical expenses.

19 It shows us we have 3,678 total claims. Now,  
20 that is 2,605 claimants because you could submit one or more of  
21 these types of EI claims, and a lot of folks did. Some  
22 presented them all. So it boils down to 2,605 unique people  
23 from 211 different law firms.

24 Now, we are working on these claims now because  
25 the first thing we have to do is go through the basic threshold

1 steps to get into the program and be eligible for payments.  
2 The first will be that you have to have a recoverable claim on  
3 your underlying claim. You have to have a points award. You  
4 would have to be a qualified program claimant on your heart  
5 attack claim or your stroke claim to be in this program. You  
6 have to receive a points award above the special marker level  
7 to be in the extraordinary injury program. You have to have  
8 sent us the material and the claim form and documents by  
9 September 1 to be in the program. The documents and the claim  
10 form both were supposed to be to us in our hands by  
11 September 1.

12                   We now are reviewing these claims to do this  
13 analysis. You have to have the economic loss above \$250,000 or  
14 above to be compensable in the program. You have to establish  
15 what we call a special medical injury that's extraordinary to  
16 be compensated in this program.

17                   We have devised the processing steps to take us  
18 through all of this, through our review, and we are going to  
19 issue a notice to claimants on their EI claims. We are not  
20 going to spend the time going through a lengthy deficiency  
21 process. If we are missing documents, we are going to tell  
22 claimants and their counsel, "This is what your award appears  
23 to be and this is why."

24                   Part of it may be because you didn't send us a  
25 tax return. These claims are very complicated because they



1 have mountains of financial records for us to go through. They  
2 get a second review request with us to send us additional  
3 information, and that's where we are going to fold the  
4 deficiency process into the claims evaluation process.

5 We will issue a second review after that. If  
6 the claimant is still unhappy with that, we have a chance for  
7 appeal on a \$700 fee for appeal to Special Master Juneau. We  
8 have already worked with Special Master Juneau and his team to  
9 be ready for those when they happen. Once the special master  
10 rules on it, we will issue a final award if there is an appeal.  
11 We are hoping that we won't have a lot of appeals because we  
12 think the second review process will straighten out most of the  
13 gaps in the proof and the evaluation issues.

14 We are going to use the Vioxx portal for primary  
15 counsel in this program just as we have done throughout. They  
16 will be able to see information and status on their EI claims  
17 on the portal. All of this will be out in about two weeks time  
18 and live. We will announce that to the claimants and their  
19 counsel. They will be able to search and determine their  
20 statuses just as they have done throughout the program on the  
21 MI and stroke claims.

22 We are reviewing these claims right now. We  
23 have been since they came in. They started coming in over the  
24 summer. We are going to issue our notices of our evaluations  
25 on a rolling basis as we get through them. We are not going to

1 wait until the end. Our projection right now is that we will  
2 be able to go through those claims, all those processing steps,  
3 and issue final EI payments in June of 2010, the second  
4 quarter. If all the stars get aligned, we may can do it sooner  
5 than that, depending on how many second reviews we get, but our  
6 goal is to have final payments out by June 2010 on the  
7 extraordinary injury claims. That's all I have, Your Honor,  
8 unless you have any questions.

9           **THE COURT:** Thank you very much. As I mentioned to  
10 Lynn, I really appreciate all of the work that you have done on  
11 this.

12           **MR. BROWN:** Thank you, Your Honor.

13           **THE COURT:** It's worked well because of your  
14 experience, diligence, and good work. I appreciate it.

15           **MR. BROWN:** Thank you very much. We are delighted to  
16 be involved in it.

17           **MR. BIRCHFIELD:** Your Honor, the next item on the  
18 agenda is the lien resolution administrator. We have Matt  
19 Garretson with the Garretson Firm to give a report.

20           **MR. GARRETSON:** Good morning, Your Honor.  
21 Appreciating the timing of the myocardial infarction and sudden  
22 cardiac death cases that are now being processed as the claims  
23 administrator has explained this morning, I'm going to just  
24 focus this report on those claims.

25                   I would also like to reinforce, as we did last

1 hearing, that we have continued to work with BrownGreer to make  
2 sure that primary counsel has access to their clients' lien  
3 obligations available on the Web portal. I would encourage  
4 counsel to continue to check that at least twice a week. We  
5 have new functionality, as Lynn explained, on the Web portal  
6 that allows primary counsel to actually now export to an Excel  
7 spreadsheet all of their client lien obligations.

8 Let me first speak this morning about the  
9 governmental liens. I will then turn my attention to the  
10 private lien resolution program.

11 With respect to Medicare, we have now completed  
12 Medicare resolution for 97.6 percent of all the active cases.  
13 There are 328 cases with unfinalized Medicare obligations.  
14 Those are largely the cases that have yet to be through the  
15 redetermination process or cases that have Social Security  
16 number changes that we are in the process of reverifying.

17 With respect to Medicaid, we have finalized  
18 94.8 percent of the Medicaid obligations. The unfinalized  
19 Medicaid obligations are due to the fact that those are  
20 obligations that have hit the cap that is in place, and now  
21 they are working with the states on finalizing cases that have  
22 hit that cap or there are a variety of cases in that mix that  
23 also have Social Security number issues. We continue to work  
24 with primary counsel and the claims administrator to rectify  
25 those.

1           With respect to other governmental obligations  
2 such as military plans, we have 432 other governmental lien  
3 obligations that remain outstanding. This is a major focus of  
4 our attention right now. We have been having considerable  
5 trouble getting the claims histories from these military  
6 agencies. As I mentioned before, it's because those agencies  
7 actually have to go out to well over 100 facilities that treat  
8 our veterans and active military personnel to get their claims  
9 histories. We have made great strides, but it's still a big  
10 issue that I wanted to bring to the Court's attention.

11           With respect to the private lien program, we  
12 have 477 private health-care plans that have agreed to  
13 participate in the program according to its terms and  
14 conditions. I believe that that probably covers 80 to  
15 85 percent of the active lives in America would be  
16 represented -- insured lives in America would be represented by  
17 these plans from what I'm told.

18           As of today, 21,418 claimants have signed  
19 acceptance forms in order to participate in the private lien  
20 resolution program. These claimants can be segregated into two  
21 categories. The first category are those who signed the  
22 acceptance forms prior to June 19, 2009. That's Category 1,  
23 and there's approximately 20,000 claimants in that first  
24 category. Category 2 are those claimants who signed acceptance  
25 forms as a result of this Court's first extension of the

1 enrollment period or on account of PTO 48 or most recently PTO  
2 54.

3 I'm going to first speak about the time line  
4 associated with those claimants in the first category. As Lynn  
5 mentioned, on September 29 we released holdbacks for the  
6 Category 1 claimants who were not matched by any of the 477  
7 plans. Those have been released and have largely all been  
8 swept in the October or November cycle for payment.

9 On October 2 we submitted to BrownGreer maximum  
10 holdbacks for participating claimants that had a match to one  
11 of the participating plans. These holdbacks for Category 1  
12 claimants are being reduced now in one of the two following  
13 ways:

14 First, if there was no valid lien data or claims  
15 produced/submitted to us by October 14, we will have released  
16 already or will release within the next week the holdback for  
17 those claimants. Those are those Category 1, had a match of a  
18 participating plan, but the plans failed to produce any  
19 injury-related claims data.

20 For those Category 1 claimants for whom a lien  
21 was asserted, the holdback will be reduced to the lesser of the  
22 cap, which is 15 percent or 50 percent of the total amount  
23 asserted by the participating plans. That 50 percent number is  
24 because, under the terms of this program, the claimants will  
25 ultimately have a cap of 15 percent or 50 percent of the

1 audited lien value. For now, because the liens are in the  
2 process of being audited, we have been able to at least cap it  
3 at 50 percent of the inbound claim value.

4           If a holdback or lien value is reduced by either  
5 of these scenarios, the funds will be available for  
6 disbursement in the November monthly payments. For many of the  
7 primary counsel who have seen these holdbacks on these  
8 claimants, many of them who signed up had their Medicaid  
9 obligation, and then stacked on top of that was a private  
10 health-care insurance 15 percent obligation. So we are working  
11 very hard for those claimants who either have no match or a  
12 *de minimis* payment inbound lien to really ratchet down that  
13 holdback so there's some relief in the November payment cycle.

14           It is also important to note that this amount  
15 held back now for all these claimants who have been matched,  
16 who have valid inbound claims -- that this holdback that we  
17 have worked through over the last week with the claims  
18 administrator will now be potentially reduced, as we go through  
19 the audit procedure, to ensure that only injury-related care is  
20 subject to the lien. We will finalize these audits on a  
21 rolling basis and are in the process of doing that.

22           To date we have audited approximately 8,600  
23 private lien files out of approximately 9,100 submitted as of  
24 October 14. I think it's important to point out not all of  
25 those have been sent to the plans for their consideration yet,

1 but we are in the process of returning these summaries to the  
2 respective plans for their approval of our audit.

3 I should bring to the Court's attention here  
4 that we have an issue with many of the plans with how  
5 preexisting conditions impact the audit process. I also want  
6 to say that the issue is a very significant one. However, we  
7 are actively and I believe constructively working with the  
8 parties through these actual claims. We are certainly not at  
9 an impasse, but this is a very important point to bring to the  
10 Court's attention.

11 As we work through that issue with the plans  
12 that have brought the preexisting injury issue to our  
13 attention, the finalized liens will be posted to each primary  
14 counsel's Web portal. Again, I would encourage counsel to  
15 check the Web portal at least twice weekly for updated lien  
16 amounts as we will be finalizing these audits on a rolling  
17 basis.

18 **THE COURT:** I would like to move on that. So if  
19 there is a way that a claim can be filed for immediate payment  
20 and it's representative of the issues of whether and how much,  
21 if any, prior conditions play a part in this lien process, it  
22 needs to be brought to me so that I can deal with it  
23 immediately. I don't think that issue ought to be tabled. I'm  
24 ready to move on it.

25 This case involved Vioxx. This case involves

1 taking Vioxx and the allegations resulting from the taking of  
2 Vioxx. It's not any other medication. Nobody else contributed  
3 but Merck, and the only reason they contributed is with regard  
4 to Vioxx and the problems alleged that Vioxx caused. Give me  
5 something and I can focus on that immediately.

6 **MR. GARRETSON:** Yes, Your Honor. Your Honor, I would  
7 also let the Court and primary counsel know that the time lines  
8 I have just articulated were e-mailed to primary counsel on our  
9 behalf, I believe, in the last 24 hours by BrownGreer.

10 Your Honor, let me speak briefly about the time  
11 line for the second category of claimants. Those are the  
12 claimants who enrolled after the extension or on account of  
13 PTO 48 or PTO 54.

14 As of today we have received 154 signed  
15 certifications from the primary counsel identified on the  
16 exhibit to PTO 54. Your Honor, we would like the agreement of  
17 the parties that the final deadline for all claimants to submit  
18 acceptance forms in response to PTO 54 should be set at  
19 November 16, 2009. That time line for us is not an arbitrary  
20 one, but that would allow us to get as much done by year-end as  
21 possible on this universe of the claimants who signed up later  
22 in the program.

23 Further, we would like the Court to acknowledge  
24 that it is assumed under PTO 54 that if a firm has mailed  
25 acceptance forms to their clients and a three-week time period



1 has transpired, that that is acceptable as a reasonable amount  
2 of time for counsel to have sent these materials to their  
3 clients and for their clients to have responded.

4 **THE COURT:** I think that is reasonable and that's the  
5 appropriate period.

6 **MR. GARRETSON:** Thank you. We can report on this at  
7 the next hearing, but we would like to go out to the plans with  
8 this next wave of claimants who sign up and request that all of  
9 their claims data be provided to us by December 18, 2009, so we  
10 have a fighting chance to complete all the audits by the end of  
11 the year for this later category of claimants.

12 **THE COURT:** That's fine.

13 **MR. GARRETSON:** Your Honor, there's two more  
14 administrative matters I would like to draw the Court's  
15 attention to. The first is a Medicaid-related topic, special  
16 needs trusts. Because of our role that touches Medicaid, we  
17 are brought in, as I have mentioned to the Court before, to  
18 request to assist with the process of establishing a special  
19 needs trust to preserve Medicaid eligibility.

20 We have defined a proposal and a protocol that  
21 we have brought to the Court's consideration and to the  
22 consideration of the defendants and the PSC. It is just a  
23 process that we have refined in our experience in other MDL  
24 settlement programs. Basically, we submitted a proposal for a  
25 procedure that we, in our capacity as the lien resolution

1 administrator, would file a petition for claimants who desired  
2 to have these trusts established.

3           So, for instance, as the disability lawyers who  
4 are working with these claimants throughout the country address  
5 this issue, that we would on behalf of the Court -- to ensure  
6 that the Court is not bogged down with these issues, that we'll  
7 review those documents and sign a petition that attests to the  
8 fact they would meet the state and federal requirements.

9           I believe that probably the most effective thing  
10 to do would be as that procedure is worked out -- and I can  
11 work with Jared in the coming weeks or the coming days --  
12 perhaps that could be posted on the Court's Web site.

13           **THE COURT:** Yes, I will do that.

14           **MR. GARRETSON:** Your Honor, the last item is probate  
15 and bankruptcy issues that I wanted to point out. This  
16 morning, after the motion and order had been reviewed by the  
17 defendants and the PSC, we have submitted to the Court a motion  
18 and order that will establish procedures to help us address  
19 liens related to claimants with probate or bankruptcy issues.  
20 This order establishes the fact that the assets that have been  
21 held back at BrownGreer, the claims administrator, to satisfy  
22 the state, federal, and other governmental lien obligations --  
23 and the private lien obligations, for that matter -- should be  
24 held back and are not intended to be part of the probate or  
25 bankruptcy estates of the claimants.

1           In this matter we can ensure the orderly flow of  
2 the settlement proceeds both to the probate estates, the  
3 bankruptcy estates, as well as to the state and federal  
4 governments who have participated in this program. As the  
5 Court is well aware, our commitment to them is to send one  
6 check, not 30,000 checks. Unless we have this procedure in  
7 place, the program cannot meet that objective.

8           So in conclusion, Your Honor, that is the report  
9 of the lien resolution administrator. If there's any  
10 questions, I'm certainly happy to take them.

11           **THE COURT:** Last time you mentioned that you were  
12 having some problem with Kentucky. Has that worked itself out?

13           **MR. GARRETTSON:** Your Honor, I'm very pleased to  
14 report everything is well in order with Kentucky at this time.

15           **THE COURT:** The Court should express appreciation to  
16 Governor Beshear as well as Attorney General Conway from the  
17 great state of Kentucky. I know that they looked after their  
18 people and they did it well. I appreciate it.

19           **MR. GARRETTSON:** Yes, Your Honor. Thank you.

20           **MR. BIRCHFIELD:** Your Honor, in regard to the open  
21 issue about the audit process and the lien, I plan to file on  
22 behalf of a claimant a motion on Monday to bring that issue  
23 before the Court.

24           **THE COURT:** Good.

25           **MR. BIRCHFIELD:** The next item on the agenda is the

1 special master and deputy special masters. We have Mike Juneau  
2 here to give a report.

3 **MR. JUNEAU:** Good morning, Your Honor. Michael  
4 Juneau standing in for Special Master Juneau.

5 In terms of the work of the special masters, the  
6 review of the heart attack claims was completed in such a way  
7 so that the heart attack final payments were able to be made.  
8 So that occupied a good bit of the special masters' time since  
9 this last conference.

10 Special Master Juneau is also in the process of  
11 reviewing the special marker claims for the heart attacks,  
12 those that fell under the 10-point level and elected not to  
13 receive the fixed payments, so those claims are now before the  
14 special master. Those would be expected to be resolved by the  
15 middle part of November so that payments could be made on those  
16 as well.

17 The special masters are in the process of  
18 reviewing stroke claims as they come in. The appeals have not  
19 been at the level that they are expected to be in the future,  
20 but as they come in the special masters continue to review  
21 those.

22 In terms of the extraordinary injury claims that  
23 we already spoke about, the special master has received  
24 training on that, learned that program, so that as the  
25 extraordinary injury assessments are made and to the extent

1 people elect to appeal those, the special master will be  
2 prepared to do reviews of those as they come in as well.

3 **THE COURT:** Thanks very much. The special master  
4 played a very important role in this litigation, and I  
5 appreciate his work. Thank you.

6 State court trial settings, anything on that?

7 **MR. MARVIN:** No, Your Honor. There are no cases set  
8 for trial in state courts.

9 **THE COURT:** Class actions, anything on that?

10 **MR. MARVIN:** There's no change there, Your Honor. I  
11 think we are ready now for Ms. Barrios.

12 **THE COURT:** State/federal coordination.

13 **MS. BARRIOS:** Good morning, Your Honor. Dawn Barrios  
14 for the state liaison committee. Through the most current  
15 conditional transfer order, which I believe is 158, there are  
16 no additional remands. We are not going to repaper everything  
17 for that. We are going to work with BrownGreer and with  
18 Ms. Dorothy Wimberly to try to clear out some of the other  
19 claimants who were on that recent motion to dismiss that you  
20 signed, and we should have that for you next status conference.

21 **THE COURT:** Good. Thank you very much.

22 Anything on *pro se*?

23 **MR. BIRCHFIELD:** Yes, Your Honor. We have an  
24 attorney from Bob Johnston's office to give a report.

25 **MS. REZNIK:** Good morning, Your Honor. Heather

1 Reznik for Bob Johnston, *pro se* curator.

2 Our office continues to receive many calls from  
3 *pro se* claimants. The majority of these calls are regarding  
4 the final MI payments, including inquiries about the holdbacks  
5 for the common fees and the lien holdback. We also receive  
6 inquiries as to when the IS claims will be completed and when  
7 payment can be expected. We also continue to receive a limited  
8 number of calls regarding the completion of the IS claims  
9 packages and wrapping up of the final submissions of the IS  
10 claims. We will continue to receive these *pro se* calls as best  
11 we can. Thank you.

12 **THE COURT:** We have tried to give the *pro se* people  
13 some information, access to an attorney, and I think that's  
14 been an important part of this program.

15 MDL trial package, anything on that?

16 **MR. BIRCHFIELD:** Nothing new, Your Honor.

17 **THE COURT:** What about third-party payor cases?

18 **MR. MARVIN:** Your Honor, as we mentioned at the last  
19 status conference, the parties have negotiated a settlement  
20 agreement with respect to the third-party payor actions. A  
21 settlement has been reached and the papers have been signed.

22 **THE COURT:** That leaves the governmental actions.  
23 Anything to report on that?

24 **MR. DAVIS:** Your Honor, the AG matters are going  
25 forward. As you know, the Louisiana case is set for trial on

1 April 12, 2010. On September 30, the Court issued Pretrial  
2 Order 53. The parties are moving forward, moving ahead with  
3 discovery, and the matter is proceeding. Mr. Dugan is here if  
4 there is anything to add.

5 **THE COURT:** Jim, anything more?

6 **MR. DUGAN:** That's accurate, Your Honor.

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

8 Discovery issues? Any other issues connected  
9 with third-party payor or government issues?

10 **MR. DAVIS:** No, Your Honor. There's nothing.

11 **THE COURT:** What about pending personal injury cases  
12 in which *Lone Pine* expert reports have been served?

13 **MR. MARVIN:** Yes, Your Honor. There's nothing  
14 further to report other than what's set forth in the joint  
15 status report.

16 **THE COURT:** Anything on the fee allocation committee?

17 **MR. BIRCHFIELD:** Yes. Your Honor, the third-party  
18 payor motions, which was the next item, that's already been  
19 covered by Matt Garretson.

20 Your Honor, the common benefit costs that were  
21 awarded under Pretrial Order 51, that order has become final  
22 and those costs will be disbursed on Monday, October 26.

23 Since the last status conference, the Court  
24 entered Pretrial Orders 49 and 50 that addresses the amount of  
25 fees to be held back for common benefit or the 32 percent

1 depending on the action of the attorneys in regards to a  
2 certification. A writ of mandamus was filed on that issue, and  
3 the Fifth Circuit has invited responses on or before  
4 October 27.

5           **THE COURT:** With respect to the costs, let me mention  
6 that that's always a difficult issue to handle. I think the  
7 way that we tried to do it in this particular case is helpful  
8 in that the first thing we did was to appoint a CPA and then  
9 set down some guidelines. It's more complicated when you then  
10 fold in the state courts in cases because they have not been  
11 the subject of the guidelines. I'm trying to do something  
12 differently in the *Chinese Drywall* case that I'm handling now,  
13 but in *Vioxx* we couldn't do that.

14           In any event, the guidelines as set out, and  
15 certain documents are required to be filed with the CPA. That  
16 was done. Then when it gets time to look at the costs, all of  
17 that material is pulled together, and some of it doesn't  
18 satisfy the guidelines. So the CPA has to step in and say,  
19 "This is not a coverable cost."

20           In this particular case, we also created a  
21 committee to meet with all of the individuals who put in costs,  
22 if necessary to take evidence, if necessary to get more  
23 material, and the cost will refine down to costs that came into  
24 the guidelines and satisfied the requirements of the  
25 guidelines. I looked them over very carefully. Some of it was



1 disputed. I resolved those disputes, and then the costs were  
2 able to be paid out.

3           The point that I make is that the costs were  
4 just not that a lawyer would say, "This is how much I spent.  
5 Give it back to me." It was a lot more involved than that. I  
6 think that the costs were whittled down to a satisfactory  
7 amount.

8           **MR. BIRCHFIELD:** In working through that process, the  
9 lawyers were very cooperative in providing answers to  
10 questions, providing documentation, and that cooperation is  
11 much appreciated.

12           Also, since the last status conference, the  
13 Court has appointed Michael Stratton to serve as liaison  
14 counsel to the objectors to the 8 percent and Russ Herman as  
15 liaison for the plaintiffs' committee. There have been some  
16 meet-and-confers in that regard, and the parties will get  
17 together once Russ returns.

18           **THE COURT:** My thinking on that is that some  
19 discovery or whatever is required needs to be done, and then I  
20 will key up a hearing and deal with it in that fashion. I'll  
21 give everybody an opportunity to express themselves, to write  
22 whatever briefs they need to write, and then when the issue is  
23 sharpened a bit I will deal with it.

24           **MR. BIRCHFIELD:** The next item on the agenda,  
25 Your Honor, is a motion for reconsideration or revision of the

1 order capping contingency fees. The Court has entered an order  
2 on that motion, and there's nothing new to report.

3 **THE COURT:** That's on appeal, too, isn't it?

4 **MR. BIRCHFIELD:** Yes.

5 **THE COURT:** Other motions?

6 **MR. MARVIN:** Your Honor, I think we are now up to  
7 page 15, Item XVII, Merck's motions. Merck has filed motions  
8 under PTO 28 and 29 and 43. Those are set to be heard on  
9 October 29.

10 **THE COURT:** Any other motions that we have? Anything  
11 on appeals?

12 **MR. MARVIN:** No, Your Honor.

13 **THE COURT:** Motion for attorneys' fees, anything on  
14 that? I think we talked about that. The next meeting is  
15 Thursday, December 3.

16 Let me mention that I read articles about mass  
17 torts and generally they are not favorable. Generally, the  
18 concept is that this type litigation is a black hole, that it's  
19 only for the benefit of the attorneys on either side, that they  
20 keep churning matters, it goes on forever and eventually, if it  
21 is resolved, the attorneys get paid very handsomely and the  
22 claimants get a coupon or some kind of gold star, something of  
23 that sort. You read all about that.

24 It's unfortunate that, in a case that has been  
25 handled well, you're probably not going to get any press.

1 That's just the way it works. Orran talked about the short  
2 period of time between the time of the settlement and the time  
3 of the pay-out, nine months, less than a year, but the whole  
4 case worked that way.

5           The case was brought to the Court in 2005, and  
6 within nine months the trials started. Unfortunately, we had  
7 to try the first case in Houston because Hurricane Katrina  
8 "dissented" and we had to move, but the case went on. We tried  
9 six in the federal courts and 10 or 12 in the state courts. We  
10 had almost 20 cases or thereabouts within a couple years. The  
11 case was settled within three years of its filing, and then  
12 payouts were made within four years.

13           I think it's a tribute to the people who worked  
14 on the case. The good thing about this from the standpoint of  
15 the Court's vantage point is these type cases generally have  
16 the best lawyers on both sides. The best lawyers in the  
17 country handle these cases because of their complexity, because  
18 of their interests, because of the economics involved, and it  
19 was true in this case. Because of their efforts and hard work,  
20 the case was able to be resolved in a very short time as time  
21 goes.

22           In fact, some separate individual cases are not  
23 really resolved within four years. They go on forever. For  
24 50,000 claims to get resolved from the time suit was filed  
25 until pay-out, four years is really a tribute to all of you in

1 the audience and all of you who have participated in this case.  
2 You need to know that the Court is mindful of that and  
3 appreciates and recognizes all of the work you have put in.  
4 I'll see you at the next conference. Thank you very much. The  
5 Court will stand in recess.

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

7 \* \* \*

8 **CERTIFICATE**

9 I, Toni Doyle Tusa, CCR, FCRR, Official Court  
10 Reporter for the United States District Court, Eastern District  
11 of Louisiana, do hereby certify that the foregoing is a true  
12 and correct transcript, to the best of my ability and  
13 understanding, from the record of the proceedings in the  
14 above-entitled and numbered matter.

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17 s/ Toni Doyle Tusa  
18 Toni Doyle Tusa, CCR, FCRR  
19 Official Court Reporter  
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