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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA
AT NEW ORLEANS

IN RE: VIOXX PRODUCTS) Case No. 05-md-1657 "L"
LIABILITY LITIGATION) December 16, 2014
) Status Conference
) and Motions

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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1 NEW ORLEANS, LOUISIANA; TUESDAY, DECEMBER 16, 2014

2 9:00 A.M.

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

5 Let's call the case, please.

6 CASE MANAGER: MDL 5697, in re: VIOXX Products
7 Litigation.

8 THE COURT: Counsel, make your appearances for the
9 record, please.

10 MR. DAVIS: Good morning. Leonard Davis on behalf of
11 liaison counsel.

12 MR. MARTIN: Douglas Martin for Merck.

13 THE COURT: We're here for our now every two-month
14 status conference. This is almost the tenth anniversary of this
15 claim. We're at sort of tail end. By tail end, I don't mean
16 less important. We all know how good ox tail soup is, and ox
17 tail is the most valuable part of the ox. So this is just the
18 latter part of the case where we have a couple of matters.

19 One matter that we do have is a motion today on a
20 class action, the consumer class actions. I'll defer that until
21 we finish with this meeting and then we'll take that motion up.

22 So the first item on the agenda is government
23 actions. Anything on government actions?

24 MR. DAVIS: Your Honor, BrownGreer is here to make a
25 presentation on the status of the consumer, if you'd want to

1 defer.

2 THE COURT: Not now. We'll package it all together.

3 And the government actions. I know that Alaska,
4 Montana and Utah have been sent back to the federal courts in
5 Alaska, Montana and Utah. I understand that there are some
6 remand motions to send those cases back to the state court.

7 MR. BEISNER: Good morning, Your Honor. John Beisner
8 for defendant Merck.

9 Yes, Your Honor, that is correct. In Alaska and
10 Montana, the briefing of the remand, jurisdictional remand
11 motions, supplemental briefing, has been complete and oral
12 argument date has been set in Alaska and Montana. No date has
13 been set but the briefing is completed.

14 In Utah, nothing has happened yet there except
15 that counsel have been speaking with the clerk's office here to
16 get the materials transmitted to that Court. So I assume that
17 we'll have some activity in that matter soon.

18 But, in any event, those cases are all back in
19 their original jurisdictions and proceeding.

20 THE COURT: Okay. If this Court can be of any help to
21 them, please make sure that they understand they can call me and
22 talk with me about it.

23 MR. BEISNER: And, Your Honor, we will get to chambers
24 the identity of the federal district judges who have each of
25 those cases.

1 THE COURT: That's fine.

2 We've had about twenty-six states originally in
3 this matter seeking recovery for certain expenses that they've
4 incurred, down now to only three. So hopefully it will work for
5 the rest of the states and we'll see what happens to those
6 three.

7 Pending personal injury cases, anything on that?

8 MR. DAVIS: Ms. Oldfather is here to address that.

9 MS. OLDFATHER: Morning, Your Honor. Morning, counsel.
10 Ann Oldfather, liaison counsel and lead counsel for certain
11 personal injury cases.

12 Your Honor, I can report just in general that
13 there are eighteen personal injury cases still on our case
14 census. One of those is Jo Levitt, heart attack case. And the
15 remaining actually -- sixteen, so a total of seventeen -- the
16 remaining sixteen are VTE cases. Many the VTE cases have
17 resolved prior to and since the last status conference by
18 settlement. There were six of the VTE cases that had been
19 submitted to the Court on motions for summary judgment on the
20 future evidence stipulation. Three of those had previously
21 resolved by settlement and one of them is tentatively resolved
22 now with Merck pending working out the lien situation, that one
23 being Todd Jelden. So we've got of the sixteen BTE cases that
24 are on the case census that I discussed earlier, twelve of those
25 are not yet in the resolved posture or tentatively resolved

1 posture. Most of them are under active discussion with Merck's
2 counsel regarding settlement possibilities.

3 Beyond that, Your Honor, and in looking through
4 the joint status report, I can report that we are in
5 conversations with Mr. Davis and Mr. Birchfield about the
6 financial issues that address both the common benefit fee and
7 expense matters. I've just addressed the pending summary
8 judgment motions.

9 The Jo Levitt case, Your Honor is familiar with
10 that.

11 I apologize to the Court because I meant to
12 discuss with Merck before we came in here the Byrd case which is
13 mentioned in here. Mrs. Byrd died, and Merck filed a motion to
14 dismiss with prejudice based on her death. I had thought that,
15 in October, Merck withdraw that opposition because Mr. Byrd had
16 appear and filed a motion to substitute. But I may very well be
17 wrong about that and I haven't checked the transcript. So I'm
18 not sure where that stands. I think that's something that we
19 need to go back and check on.

20 THE COURT: Take a look at that. I do remember
21 something, I don't know whether it's the Byrd case or some other
22 case. But I do remember that something was withdrawn.

23 MS. OLDFATHER: I believe I reported back to Mr. Byrd
24 that he had now been allowed to move forward. But that may have
25 been my error, and we will look into that and get back with

1 Merck.

2 And then the balance of the report on the pending
3 personal injury cases are clean-up motions that I'll allow Merck
4 to address.

5 THE COURT: Okay. One thing that we're going to have
6 to get to and I may have to convene a conference on the Stratton
7 matter. We've been kicking that can down the roadway a bit.

8 MS. OLDFATHER: Yes.

9 THE COURT: I may need some suggestions from lead
10 counsel.

11 MS. OLDFATHER: All right, Your Honor.

12 Thank you, if the Court has no further questions.

13 THE COURT: Anything?

14 MR. BEISNER: No, Your Honor.

15 THE COURT: What about appeals, John, anything on that?

16 MR. BEISNER: Your Honor, the one appeal that we have
17 pending is from the class action. That matter was fully briefed
18 before the circuit at this point, including a suggestion that
19 that could be subject to summary disposition. But no oral
20 argument has been scheduled in that matter at the moment, Your
21 Honor.

22 THE COURT: Does that complete what we need to talk
23 about, other than the motion?

24 All right. What's the new date?

25 CASE MANAGER: February 26th.

1 THE COURT: February 26th.

2 And, at this stage, it may be more efficient to
3 have these matters by telephone. But I'll hear from the parties
4 on that when we get a little closer.

5 Let's go then to the motion.

6 Dean, do we have to do anything with the phones?

7 CASE MANAGER: Yeah. I have to get Mr. Getty on the
8 phone, Judge.

9 THE COURT: Okay. Hold on while we get Mr. Getty on
10 the phone, and then we'll go into the motion.

11 (Proceedings in recess.)

12 THE COURT: Be seated, please.

13 We are here today on a motion filed by Mr. Richard
14 Getty involving this class action consumer class.

15 Just by way of background, a consumer class are
16 those individuals who purchased VIOXX who did not have any
17 personal injuries from VIOXX. And many of whom, I might say,
18 have over the years called the Court and expressed themselves
19 about the fact that VIOXX was taken off the market. Somehow or
20 another, they attributed that to me, but it was off the market
21 before I got into the case. They apparently got some benefit
22 out of VIOXX, or at least some of them did. But they felt and
23 they had a claim that, had they known that VIOXX was
24 problematic, they would have -- their doctors would have
25 prescribed something else and they would have purchased

1 something else. And, they did not know that it was problematic,
2 and so they were an innocent purchaser and they wanted their
3 money back. And, in some states, the consumer protection laws
4 gave them more than that.

5 But, in any event, the claims were for the
6 consumers, primarily any claims growing out of their purchase of
7 VIOXX. As I say, they didn't have any adverse effect of it, but
8 they did expend money and take the drug.

9 The parties began negotiations, and they were
10 difficult negotiations, nationwide, but they eventually came to
11 an agreement. And, basically, the agreement was to give the
12 consumers back their provable costs that they spent for the drug
13 and also to reimburse them for any medical expense that they
14 incurred in getting another doctor or getting another drug for
15 their malady or problem. And, when that settlement was
16 announced, the class action settlement was filed. A part of the
17 class action settlement, a vital part of the class action
18 settlement, was to notify people. And so we undertook various
19 methods of notifying the individuals. We had language issues in
20 some states. New Mexico, for example, we had to make sure that
21 the notice was in Spanish and disseminated to people in those
22 areas and those magazines and newspapers that they were
23 accustomed to reading. In various other states, we also tried
24 to focus on the notice.

25 But the issue today is whether or not there ought

1 to be a supplemental or a second supplemental notice to go out.
2 So I'll hear from the parties at this time.

3 Richard, you brought the motion. Do you want to
4 speak on it?

5 MR. GETTY: Yes, Your Honor. I'll be very brief.

6 As you know, we have done everything we thought
7 was possible to try and increase the claims rate. And,
8 unfortunately, in hindsight, you look at this -- and I think one
9 of the reasons for the claims rate is that many of the people
10 who took this substance and would be eligible had passed because
11 of the time and the age of the people who were prescribed VIOXX.
12 I think, ten years earlier, the claims rate would have been much
13 greater. But it is what it is.

14 We've made efforts, at least with respect to the
15 Kentucky consumers, to increase or have either BrownGreer or
16 plaintiff's liaison counsel do everything to increase that rate,
17 and I think we're pleased with the fact that we've increased the
18 number of eligible claims six-fold really as a result of our
19 efforts to get better, more complete notice.

20 The issue now is we've got a group of ineligible
21 claims that we believe maybe there ought to be some direct
22 contact in an effort to try and make them eligible. There are
23 2,284, I guess, nationwide. With respect to Kentucky, Kentucky
24 is a percentage of that. And we would simply like to have some
25 direct conduct with the class members to see if their ineligible

1 claims can become eligible.

2 We've talked this through to some degree with
3 plaintiff's liaison counsel and with BrownGreer, who are to be
4 complimented on their efforts overall here. And what we're
5 proposing is that the Court direct class counsel to utilize
6 BrownGreer for making direct telephone contact with the class
7 members whose claims remain ineligible.

8 The main point of that is that the BrownGreer
9 personnel have the claims files, and those who have the claims
10 files would be best suited to do that. And that's basically it.

11 THE COURT: All right.

12 Let me -- I can either hear from the plaintiffs in
13 response or from Orran Brown.

14 Orran, do you want to just tell us what's happened
15 so far, what have you done?

16 And, Richard, take a look at the material that
17 Orran sent to you as he goes through this with me at this time.

18 MR. GETTY: Yes, Your Honor. I have that.

19 THE COURT: Okay, good.

20 Go ahead, Orran.

21 MR. BROWN: Good morning, Your Honor. Orran Brown, and
22 within me also from BrownGreer is Orran Brown, Junior, today.
23 We have been privileged to serve as the claims administrator in
24 the VIOXX consumer settlement. And we're here today not as an
25 opposition to this motion but just to provide the information

1 for the context in which it occurs so the Court and the parties
2 have full information on what has happened up until now, the
3 claims that were received, what we did with them and what's
4 left, including the numbers that Mr. Getty just mentioned.

5 We have a presentation. I left of a copy it on
6 the Court's desk and your law clerk's desk. We had emailed it
7 to all the parties and Ms. Winters and Mr. Getty, who are on the
8 phone. I have a couple of extra copies if anybody needs one.

9 But the goal, Your Honor, is to walk through these
10 topics which take us from the beginning of this program through
11 the efforts at notice, the claims we received and then our
12 review of them back and forth with the claimants to see which
13 ones, where we ended up with the claims that are payable or not
14 payable.

15 And we'll go through this, Your Honor. This is a
16 lot of information, but this is our report essentially on the
17 entirety of this program and essentially is our final report
18 because we are finished reviewing all the claims. Everybody is
19 in their final spot, pending the outcome of this motion today in
20 terms of further action.

21 And, also, we're unable to issue appeals
22 technically under the settlement agreement -- issue payments
23 under the settlement agreement until that one appeal is
24 concluded. But we're prepared to issue payments as soon as
25 those two matters are cleaned up.

1 This program launched with the Court's preliminary
2 approval in August 2nd of 2013. We immediately set up a public
3 website to provide information to the claimants and to the
4 public on copies of the settlement agreement, availability of
5 the claim form, further information that they could obtain on
6 the notice on the public website.

7 Then there was an extensive notice campaign, the
8 direct mailing notice campaign -- we'll talk about this in a
9 little more detail in a moment -- but this is the national
10 notice campaign that launched in early August of 2013 designed
11 by the notice agent Kinsella Media. And we'll go over in a few
12 minutes a little bit more detail of what that include.

13 On September 1, 2013, we had up on the public
14 website an interactive online method to file a claim form so
15 that anyone who wanted to, a lawyer or a pro se claimant, could
16 go online and very quickly indicate that they wanted to submit a
17 claim for the benefits available under this settlement
18 agreement.

19 This Court had its final fairness hearing on
20 December 13th of 2013 and then issued its approval order of
21 January the 3rd of 2014.

22 By February, to boost claim participation, we
23 worked with the parties and the Court to develop a reminder
24 campaign for certain targeted segments of this claimant
25 population, and I'll go over that in a little more detail as

1 well.

2 Then the final claim filing deadline was May the
3 6th of 2014. So claimants had a period of nine months from the
4 time that this was approved to be able to submit a claim.

5 The class notice that I mentioned that the notice
6 agent developed, Kinsella Media, included a mail notice to the
7 counsel of record in this MDL proceeding. We mailed that notice
8 to sixty-six law firms.

9 It also included what Kinsella and other notice
10 experts referred to as earn media campaign, which means press
11 releases. You garner some media coverage at no cost through
12 that as news articles are written about the outcome of the
13 settlement or the pendency of the settlement.

14 And then there was an extensive publication notice
15 that involved print ads and notices in consumer magazines.
16 There was an internet online presence with search words and
17 keywords to facilitate finding the website online. There were
18 newspaper ads and newspaper supplement ads.

19 The notice campaign that the Court approved on the
20 basis of the recommendation and declaration from Shannon
21 Wheatman at Kinsella Media ended up -- the parties spent over
22 \$1.6 million, an extensive national notice campaign, in August
23 and September of 2013.

24 We also, on our part as claims administrator, we
25 did set that public website. We immediately set up in August a

1 PO Box for claimants to send us material or send us questions.
2 And we also set up a toll-free number that was advertised on the
3 website for people to call us and ask for information. It had
4 an automated system to where you could hear recorded messages,
5 you could ask for a copy of the settlement agreement.

6 Over the course of this program, we've had nearly
7 121,000 visits to this settlement website. We've had over
8 18,000 calls that our people have fielded from claimants,
9 lawyers, other persons interested in this program at that
10 toll-free number.

11 The courtesy reminder campaign I mentioned is
12 something that was unique to this program. We have not seen
13 this done much, though it is a positive development that should
14 be repeated in other programs. In January/February of 2014, as
15 we were watching the claim volumes coming in, the parties talked
16 with us, class counsel and Merck's counsel, and asked us for
17 ideas about how to spur claimant participation in this program.
18 So we worked with them to design a more targeted notice, direct
19 notice effort, that was kind of a booster shot on the labyrinth
20 notice that had been done in the fall. And we targeted these
21 groups that's shown in this slide for specific notice of this
22 program. And what we were trying to do is find people who may
23 have had VIOXX used, may have had some interest in this program
24 that we could reach out to directly.

25 And so, this first group, this 11,226 people,

1 because we were the claims administrator in the VIOXX personal
2 injury settlement that this Court also presided over, we had
3 contact information for claimants who had come forth, registered
4 in that program but who had not signed a binding release in that
5 program.

6 Under this settlement, if you signed a release in
7 the VIOXX personal injury program, you released all your claims,
8 you could not participate in this consumer recovery. That is I
9 think one reason that we did not have millions of people who
10 wanted to participate in this settlement, because a lot of the
11 people -- over 50,000 of them -- who had used VIOXX and felt it
12 caused them a problem went through the personal injury program,
13 signed a release and their claims were finished, so they could
14 not participate in this program.

15 But we did know of this 11,226 persons who had
16 registered in that program and had not signed a release or a
17 binding release. So for these folks we developed a letter that
18 sent them -- and we mailed them a letter with a prefilled claim
19 form and a self-addressed envelope to send it back to us to
20 those 11,000 people. This was part of the work that we did in
21 February of 2014 to try to spur activity among claimants. And
22 we'll see in a moment the results of that.

23 We also had information on 411 law firms who had
24 represented claimants in the personal injury settlement, and we
25 emailed them the notice in this program.

1 We knew of 668 claimants who had gone on the
2 website and they had started a claim form but they hadn't
3 finished it. They hadn't filled it out, they hadn't submitted
4 it. So we emailed that group and encouraged them to fill out
5 their claim form and told them how to do it.

6 Row 4 here are persons who had gone to the
7 website, they had given us their name but they hadn't done
8 anything else yet. They hadn't filled out the claim form. So,
9 that 5,000 plus persons, we emailed them. We had their email
10 and we could use the inactive portal to contact them through the
11 account they had set up with us. We encouraged them to finish
12 their claim, go ahead and submit a claim in this program.

13 Then we also had, in Row 5, over 3,700 persons who
14 had called us or had emailed us or something and asked us for a
15 claim form, and we had mailed them a hard-copy claim form but
16 they had not sent it back. So we mailed them a letter asking
17 them to go ahead and fill out the claim form and send it back.

18 All of this was going on in February of 2014 in an
19 effort to target these groups to encourage them to file claims.

20 At the same time, we upgraded some of the
21 functions that were available on the call center, the toll-free
22 number. We added the option to have the person leave a request
23 for a live operator to call them back, one of our people to call
24 them back. Up until this point and the settlement agreement had
25 called for an automated system where they hear recordings. We

1 added a live touch to that so they could actually talk to
2 someone.

3 We also added all the messages in Spanish so that
4 if there were segments of this population who were dependent
5 upon the Spanish language they could hear everything on the
6 automated toll-free number in Spanish. We had assigned some of
7 our Spanish-speaking representatives to return those calls to
8 Spanish-speaking claimants or persons interested in it.

9 Also along with this we upgraded some functions on
10 the website. We moved the claim form to the home page, instead
11 of just a documents page, to make it easier to find, find it
12 immediately.

13 We added a function where you can go online and
14 ask that a claim form be mailed to you.

15 We added new language on the settlement website
16 that stressed the availability of payments and stressed that
17 under this Option 2 in this program you could receive \$50 if you
18 could sign a declaration under oath that you bought VIOXX and
19 had not been paid back for it.

20 We were trying to encourage focus on the
21 availability of the payments.

22 We also added a function that was an online
23 interactive question-and-answer segment where a person could go
24 to the website and ask: Do I qualify form payment? And it
25 would take you through the questions about: Did you purchase

1 VIOXX, was in the United States, have you already signed a
2 release or not? And you'd end up with answer, yes or no, you
3 qualified, so you should or shouldn't file a claim.

4 All of these were efforts that we were doing to
5 upgrade the website and make it even more advantageous for
6 claimants to use than it already was.

7 We changed the way to file a claim form online.
8 Our ideal method for filing a claim form online is to have
9 someone set up an account, much the same way when you register
10 for an account with Amazon when you buy something. So that then
11 we have their interactive contact and can go back and forth with
12 them. So it's a two-step process: Set up an account, fill out
13 the claim form. We changed it to say, all right, if someone
14 doesn't want to do the two steps, just let them fill out the
15 claim form and that will be it. We made it easier; one step
16 instead of two.

17 We added a Spanish claim to the website. We added
18 an option to switch to an entire version of the website in
19 Spanish.

20 That reminder campaign did bear fruit for us. As
21 you can tell from this slide, in the period before the campaign,
22 we were getting about 131 claims per week. After the campaign,
23 we were getting 312 claims average per work. It almost tripled
24 our claims weekly filings.

25 And look on the right here, in terms of total

1 claims filed, we got over 5,600 claims after this campaign
2 began. Some of that is naturally attributable to the fact that
3 we were approaching a deadline. But we got over sixty percent
4 of our claims after the time that we started this booster-shot
5 reminder campaign.

6 This Slide No. 10 shows us the total claims we
7 received. We got 8,757 claims in this program. Most of them or
8 way over half of them were done online. Nearly all of these
9 claimants were unrepresented. We only had three law firms that
10 submitted claims on behalf of a handful of claimants. But, even
11 though this population was unrepresented, fifty-six percent of
12 them used the online function. The other forty-three percent
13 plus we got in the mail in hard copy.

14 So, of those 8,757 claims, what did we do with
15 them? We reviewed them to see if they qualified under the terms
16 of the settlement and had submitted the proof that they had to
17 submit to receive payment reimbursement for their VIOXX
18 prescriptions costs.

19 We started issuing notices to these claimants
20 about whether they were missing anything on August the 22nd of
21 2014. The settlement agreement required us to notify claimants
22 if there was anything missing in their claim and give them
23 thirty days to supply it. So we developed a notice that was in
24 clear language. It's attached to my declaration that I filed
25 recently to report to the Court on our processing activity.

1 That notice explained to the claimant what was missing, what
2 they had to do next, the deadline, the thirty-day deadline. It
3 gave them an email to email us with questions. It provided a
4 toll-free number. It encouraged them to call us or email us if
5 they had questions about what they had to do next. It told them
6 exactly what they had to do to get their claim complete and gave
7 them thirty days to do it. We mailed it to people if they had
8 sent us a hard copy claim form. We posted it on their
9 interactive portal if they had set up an online account with us.
10 And, that way, we could monitor that they'd actually read that
11 notice.

12 At the same time the claimants then started
13 responding to us, we reviewed those materials. The settlement
14 agreement required us to give them another notice. If they were
15 still incomplete after that first round, we gave them another
16 notice, a final notice, same information about what was missing.
17 And another thirty days to complete their claim if they still
18 didn't have all of the information in it.

19 And then, as we got through the fall, those thirty
20 days, the first thirty days and the second thirty days where
21 claimants started to expire, we -- the first group, October 24,
22 was the last of the first thirty-day cure period. And then
23 November 30, 2014 was the last of the second thirty-day cure
24 period. So all of those notices and cure periods have passed
25 and we have reviewed all the claims and all the materials that

1 came in.

2 Now I want to spend a few moments explaining to
3 the Court what changed, because it bears upon the analysis of
4 whether claimants have been told what they were missing, had an
5 opportunity to present it and then tried to do so.

6 After our first reviews, before we sent them any
7 notices, this slide, No. 12, shows us that we found over 6,000
8 claimants that were payable for what they asked for. That's Row
9 1.

10 There were 288 people who were payable but they
11 did not prove all the amount they asked for.

12 And then there were 131 people who were payable
13 for more than they requested.

14 Now the parties instructed us that we were to
15 follow the proof. In other words, if whatever the documents,
16 prescription records, the cancelled checks or the credit card
17 statements that claimants presented to us that showed amounts
18 that paid for VIOXX, we were to pay that amount. Even if it
19 were more than they had asked for in the claim form.

20 But these two groups right here, the 288 and the
21 131, we could not be certain what they really had paid in some
22 instances. So the parties directed us to send them a notice
23 that said we got your claim, you're payable for a certain
24 amount, you might get paid more if you can fill in the rest; or,
25 if you -- if your proof showed more than you asked for, why

1 didn't you ask for more. Because we felt and did find out in
2 some instances it was because their insurance had paid for part
3 of it. So we didn't want to overpay. So those two groups got a
4 notice and got the second thirty days to complete their picture
5 for us.

6 These claimants right here on Slide 13 are the
7 ones that were not payable anything after the first review. And
8 this is a group we talk about when we start thinking about
9 incomplete claims, claims that were not payable because they
10 were missing vital information the settlement agreement
11 required.

12 The first row, no documents or people who hadn't
13 sent us anything. They sent us a claim form but no proof of any
14 kind.

15 The second group, the invalid documents, are
16 people who had sent us something but it wasn't the right kind of
17 proof. It was maybe a list of prescriptions but it didn't show
18 what they paid, didn't show how they'd actually spent money.

19 Then there were people who had started a claim
20 form but had left out information. They hadn't signed it or
21 they hadn't completed it online, they had an incomplete claim
22 form. There was a large group that had multiple reasons, they
23 had some of all of those things of why they were not payable.

24 And then the Row 5 is the 110 who were excluded.
25 Most of those were people who had submitted claims here and who

1 had signed the release in the VIOXX personal injury program.
2 There were some claimants who were excluded because they had
3 been residents of Missouri when they purchased VIOXX. And the
4 members of the *Pluebell* settlement in Missouri the state class
5 action that were excluded this program.

6 And then there were 398 of all of our claim forms
7 that we determined that were duplicate, the same person filing
8 more than one claim form. So we eliminated the 398.

9 We had, at the end of this, 2,284 claims that were
10 on the bubble that we could not pay. We sent them the notices
11 that I described that told them what they were missing. We got
12 responses. Twenty-nine percent of them, as this pie chart
13 shows, responded. We sent out 2,338 notices telling people
14 you're missing something, we can't finish your claim.
15 Twenty-nine percent of them responded. Of those, eighty-three
16 of the responses cured. So this first round of incomplete
17 notices cleaned up 562 claims.

18 After that, the amount total payable went up, as
19 you can tell, about \$100,000. And that's people finishing out
20 their claims, giving us information. So the payable amounts go
21 up.

22 This slide shows us the second round of notices,
23 the final notices, the second thirty days, where we sent --
24 we're whittling the group down to fewer and fewer people. We
25 sent out 1,764 of these final notices. About twenty percent of

1 them responded. This is fairly typical. Sometimes it's higher
2 than this if the dollars involved are higher. Sometimes it's
3 way lower than this if the dollars involved are lower. But we
4 had another twenty percent of people responding. Most of them,
5 eighty-four percent of them, could fix their issues with us. We
6 ended up with another 300 people becoming payable or cured
7 through this second round of notices. And the payable amount
8 that we have increased into over \$706,000 of VIOXX costs
9 reimbursement in this program.

10 This Slide 18 shows us where we stand today in
11 terms of what's payable.

12 Option 1 is the option to submit your
13 reimbursement proof and get paid your actual reimbursement
14 amount. The largest claim we have to pay under that is just
15 under \$6,000. People had proof that they had out-of-pocket
16 expenses for VIOXX at that level.

17 Option 2 are the claimants who had no proof of
18 payment and they could submit a pill bottle or they could submit
19 a declaration and receive \$50. You can see most of the folks in
20 this program end up in that proof level, they were receiving the
21 \$50. We end up with this amount, the \$706,000 plus that's
22 payable today.

23 And these are the folks on this Slide 18 that bear
24 upon Mr. Getty and Ms. Winter's motion. Because, as we stand
25 today, we have 1,391 claimants whom we cannot pay. Some of

1 these are obviously not payable.

2 The 403 people in Row 6, the duplicates, we're not
3 going to pay them. There's nothing we can do to change that,
4 it's just an extra claim. We don't want to pay them twice.

5 The 110 people who are excluded in Row 5, we don't
6 think that's going to change even if we were to call them, we
7 could call them to make sure we've got it right, that they were
8 the same person who signed the VIOXX release. But we don't they
9 think there's any doubt about that because we have the VIOXX
10 releases, we have the Social Security numbers, we can match up
11 those people.

12 So the ones in Rows 1 through 4 are the ones, the
13 claimants, who are still on the bubble, who, after all the
14 things I've described, did not complete their claims and have
15 not converted themselves into payment. And, if we were to do
16 any calls now, it would be to these claimants in Rows 1 through
17 4 of Slide 19, the 224 with no documents, 2,338 who still
18 haven't given us a qualifying document, the 61 who still haven't
19 finished out their claim form or the 355 people who have several
20 things wrong. That's a total of 878 people that might be
21 subject to calls.

22 Now, we have phone numbers for about eight-four
23 percent of those. We don't have phone numbers for all of them.
24 I think we could call 738 people if the Court and the parties
25 directed us to on top of what's already happened.

1 So this group right here in these first four rows
2 are the ones that would be subject to any calls that we made now
3 to ask them further questions about their claim.

4 THE COURT: What's your estimate of the costs of
5 something like that?

6 MR. BROWN: Well, Your Honor, it's difficult to
7 predict, just like all costs are. But we think it would cost
8 about ten to \$15,000 in time. The reason for that is, if we're
9 making seven to 800 phone calls, we will not reach them all
10 during business hours during the day. There's usually at least
11 two or three call efforts to get back and for and talk to them,
12 so that takes time. And then we're talking to them, that takes
13 time, and explaining things to them.

14 And then there will be claims handling. We will
15 maybe get a few things in that we process and add to them, so
16 there's some time associated with that.

17 The best we can say is that ten to \$15,000 time
18 costs handling for that.

19 And the success rate is also hard to predict, Your
20 Honor. We will reach ultimately at least fifty percent of them.
21 Some of them, we cannot. They won't call us back, we can't
22 reach them. So we'll get probably fifty percent of them. I
23 expect that -- and it's really kind of conjectural at this point
24 to say why haven't they finished by now after all of these
25 efforts. I think part of it is they just don't have the proof.

1 Some of them may have ended up feeling like they don't want to
2 fool with it anymore or they don't -- didn't actually have any
3 out-of-pocket expenses that they want reimbursement for.
4 Because the bottom line is, if they sign a declaration that says
5 under oath that they used VIOXX and weren't repaid, this
6 settlement allows them \$50. And the eighty-five percent, eighty
7 percent of our payable claim is of that genre, they're getting
8 the \$50 because they don't have the proof, can't demonstrate
9 actual out-of-pocket.

10 We would basically be encouraging these folks to
11 do that, if they can do it honestly under oath, to send in that
12 request for the \$50.

13 And so, if you run out the numbers, Your Honor, we
14 might end with a with a couple of people who actually give us
15 hard proof to give us more than \$50. But, mostly, will end up
16 fifty percent or more of about 738 people who end up with \$50 as
17 payment.

18 So the benefits that we could pay after all that
19 effort would end up being somewhere in the --

20 THE COURT: Twenty to \$30,000.

21 MR. BROWN: Yes, sir. Or less, depending upon how many
22 of them we can reach.

23 This final Slide No. 21 shows where we stand
24 today. I've already said most of this. The 8,750 claims that
25 we've received are all accounted for. 988 not payable today.

1 That includes the exclusions and the duplicates of 403. And we
2 have 7,366 that are payable. A total of 706,925.92.

3 And so that concludes that presentation, Your
4 Honor. I apologize for being the longest speaker today but we
5 did want to have this opportunity to give the Court a full
6 context of everything we've done to date.

7 THE COURT: Let me hear from Elizabeth in response to.

8 MS. CABRASER: Thank you, Your Honor. Elizabeth
9 Cabraser.

10 First, I would note -- and not in passing -- that
11 the very comprehensive presentation that BrownGreer just made to
12 the Court and parties is essentially a final report on claims
13 administration. We would be submitting such report at the close
14 of any class action settlement program. We believe that this is
15 sufficiently thorough to constitute a final report here and we
16 would respectfully move that this presentation be included in
17 the record of these proceedings.

18 We have spent the year since the settlement was
19 granted final approval by Your Honor in January in a series of
20 conference calls with Merck and with BrownGreer to devise and
21 implement the courtesy reminder program, which we sometimes call
22 a claims stimulation program, and it's been an iterative basis.
23 These programs are not required by Rule 23 but they are becoming
24 a best practice. And we submit that this particular program,
25 this claims enhancement program, is state-of-the-art. We've

1 been able to use social media. We've been able to use YouTube.
2 We were able to use an email blast courtesy of AARP to reach a
3 target population. And we were also, based on BrownGreer's
4 developing knowledge and familiarity with the claims program and
5 the claimants themselves, to discuss and agree with Merck on
6 additional features not only to reach the claimants and remind
7 them of claims deadlines but to affirmatively assist them with
8 claims. And I won't repeat all of the futures of the program
9 because they are in the presentation.

10 So, when we received Mr. Getty's motion for direct
11 phone contact with claimants, the utilization of phone contact
12 was certainly something that we had considered and discussed.
13 We had always considered that any such outreach ought to be done
14 by the claims administrator and the administrator's staff,
15 simply because although class counsel would be entitled to work
16 directly with claimants -- and we have -- typically what we do
17 when claimants contact us for assistance is that we refer them
18 back to the claims administrator. Because that's where the
19 records and information are and frankly that's where the
20 expertise of working with claimants is.

21 And so, in our response to this motion, our
22 recommendation is that any further activity by the claims
23 administrator be by the claims administrator office.

24 Your Honor, whether or not this last effort by
25 telephonic outreach or otherwise to these remaining several

1 hundred claimants ought to be made is uniquely within your
2 discretion. It was not contemplated by the settlement
3 agreement. But frankly, these days, what happens in the
4 implementation phase, particularly of consumer class action
5 settlements -- and I'm involved in several right now -- is that,
6 with the cooperation and assistance of the settling defendants
7 and the claims administrator, we learn as we go and we use newly
8 available media and techniques to enhance the claims process.

9 As you'll recall at the outset of the notice
10 program and at the final approval stage the concern was did we
11 have enough notice by publication. We have learned over the
12 years that the increase to publish notice does not have a direct
13 relationship to the increase of claims. Publishing more notice
14 does not generate more claims. I wish that it did. There are
15 other techniques that are more effective. We believe throughout
16 this program we've tested and implemented and utilized all of
17 the effective techniques that are presently available,
18 particularly given the challenges of this class: An older
19 population to begin with, a drug taken off the market over ten
20 years ago, a very, very effective and sizable settlement
21 personal injury and wrongful-death claims. And the fact that
22 back in the beginning years of this century there weren't the
23 records that would exist today. If we were starting a notice
24 program today on a drug that was taken off the market this year
25 or last year, I think you would see the same techniques that we

1 have been utilizing but you would probably see at least a
2 somewhat larger claims rate.

3 That is to say that we're at the point now in the
4 process where, as Mr. Brown discussed with Your Honor, we have
5 an opportunity to expend another \$15,000 to generate possibly
6 another twenty to \$30,000 worth of claims. And it is difficult
7 to make an argument that this is a cost-effective effort to take
8 at this time, given the thoroughness and innovation of the
9 claims program to date.

10 On the other hand, as class counsel, it's always
11 our goal to do everything practicable to assist every claimant
12 again as long as the Court allows us to do so. It's not a
13 matter of due process. This program has gone way beyond due
14 process. We think this program as we've developed it
15 establishes a model for other consumer class action settlements
16 and we appreciate that Your Honor gave us the opportunity and
17 encouraged us to do so.

18 We also appreciate that the settling defendant,
19 Merck, has agreed for the most part with all of the proposals
20 we've made, has agreed that settlement funds can be expended to
21 implement those innovations and that claims assistance, and in
22 doing so has taken responsibility for its product. We deeply
23 appreciate that and we think Merck's attitude and conduct in the
24 course of this class action administration also sets a model.

25 So that leaves the question -- we appreciate that

1 Mr. Getty acknowledges the direct phone contact by anyone other
2 than the claims administrator would simply not be effective.

3 We appreciate also that we're asking the Court to
4 consider spending an amount of money that may equal or exceed
5 the amount of claims it generates. That's a cost-benefit
6 analysis that is uniquely discretionary. We think there's no
7 right answer to that question. And so we respectfully submit
8 that to the Court.

9 THE COURT: The problem is as I see it from the
10 standpoint of expenses, it looks like the expenses are about
11 fifteen to \$20,000. \$15,000, at least. The maximum that could
12 be gotten is about \$30,000 if BrownGreer assumes that fifty
13 percent of that would respond. That's down to \$15,000. So
14 you're spending \$15,000 to get \$15,000. That concerns me.

15 It also concerns me that also that people can't
16 get paid, people that have put in their requests and have been
17 approved, can't get paid until this -- and as well there's an
18 appeal, I understand that. And also they can't get paid until
19 that is resolved.

20 But does Merck have any input on this?

21 MR. BEISNER: Yes, Your Honor. Just a couple of
22 points.

23 I think we're in agreement that everything Ms.
24 Cabraser said to you on the subject, but I'd just note a couple
25 of points.

1 The first is, I wanted to clarify, Your Honor,
2 Elizabeth reminded me that we have indicated to the circuit that
3 we don't think there is a need for oral argument on this appeal.

4 So I think that, at this point, if we can advise
5 the circuit now that the claims process is complete and payment
6 is awaiting their ruling, it may help move that along.

7 And I also wanted to just note, Your Honor, that
8 we may have a law of diminishing returns on another respect as
9 well. And that is some of these people put their claims in a
10 year ago. The census statistics indicate that fifteen percent
11 of the US population moves every year. I suspect it's less than
12 that here given the age of this population. But we're going to
13 be losing people at the other end when you go to mail the check
14 where the address may have changed. So I worry that we're just
15 at the point now that we've given opportunities to individuals
16 and we may lose some folks who did everything on time earlier
17 and be unable to get them paid on this as well.

18 THE COURT: Yes, go ahead.

19 MS. CABRASER: Your Honor, one other thing -- and that
20 is a good reminder. The claims deadline was May 6th of this
21 year, and we do get calls from folks who have completed their
22 claims and are wondering when they will be paid. The appeal
23 before the Fifth Circuit does not relate to any of the benefits
24 under the class action settlement. It doesn't relate to claims
25 at all, and we would I think advise the Fifth Circuit that

1 claims, if and when claims administration is completed and we
2 would otherwise be able to send those checks to folks, we would
3 like to advise the Fifth Circuit that we're ready to go but for
4 the appeal before them which is on a complete different issue.

5 THE COURT: Richard, do you have any rebuttal comments?

6 MR. GETTY: Just real quickly. I hadn't heard the
7 BrownGreer presentation, which I think was excellent. Very
8 informative.

9 I have mixed emotions, too. I understand this is
10 discretionary. I guess the only thing I'd say is that the lower
11 participation rate because of time passage, age of the users of
12 VIOXX or whatever, Merck has ended up spending a lot less money
13 than they ever anticipated. And I guess the Court could
14 exercise its discretion and say, well, maybe we can get some
15 more participation using Merck's money. Which I'm always in
16 favor of. But I really have mixed emotions.

17 THE COURT: I do, too. We've tried all along to
18 accommodate the claimants. In Kentucky particularly, but also
19 New Mexico with their unique problem.

20 And, in this one, I had asked BrownGreer to give
21 us a periodic review. That, I thought, was helpful. And I hope
22 future courts do that. Because we picked up earlier on that the
23 response level was lower than anticipated, and so early on we
24 kind of shook the tree a little bit and stimulated some
25 additional notices. We didn't wait until the end. And so that

1 is sort of plugged in to the system, too.

2 Let me think about this. I'll come up with it,
3 but it seems to me that we've expended enough time and money and
4 effort on this matter. The truth of the matter is, people have
5 moved on. They don't -- also calls. We've just been through an
6 election cycle and you hate to answer the phone. People ask you
7 to do things, and you get angry with them because they call you
8 at crazy hours like dinnertime and in the morning when you're
9 trying to get off to work. And so I don't know how much people
10 respond to the telephone anymore. It looks like that's almost a
11 thing of the past, like the pigeon communications.

12 MR. GETTY: I think that a lot of people any longer
13 don't have anything about a cellphone.

14 THE COURT: That's right. That's right. It's one of
15 those by-gone things. The idea of telephone booths being
16 something that's very, very private. Heck, it was private
17 enough that that's where Superman went to change. And now
18 people say things on their cellphones that you can't believe
19 they are saying on their cellphones. You know more about them
20 now than probably their mothers did.

21 Okay. I appreciate the time that all of you all
22 have spent. And, Richard, I appreciate the vigor that you've
23 shown in this matter. It's what lawyers should be doing, so I
24 compliment you on that.

25 MR. GETTY: I appreciate that, Judge. We just tried to

1 do everything we can to get the claim level up to the maximum.
2 That's always been our goal.

3 THE COURT: I know that.

4 All right, folks. Thanks very much. See you all
5 next time.

6 CASE MANAGER: All rise.

7 (10:00 a.m., proceedings concluded.)

8

9

10 CERTIFICATE

11

12

13 I, Susan A. Zielie, Official Court Reporter, do hereby
14 certify that the foregoing transcript is correct.

14

15

/S/ SUSAN A. ZIELIE, FCRR

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Susan A. Zielie, FCRR

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