

ROUGH DRAFT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCT	MDL 1355
LIABILITY LITIGATION	Section "L"
	New Orleans, Louisiana
	Friday, April 25, 2003
	9:00 a.m.

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

APPEARANCES:

LIAISON COUNSEL FOR
PLAINTIFF:

HERMAN, MATHIS, CASEY & KITCHENS
BY: RUSS M. HERMAN, ESQUIRE
LEONARD A. DAVIS, ESQUIRE
820 O'Keefe Avenue
New Orleans, LA 70113

MURRAY LAW FIRM
BY: STEPHEN MURRAY, ESQ.
909 Poydras Street, Suite 2550
New Orleans, LA 70112

ZIMMERMAN, REED, P.L.L.P.
BY: CHARLES ZIMMERMAN, ESQ.
901 North Third Street, Suite 100
Minneapolis, MN 55401

BECNEL, LANDRY & BECNEL
BY: DANIEL E. BECNEL, JR., ESQ.
106 West Seventh Street
Reserve, LA 70084-0508

BARRIOS, KINGSDORF & CASTEIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ROUGH DRAFT

1
2 shouldn't have the burden of that under Rule 45 assuming all of
3 those expenses.

4 THE COURT: Well, I'll have to decide that, I won't
5 make any preliminary judgment on it. What I would require is
6 that there be some specificity of that as to how many hours,
7 who did it and what was needed and then I'll make that
8 decision. I don't know whether that's recoverable, but I'll
9 listen to it.

10 MR. TARRANTO: All right. Thank you, your Honor.

11 THE COURT: All right. Anything else from you, from
12 your standpoint?

13 MR. TARRANTO: No, I don't think so. Also, your order
14 in this case will be issued, would you then also do it as
15 sitting with jurisdiction for Eastern District of Virginia?

16 THE COURT: I certainly will.

17 MR. DAVIS: If you would be kind enough to get me the
18 dates when you guys could let us have access to the documents,
19 I'd appreciate that.

20 THE COURT: This is what we're going to do. I want
21 plaintiff counsel to contact you by Monday, get some dates that
22 you can live with, write me a letter within ten days from now
23 telling me, I don't care when you do it, if you all are
24 agreeable to a particular date, that's fine with me. But just
25 let me know what that is so that I can put that in the record.

ROUGH DRAFT

1
2 When I say a list, I'm not saying if it's a
3 letter, a letter from the lawyer to the defendant dated such
4 and such a time, regarding advertising or something of that
5 sort. Don't spell out what's in it, because obviously that is
6 not the way to do it. But get a log, a privilege log give it
7 to the plaintiff and then if the plaintiff wants it I'll
8 require that it be delivered to me, I'll look it over and make
9 the decision as to whether or not it is governed by the
10 privilege or not.

11 MR. TARRANTO: The reason I mentioned that, there
12 probably will be not many items that are going to fall under
13 attorney-client or attorney product privilege. As an example,
14 when we had some other two litigations involving the same
15 attorneys or plaintiff Herman Mathis. Degge produces over
16 21,000 documents and pages of material. And there is also a
17 privilege log. And I think the privilege log is only one or
18 two pages at most, but there were only a handful of items.
19 Most of the matters that were privileged concerned the privacy
20 rights of individuals where there were references and medical
21 records or medical information on individuals that required
22 redaction.

23 THE COURT: Right. There is no problem with that.

24 MR. TARRANTO: It was worked out. But it's a time
25 consuming process for Degge personnel, and we felt like we

ROUGH DRAFT

1
2 THE COURT: Let me be clear, I'm not saying that the
3 electronic documents will not be discoverable, I'm not
4 addressing that at this point. What I am addressing is hard
5 copy now and I'll revisit the electronic documents at a later
6 date, and I'll hear from you and keep an open mind on it. The
7 fact that I am requiring the hard documents is not an
8 indication that I will require the electronic documents. It's
9 also not an indication that I will not. I'm not focused on
10 that at this point. I'm only focused on the hard documents.

11 MR. TARRANTO: The effort to -- if I could raise a
12 couple of matters concerning the hard documents. There will be
13 some time involved in retrieving them and producing them. I
14 don't know exactly how much. But also those documents will
15 have to initially be reviewed by Degge personnel or counsel for
16 Degge to identify anything that's trade secret related or trade
17 related of individuals and there may be a handful of items that
18 are attorney work product or attorney-client privileged
19 material.

20 THE COURT: The way that it's done if you feel there is
21 some attorney work product and you pull those out, give me a
22 list or log on what you pulled out, just a description of what
23 the document is and give the list to plaintiff counsel,
24 plaintiff counsel will look at the list and determine and
25 decide whether or not those are significant.

ROUGH DRAFT

1
2 copies and not the electronic documents, they may not be
3 discoverable or they may be discoverable. The point is I make
4 no decision at all on the electronic documents.

5 On the hard copy documents, I expect that to be
6 worked out, and I direct plaintiffs' counsel to contact defense
7 counsel and get some times, dates and work those problems out.
8 If they can't, bring it to me and I'll act accordingly.

9 MR. DAVIS: And we will do that within the next 30
10 days.

11 THE COURT: I want that done within 15 days.

12 MR. TARRANTO: Your Honor, a couple of matters I may
13 raise. The person, as far as the time, the person who is going
14 to be responsible at Degge is the administrative assistant to
15 Dr. Jones, had surgery recently, a couple of days ago. The
16 woman is out for the next two to three weeks, so that'll fall
17 on Dr. Jones' shoulders, and she's got a lot of other
18 responsibilities.

19 THE COURT: I'm sensitive to that. That's enough said.
20 You work it out with the plaintiffs' counsel and let's make it
21 at a convenient time for her.

22 MR. TARRANTO: Another couple of related matters.
23 First of all, I greatly appreciate the court's willingness to
24 try to initially limit this to the hard documents rather than
25 the electronic because it raised monumental problems.

ROUGH DRAFT

1
2 you have an opportunity to look at the material that they've
3 tagged, which at that point is a considerable less number. If
4 they look through 2,000 documents and tag five, you only need
5 to look at the five documents to determine whether or not
6 you're going to give them or not give them. And then if you
7 have any problems with those five documents, tell me, I'll look
8 at them and I'll make that cut.

9 MR. DAVIS: And, your Honor, with respect to
10 electronic, we already have in place an confidentiality order
11 that should protect and avoid any concerns that anyone has as
12 to the plaintiffs looking at these documents. But what we
13 would be willing to do as is we've done with others is accept
14 the documents in their native format, native format or
15 alternative if Degge would allow us to use their computer
16 equipment, we will they then go in and do our own searches and
17 identify what we want and deal with the means of getting the
18 electronics off.

19 As your Honor is well aware, we have produced
20 probably more electronic information in this case than most any
21 other case in the country. We're very familiar with those
22 issues, and I don't see this as a huge problem provided we have
23 access to the electronic information.

24 THE COURT: Well, I'm not going to speak on the
25 electronic information at this point. I'm just looking at hard

ROUGH DRAFT

1
2 the hard copies. If there isn't, then we regroup and see how
3 we do with the electronic. If even that is necessary.
4 Hopefully it won't be necessary. But if it is we will have
5 some track record as to how it was done and some cooperation
6 demonstrated by the parties, which will be helpful to me at
7 that time in fashioning a solution.

8 So from the standpoint of the hard documents, it
9 would be my hope that these could be put in some kind of room,
10 on some kind of table, let the plaintiffs look through them.
11 Let them assemble them, let them do whatever they need to do
12 with them and tell you whether or not they need them copied.
13 If so, then it's their expense, not yours.

14 ^{*Davis*} MR. HERMAN: Your Honor, what we will be willing to do
15 and what we have done with other third parties is sometime in
16 the foreseeable near future we will send some representatives
17 to the Degge Group, we will spend the time going through the
18 documents, we will tag what we desire and we will pay the
19 reasonable cost for the copying of the hard copy documents,
20 consistent with what your Honor is saying.

21 THE COURT: What we have done in the past is required
22 the parties to have somebody from each side there, let somebody
23 from the defendant look over it, make sure that this is being
24 done satisfactorily, they know what they're seeing, what they
25 haven't seen, tag the documents, don't remove anything, then

ROUGH DRAFT

1
2 around I think March 19th, about five weeks ago, that the
3 majority of the effort plaintiffs' subpoena would require would
4 be devoted to reviewing the electronic files or electronic
5 documents and all of the attachments to them, whereas the hard
6 documents are still very time consuming because there is a
7 great volume of them, estimated that there are approximately 16
8 to 20 box of material by a rough estimate that would have to be
9 compiled and reviewed and produced.

10 But if they can narrow the scope to just the hard
11 documents, then that would make things, well, speedier and less
12 costly for everyone. Plus the plaintiffs and defendants might
13 be able to join in the effort of undertaking the burden of the
14 cost.

15 THE COURT: Either the cost or the amount, it should be
16 born by the plaintiffs who want to see the documents, they
17 ought to be the ones who have the responsibilities of going
18 through the documents. I don't have any problem if you put the
19 documents in a room and let them look at them and generally
20 look through the documents, make a decision as to which ones
21 they want copied and then it's their ticket, their expense to
22 copy the documents.

23 I don't know about the electronics at this point.
24 I suggest that what we do is to look first at the hard copies,
25 see whether or not there is any way of resolving it only with

ROUGH DRAFT

1
2 thereabouts, and that this would be a monumental problem, even
3 if it could be done it would occupy the full staff and it would
4 be costly and it would be problematic. It's not my intention
5 to do that. I want to see if there is a method of resolving
6 the problem so that you have as limited time, consequence or
7 effort expended as necessary. Any suggestions from you as to
8 how this can be done?

9 MR. TARRANTO: Yes, your Honor. One initial comment.
10 A couple of days ago I found out corrected information on
11 staffing of number of Degge personnel from the president. I
12 had previously gotten evidence and the evidence from the
13 assistant to the president, and I think there may have been a
14 difference in her perception of contracted personnel. The
15 actual number that Degge employees is not more than 23 and two
16 year ago it was approximately 48, so they've had a significant
17 economic downturn in loss of staff.

18 THE COURT: Right, I'm sorry to hear that.

19 MR. TARRANTO: Director of informatics who is their
20 computer person who is accepting the electronic files, but the
21 staffing is not the person that I mentioned in the papers. I
22 want to correct that right off the bat.

23 THE COURT: Thank you.

24 MR. TARRANTO: As far as trying to contain the costs,
25 we had made a proposal to plaintiffs' counsel in correspondence

ROUGH DRAFT

1
2 Now, talk to me a little bit about the
3 confidentiality, what is a problem, if any, with the
4 confidentiality order?

5 MR. COGAN: Your Honor, the good news, I think it's
6 easily resolved because the only problem we had is that we did
7 not want to be subject to jurisdiction in the Eastern District
8 of Louisiana per se. Therefore, I think we can solve this
9 problem just by having you enter a two line entry that the
10 confidentiality order that's in effect is hereby ratified in
11 your capacity as a judge of the Southern District of New York
12 under 1407(b). That's one way to do it.

13 THE COURT: I'll do it. That's the easiest way, if
14 that's satisfactory to you that will be done.

15 MR. COGAN: That takes care of it. Thank you very much
16 for your help. I appreciate your suggestion and I'll exercise
17 that order.

18 MR. DAVIS: Thank you, Brian.

19 MR. COGAN: Am I dismissed?

20 THE COURT: Yes, thank you very much for participating.

21 MR. DAVIS: Thank you, Brian.

22 THE COURT: Let's talk now about the Degge matter. I
23 am aware of your particular problem, you told me in your
24 answers that you have a company or represent a company that at
25 one time was a larger company, now you have some four people or

ROUGH DRAFT

1
2 the subpoena, but I think we've agreed with Plaintiffs Liaison
3 Counsel that we're going to produce documents that either
4 principally concern Propulsid or that in some material part
5 dealt with Propulsid, and that will alleviate the burden that
6 we would otherwise have of producing what could be an enormous
7 amount of useless documents.

8 THE COURT: I understand that that's acceptable to the
9 plaintiffs' counsel.

10 MR. DAVIS: That's correct. We have discussed that
11 with counsel for McKinsey and have agreed to the scope of the
12 subpoena duces tecum. And, your Honor, you're correct the only
13 issue that's remaining is McKinsey's desire for
14 confidentiality, and we have told McKinsey that we would abide
15 by Pretrial Order No. 5, which is already in place, and I
16 believe McKinsey's counsel has had an opportunity to look at
17 Pretrial Order No. 5 which is the confidentiality order that
18 your Honor has already issued in this litigation.

19 THE COURT: First, I do appreciate your cooperation
20 from the standpoint of the court, your court in New York and
21 also the court here; the cooperation of counsel is something
22 that this court appreciates, and so I compliment both plaintiff
23 and defendant in reaching an agreement, at least partially
24 reaching the agreement that you can live with regarding the
25 type of material.

ROUGH DRAFT

1
2 documents and the number of depositions have been staggering.
3 But in a lot of this material I have been sensitive to the fact
4 that it presents complex problems in cost, it presents complex
5 problems in just amount of time, material and also the
6 confidential aspect of it. I'm just not going to require
7 everything to be presented irrespective of cost, irrespective
8 of time, and irrespective of the sensitivity of the material.

9 But having said that, we have found in this
10 litigation that there are ways of handling those particular
11 problems. I first try my best to work with the lawyers to see
12 what their problems are and to see if I can come up with a
13 solution that their clients can either live with or accept. If
14 they can't, then I will act in a way that I feel is necessary
15 to act. So my need for discussing this with you is to get some
16 input from you and to see whether or not I can come up with a
17 solution that is less onerous to you, more acceptable to you.
18 If I can't do that, then I will find a solution to the problem
19 that just solves the problem.

20 So I am interested, first of all, in talking on
21 the McKinsey issue because I think that your issue is
22 confidentiality and I'm willing to hear from you.

23 MR. COGAN: Yes, your Honor. Brian Cogan. And I think
24 you are correct that the only issue we have between us is
25 confidentiality. We did have an earlier issue as the scope of

ROUGH DRAFT

1
2 designated when needed by the panel, and that's me in this
3 case, may exercise the powers of a district judge in any
4 district for the purpose of conducting pretrial depositions in
5 such coordinated or consolidated pretrial proceedings.

6 So when I'm speaking to you gentlemen, I'm
7 speaking as a judge of your respective districts and I will
8 hear you on that level.

9 There are several ways of doing it. I can come
10 out to your district and officially sit in your area or I can
11 do it by sitting in my district exercising my authority under
12 1407(b) to sit as a judge in your district. So I am actually
13 sitting not only in the Eastern District but in your two
14 respective districts.

15 First with the McKinsey matter, I am sensitive to
16 proprietary information and also to putting matters under seal,
17 and also I am sensitive to the need for confidentiality in many
18 of these matters because we have had all of those problems in
19 the MDL setting. And for your information, I have cases from
20 every state in the union, I have 30 class actions from 28
21 states, and it looks like there are about 10,000 or so
22 individual claims, at least that's what I'm advised, that
23 either have been filed or are pending filing. So it is a
24 rather extensive litigation.

25 The parties have thus far given up nine million

ROUGH DRAFT

1
2 COURTROOM AND PROCEEDING MOVED TO THE JUDGE'S CHAMBERS WITH
3 LENNY DAVIS AND MONIQUE GARSARD ALONG WITH BRIAN COGAN
4 REPRESENTING MCKINSEY & COMPANY AND LEON TARRANTO REPRESENTING
5 THE DEGGE GROUP BY TELEPHONE.)

6
7 THE COURT: This is Judge Eldon Fallon, the United
8 States District Judge from New Orleans. I have in my chambers
9 Mr. Lenny Davis and Mrs. Monique Garsaud. I am recording this
10 with the court reporter in chambers.

11 Who do I have on the line.

12 MR. COGAN: This is Brian Cogan from Stroock & Stroock
13 & Lavan from New York representing McKinsey & Company.

14 MR. TARRANTO: This is Leon Taranto with Schmeltzer,
15 Aptaker & Shepard.

16 In Washington, D.C. My client is a non-party, the
17 Degge Group, Limited.

18 THE COURT: Let me address both of you all first. I
19 have an MDL case going on in our district. I've been
20 designated as the transferee judge by the Multi District
21 Litigation Panel under Section 1407, Title 28. As all of you
22 know in Title 28 USC Section 1407(b) provides that it is the
23 judge or judges to whom such action are assigned, and I'm
24 talking MDL, the members of the judicial panel on
25 multi-district litigation and other circuit and district judges

ROUGH DRAFT

1
2 efforts of counsel and the court does appreciate that.

3 We will stand in recess now and get the people on
4 the phone that I have to talk to. The court will stand in
5 recess.

6 THE DEPUTY CLERK: Everyone rise.

7 THE COURT: Yes, our next meeting, let's get a date.

8 THE DEPUTY CLERK: Judge, how is Friday, May 23rd?

9 THE COURT: How is that?

10 MR. ZIMMERMAN: Is it possible to do it on a Thursday
11 of that week? I don't know if I'm available or not, but I know
12 that's Memorial Day weekend.

13 MR. HERMAN: It is.

14 THE COURT: How about Thursday, do you want to do
15 Thursday?

16 THE DEPUTY CLERK: Judge, depending on what you have on
17 the Monday. We could do it at nine.

18 THE COURT: Let's do it Thursday then.

19 THE DEPUTY CLERK: Thursday the 22nd.

20 THE COURT: How about the date for the end game.

21 MR. ZIMMERMAN: We are going to call my office and get
22 some dates.

23 THE COURT: Let me hear from you all and get some
24 dates.

25 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED IN THE

ROUGH DRAFT

1
2 nickel.

3 I just want to say we appreciate the fact that we
4 did not have to take 1,427 30(b)(6) depositions, and as a
5 result we were able to save Johnson & Johnson over \$50 million
6 in fees and costs.

7 MR. ZIMMERMAN: Your Honor, one statement. We would
8 rather not have those remarks from Mr. Campion, we would rather
9 have money.

10 THE COURT: The truth of the matter is that both sides
11 deserve credit. I've been continuously impressed with the
12 professionalism and the hard work and the effort that each side
13 has exhibited. I think they've put their emphasis on issues,
14 not personalities, and it has worked to the benefit of their
15 respective clients.

16 I think a lot of waste is created by counsel
17 fighting each other rather than fighting on the issues and
18 fighting on the legal matters. They somehow or another get
19 distracted and personalities take over. This hasn't happened
20 here and, therefore, the parties have been able to put their
21 resources, as well as their great intellects and abilities on
22 the issues and not personalities.

23 And the case has worked well so far. I'm a little
24 disappointed that we haven't been able to totally resolve it,
25 but we have come a long way and it has really been through the

ROUGH DRAFT

1
2 immense database. They proceeded by saying they wanted to do a
3 30(b)(6) deposition of the person or persons who did it.
4 Obviously there was no such creature. And they were taking
5 dozens of creatures.

6 I took comfort in the fact the degree of
7 corporation I received from them, primarily Mr. Davis who was
8 the point man, in standing down as we began to develop a
9 database. We developed a database, we gave them the protocol,
10 they made a few changes, we accepted the changes and we put
11 people to work on this. We used an outside outfit. It cost
12 Janssen about a quarter of a million dollars to develop this
13 database, which is now reduced to either one or two CDs, I
14 forget how much. And we gave it to them long ago.

15 This is a matter, which aside from some original
16 jousting never reached the stage of a battle in this podium,
17 worked out so that they have a database that they can use,
18 which is our database. They expressed some dissatisfaction to
19 the fact that the CD couldn't do more tricks than it could do,
20 but I think that they've solved that. And I think that it is
21 appropriate to note at this time on behalf of the defendants.
22 We thought the cooperation given to us by the PSC on that
23 subject was remarkable. Thank you, Judge.

24 MR. HERMAN: Your Honor, could I have those remarks
25 under seal. If that gets around the plaintiffs bar, I'm a dead

ROUGH DRAFT

1
2 remained constant now for about a year, and we don't see any
3 dramatic change up or down on that one. The number of
4 plaintiffs is evenly divided, approximately divided between
5 those in federal courts, either here or about to come here, or
6 on their way here, and those in various state courts. So those
7 may be of assistance.

8 Next, I have been informing the PSC of trial
9 status of various state court cases so they can fulfill their
10 responsibilities under the various orders you have entered and
11 they've asked for some additional information and we will
12 provide that.

13 Now, I should like to make a statement, I think I
14 mention it in charm, but I think it's appropriate that some
15 note be taken about Item VIII of the agenda which is about to
16 disappear from the agenda, the 30(b)(6) deposition regarding
17 studies. When someone gets around to writing the story of the
18 Propulsid litigation whenever it ends, both the plaintiff and
19 the defendant sides will take some comfort from what happened.

20 From time to time Mr. Herman or his colleagues
21 stand up here and bring what they believe to be defense
22 imperfections to our attention and Mr. Irwin or I stand up and
23 indicate how irresponsible those charges are. The issue of the
24 studies that were done by Janssen came on early in this
25 litigation. We're talking about an immense database, I mean an

ROUGH DRAFT

1
2 THE COURT: We haven't seen you in awhile. You were
3 picking a jury for over a year in Civil District Court.

4 MR. HERMAN: 18 months we picked a jury. I want to
5 tell you, my colleague Mr. Murray did one of the most
6 outstanding cross-examinations I've had the privilege to
7 witness yesterday and it's not over yet. So I want him well
8 rested for next week.

9 THE COURT: Let me hear from the defendants. Anything?

10 MR. CAMPION: Just one or two things, Judge. So there
11 may be no misunderstanding on the part of state or federal
12 counsel, you made a remark to the effect you understand there
13 have been several other trials, there have been a grand total
14 of two cases tried to verdict, the one before you, one that was
15 tried in a state court which is now before the Mississippi
16 Supreme Court, a third case is being presently tried in state
17 court in California. So that's the grand total of that.

18 Second, from time to time I have reported to the
19 court and to the PSC about the statistics that may be relevant
20 to an understanding of the Propulsid litigation. I advised the
21 PSC earlier this week that there are approximately 5,500
22 plaintiffs presently maintaining Propulsid lawsuits. And by
23 5,500 plaintiffs I mean a plaintiff group that may be a husband
24 or wife or someone's representative. Eight percent of those
25 cases or approximately 446 are death cases. The percentage has

ROUGH DRAFT

1
2 here takes ten, that will get 120 out. We'll see.

3 MR. HERMAN: We were furnished a list of upcoming
4 trials, we understand it will be supplemented with the names of
5 the counsel of record.

6 There really are no other issues. I did want to
7 state under fifteen that Mr. Zimmerman, Mr. Hill, Mr. Levin
8 have been talking to the defendants regarding any potential
9 settlement issues, and it's an ongoing process, and it may be
10 necessary for your Honor to convene a meeting just on that
11 issue.

12 THE COURT: Right. We have an End Game Committee,
13 Mr. Campion is representing the defendants on the End Game
14 Committee, and Mr. Levin and Mr. Zimmerman are representing the
15 plaintiffs on the End Game Committee. And I'm going to be
16 meeting with them to discuss some concrete proposals and how to
17 handle the end of the litigation, what we need to do before
18 ending it, what opportunities still exist in the MDL, and how
19 we go about moving the cases back to the states if need be.

20 MR. HERMAN: Your Honor, I think that that really
21 concludes the agenda. We've discussed the Robinson deposition
22 issue.

23 I just want to say it's a pleasure to be in your
24 court, it's nice to see all of your staff looking so bright and
25 young.

ROUGH DRAFT

1
2 March 13th, 2003, this is under 6.

3 THE COURT: Right, Motion For Class Certification.

4 MR. HERMAN: And we are going to be interviewing
5 potential class members, we're going to have to amend at some
6 point, substitute some class members. As I read Newberg, we
7 don't really need class members at all points, but we think
8 before we proceed to cert, we're going to have to have some
9 additional class member or members. Of course, the defendants
10 are going to have to have an opportunity to take any discovery
11 beyond the patient profile forms that they feel they need. And
12 we're going to be acting to do that. And I apologize for
13 skipping over that.

14 THE COURT: Okay.

15 MR. HERMAN: Mr. Zimmerman --

16 THE COURT: Trial Schedule, item 12. We should be
17 setting some more trials in this particular case. I'll look to
18 the parties again, I'll talk with you about that. But we ought
19 to move forward on the cases, at least that I have before me.
20 I can do it in several ways. I can ask all of my colleagues
21 around here, there are 12 of us now, and I can split the whole
22 docket up and each judge can take four or five and we'll get
23 rid of all of the cases, or I can do them myself. I'll talk
24 with you about that, but those are the opportunities. I am not
25 quite sure how many I have in this district, but if each judge

ROUGH DRAFT

1
2 same effort, an effort to resolve the case without a trial, if
3 possible. Thank you, Judge.

4 THE COURT: The reason I'm pushing on this obviously is
5 because I see the MDL, I see my role as an MDL judge coming to
6 an end soon, and before it does that I want both counsel to at
7 least be heads-up on the opportunities that an MDL affords.
8 The primary opportunity, of course, is as a discovery vehicle.
9 But the other opportunity is to afford a forum for trying to
10 resolve all of the cases, some of the cases, part of the cases.
11 And I understand the defendants' position regarding the fact
12 that some of the cases at this present time are the ones that
13 they want to target.

14 But you need to talk with plaintiffs' counsel and
15 you need to pick up the pace on it and see whether or not we
16 can resolve those. And then we will regroup and see where we
17 are at that point. But before the MDL closes down, exhaust
18 your opportunities in this way. I think it would be helpful
19 for both sides.

20 Trial schedule is the next item. I have under
21 advisement the Brock matter. I'll work on that this weekend
22 and hopefully get it to you by Monday or Tuesday.

23 MR. HERMAN: Your Honor, I apologize, I neglected to
24 bring up one of the most important matters. The class
25 representative Virginia Gail Jones died in a house fire on

ROUGH DRAFT

1 THE COURT: Ten would be Declassified Documents.

2 MR. HERMAN: Nothing new to report on that.

3 THE COURT: Mediation, eleven.

4 MR. HERMAN: With respect to mediation, Mr. Campion or
5 Jim, do you want to address that?

6 MR. CAMPION: We provided certain statistics which
7 appear in the report, we've also given to the PSC corresponding
8 statistics regarding mediations and resolutions nationwide. We
9 believe that the work Mr. Juneau has done to date has been
10 valuable. We look forward to working with him on ongoing
11 mediations.
12

13 We have given the PSC a list of approximately 10
14 or 12 matters which are now ready for mediation. We are
15 mindful about your remarks of the goal posts. We are trying to
16 move ahead to some written reduction of those cases we are
17 prepared to mediate, which will have parameters for this, that
18 or the other thing. We have worked with two members on PSC or
19 State Liaison Committee. I think we are making some progress.
20 Our position, however, remains as before which is we are
21 prepared to review three categories of cases and we are not
22 prepared to review the remaining.

23 I think that this is a worthwhile effort. Indeed,
24 if we were only dealing with one or two cases instead of all of
25 the cases we're dealing with, we would still go through the

ROUGH DRAFT

1
2 Monday and we will now.

3 Interrogatory No. 3 is CIS-NED-32 I told them what
4 I thought the answer was and is that CIS-NED-32 still is not
5 complete and there have been no revisions since May 18, 2002
6 when the draft was produced in Trish Robinson's last
7 deposition.

8 The remaining part of the Interrogatory No. 1
9 dealing with 30 odd other individuals or suppliers, consultants
10 if you will, seeking our information on payments to them is
11 voluminous, and it goes back many, many years in some cases for
12 these people or these consultants. Mr. Campion and his office
13 is working on this information directly with the client in New
14 Jersey, and he indicated in our transmittal that we expected to
15 have this response completed in May. If we run into problems,
16 I will let Mr. Herman and Mr. Davis know.

17 THE COURT: Let's just keep in touch.

18 MR. HERMAN: We accept those representations of counsel
19 on the record, and look forward to getting the information.
20 There is nothing further on the next issue, your Honor.

21 THE COURT: That's No. 7 on the agenda. Eight is
22 30(b)(6) depositions. Nine is Trust Account.

23 MR. HERMAN: That's correct.

24 THE COURT: Is that going all right?

25 MR. HERMAN: Yes, it is, your Honor.

ROUGH DRAFT

1
2 on Propulsid. We only got a response as to Dr. Zipes and we
3 discussed that. We got no response to Interrogatory No. 2, no
4 response to Interrogatory No. 3, no objections, and we also got
5 no responses in Interrogatory No. 1 to 30 individuals or
6 entities other than Dr. Zipes.

7 THE COURT: Is this in connection with how much they
8 were paid, are these expert witnesses?

9 MR. HERMAN: Yes. That's in Interrogatory No. 1.
10 Interrogatory No. 2 that we got nothing on request the
11 countries in which, as of January 2003, the defendants
12 continued to sell the drug product or contained Cisapride. And
13 in No. 3, state whether you have completed your research report
14 on CIS-NED-32, et cetera, which has been the subject of ongoing
15 controversy in this case now for more than two years.

16 THE COURT: I'll hear a response.

17 MR. IRWIN: Your Honor, I sent this first response, I
18 believe, last Friday, Good Friday, and both our office and
19 Mr. Herman's office was shutting down. So we delivered it on
20 Monday.

21 And we indicated in our transmittal in our
22 delivery that we would be answering Interrogatory 2 and 3
23 within a week. We will do that on Monday. I told Lenny Davis
24 on the phone that Interrogatory No. 2 having to do with foreign
25 labelling, I wasn't sure whether we would have that answered on

ROUGH DRAFT

1
2 THE COURT: You mentioned trials. We had a trial, of
3 course, here in this district, and I understand that there have
4 been several other trials. I just mention, because I have all
5 of the people here today, that it would be helpful if each side
6 would get together with their respective trial counsel while
7 it's still fresh in their minds and brain bust what problems
8 and/or difficulties and/or solutions which they have found to
9 various problems in their respective trials so as you go on
10 with future trials, you will have learned from what has
11 happened before.

12 Many things worked very well in the trial before
13 me and counsel, of course, were very proficient and did a good
14 job, which was no surprise to me. There were occasionally
15 glitches that came up during the trial that they can give
16 information on and make it easier for those who come after them
17 for future trials, I suggest you keep an eye on that and do it.

18 Let's see. The next item on the agenda is
19 30(b)(6) Depositions Regarding Studies.

20 MR. HERMAN: We have one as to merits. We served on
21 the defendants interrogatories, and I received from Mr. Irwin
22 on the 21st objections. What we requested in Interrogatory No.
23 1 is the same information that we've requested from Zipes, from
24 the other defendants, either consultants or individuals with
25 whom Johnson & Johnson has or a relationship with which bears

ROUGH DRAFT

1
2 & Company attorneys and representatives and the Degge Company
3 attorneys will be on those calls.

4 THE COURT: The next item on the agenda is Plaintiffs'
5 and Defendants' Respective Requests for Production of
6 Documents. Is that where we are or did I move too fast?
7 Motion for class certification.

8 MR. HERMAN: No. 6, as I reported to the court, the
9 discovery outstanding would entail some discussion of what
10 depositions will be used for perpetuation purposes and whether
11 stipulations can be made as to depositions taken for discovery
12 to be used as perpetuation.

13 Secondly, outstanding requests for admissions and
14 objections to those requests or responses, which have been
15 extended, the time limit has been extended. There are some
16 interrogatories, which we'll get to later on, the third party
17 subpoenas which your Honor has just spoken to.

18 And the issue as to the Robinson, her deposition,
19 your Honor has indicated that'll be taken after the Calvert
20 trial. And as soon as that ends we will notice that
21 deposition.

22 So those are the main discovery issues
23 outstanding, and we expect to have those completed within the
24 next couple of months and be prepared to talk about a class
25 cert day.

ROUGH DRAFT

1
2 MR. HERMAN: Your Honor, the next issue that we have
3 are third party subpoenas, and I understand that there are
4 telephone conferences --

5 THE COURT: I have some telephone conferences set up
6 after this hearing. I will speak with those individuals and
7 talk with them and see what their particular problem is. I
8 will cite them to Title 28, Section 1407 which specifically
9 says the judge or judges to whom such actions, and I'm talking
10 MDL, are assigned, the members of the judicial panel or
11 multi-district litigation and other circuit and district judges
12 designated when needed by the panel may exercise the powers of
13 the district judge in any district for the purpose of
14 conducting pretrial depositions and such coordinated
15 proceedings.

16 There are about eight cases dealing with this
17 particular matter, I reviewed them. The cases indicate that I
18 have the authority to act as a judge of that particular
19 district. I'll either go to that district or I'll operate as a
20 judge from this district with a hat on from that district.
21 I'll be speaking as a judge, as a district judge in the
22 district to which the defendant resides. But I'll explain this
23 information to them, and I'll see what their position is and
24 I'll, of course, listen to it and then make a decision on it.

25 MR. HERMAN: Your Honor, I understand that the McKinsey

ROUGH DRAFT

1
2 him, including everything he's billed directly or indirectly in
3 connection with Propulsid.

4 The relevant question asked me was this limited in
5 time? Yes, it's limited in time to his work on Propulsid or
6 Cisapride.

7 THE COURT: Okay. I understand the issue. Dr. Zipes
8 will have two weeks in order to get together any and all
9 documentation which he has in his possession regarding any
10 bills, any statements he rendered and also to indicate how much
11 total money he received from the defendants in connection with
12 his work on Propulsid and Cisapride.

13 If there is a particular problem, you can file
14 whatever is necessary and I'll deal with that particular
15 problem. But I do feel that plaintiffs have the right to that
16 information.

17 I'm limiting it to the documents that he has. I'm
18 not saying that he has to go and get documents from other
19 people, but if he's got documents, he ought to present them.
20 If he has copies of bills, copies of statements. I also agree
21 that he ought to know how much he received. I think that
22 that's a fair request.

23 MR. HERMAN: And I assume this includes his corporation
24 through which he bills?

25 THE COURT: Right.

ROUGH DRAFT

1
2 certification to the completeness of the documents.

3 We're a little -- I don't understand why there is
4 this need to have this certification from Dr. Zipes as to the
5 amount, as to the exact dollar figure, because he's given his
6 best testimony on that. And it troubles me that maybe this is
7 an effort to try to trap Dr. Zipes in some way. It seems to me
8 his fair sworn testimony is responsive to the subpoena that he
9 gave under oath and that a certification from the attorney who
10 collected all of the records, not only from Dr. Zipes but also
11 from the company, is more than a fair response.

12 So my biggest concern, Judge, is that somehow or
13 another this could be used to trick Dr. Zipes on a technicality
14 that would not be fair to him.

15 THE COURT: All right.

16 MR. HERMAN: I think the word is impeachment. I don't
17 know of any expert witness in my experience who didn't send
18 bills, doesn't have a bookkeeper or CPA and knows exactly how
19 much he's been paid and for what he's been paid. If Dr. Zipes
20 didn't keep records or perhaps he didn't report his income or
21 he's funneling it through this corporation, I don't know. I'm
22 not going to make those accusations.

23 I know what I'm entitled to get, and that is not
24 his sworn testimony of an estimate. I'm entitled to get a
25 response to a subpoena duces tecum of his records certified by

ROUGH DRAFT

1
2 "response" that one gets to a subpoena like that, and he was
3 deposed.

4 He gave sworn testimony on the witness stand at
5 the Daubert hearing as to his estimate of the number, which was
6 as the court I think will recall is roughly \$600,000. The
7 underlying issue was how complete was the document production.
8 Well, he produced everything that he had, but we also produced
9 everything we, being the defendants, that we had; and it was
10 the combination of all of these documents, some 9,000 pages of
11 documents, that was described I think inaccurately as a
12 document dump. Because not only did we produce these documents
13 in traditional CD ROM form but they were also accompanied by
14 the detailed index that the court is familiar with.

15 So the certification issue is an issue that really
16 relates to the completeness of the document production, because
17 he had given his testimony on the amount, the sworn testimony.
18 And the reason, as I think I said in court last time, that he
19 couldn't certify to the completeness of this was because most
20 of the documents, in fact, came from J&J.

21 So what we did is had Mr. Falletta, who is an
22 attorney, working under the supervision of Mr. Sharko -- as I
23 think the court knows has worked more closely with Dr. Zipes
24 than anybody else -- review all of the documents, Dr. Zipes'
25 documents and the company documents and provide the

ROUGH DRAFT

1
2 Dr. Zipes certify it as distinguished from Johnson & Johnson
3 producing a dump of various records, some of which may be
4 Dr. Zipes, some of which may be theirs, certified by a lawyer
5 that he's looked at them. We just don't think that satisfies
6 the requirements of the federal rules.

7 THE COURT: The issue is how much he received money
8 wise, is that the issue?

9 MR. HERMAN: Yes, remuneration from all work that he
10 has done for Johnson & Johnson through later corporations.

11 THE COURT: From a certain date to a certain date?

12 MR. HERMAN: Whether it's direct or indirect through
13 some corporation that he may have set up for which he moves
14 funds.

15 MR. IRWIN: May I be heard on that issue, please,
16 Judge?

17 THE COURT: Sure.

18 MR. IRWIN: I think the issue is also the production of
19 the documents. It was a subpoena duces tecum that was issued
20 to Dr. Zipes, and it asked for his documents that documented
21 the amount of money paid to him by J&J, by Janssen or by law
22 firms in connection with the Propulsid litigation. Dr. Zipes
23 has testified under oath, which is what you usually do when you
24 get a subpoena like that, about these amounts. He was asked
25 about it, his testimony is sworn, and that is customarily the

ROUGH DRAFT

1
2 cancer surgery at Ochsner, and I think he's probably at Ochsner
3 right now with her.

4 THE COURT: I understand. Well, he's being well
5 represented here.

6 MR. HERMAN: Patient profile form, Mr. Irwin.

7 MR. IRWIN: Your Honor, there are 189 as described in
8 the report that are overdue, 80 that are coming due. We
9 recently submitted to the court, and I believe I saw that the
10 court signed a 54(b) judgment on the last motion. The 189,
11 Judge, is a little more than I expected to see at this point,
12 so we are going to look at that carefully and we'll stay on top
13 of it.

14 THE COURT: Okay. That's fine. Service list is the
15 next item.

16 MR. IRWIN: Yes, your Honor, we have Ms. Lambert's copy
17 and I have a copy for Ms. Barrios for the committee and
18 Mr. Davis' copy.

19 THE COURT: Third Party Subpoena Duces Tecum is the
20 next item on the agenda.

21 MR. HERMAN: Your Honor, we have an outstanding
22 subpoena that we believe has not been satisfied by Dr. Zipes
23 who is principle witness for the defendants on a number of
24 issues, and what we've requested is that Dr. Zipes and his
25 corporation produce their records on their billings and that

ROUGH DRAFT

1
2 CDs that may need to be replaced. But these are issues that
3 plaintiffs can work out with the defendants.

4 THE COURT: All right. Anything on that? How about
5 state liaison counsel, do you have anything to add?

6 MR. HERMAN: Just one issue. Mr. Arsenault said that
7 he wanted to submit in camera any hours expended, et cetera,
8 which we have no objection to, and we worked it out with all
9 state liaison committee folks.

10 THE COURT: All right. With regard to the state
11 liaison counsel, I have received from Mr. Arsenault a request
12 that he be supplied and given access to the documentation
13 supporting the plaintiff liaison's proposal for withdrawal of
14 funds for payment of costs and attorney fees, and I did a
15 minute entry requiring Plaintiff Liaison Counsel to deliver
16 that material to him. The matter has been set for hearing, I
17 will take it up at that time. And if there are no objections,
18 I will deal with it perfunctorily. If there are objections I
19 will consider them and in due course rule on them.

20 MR. HERMAN: Our only concern, and Mr. Arsenault I'm
21 certain has no objection, that whatever material he receives
22 that's under seal will be kept under seal by him.

23 THE COURT: Yes.

24 MR. BECNEL: Your Honor, Mr. Arsenault, I don't know if
25 the court is aware. His mother has been in and out of major

1 ROUGH DRAFT

2 P R O C E E D I N G S

3 (STATUS CONFERENCE)

4 (FRIDAY, AUGUST 23, 2002)

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

7 THE DEPUTY CLERK: MDL No. 1355, In Re: Propulsid
8 Products Liability Litigation.

9 THE COURT: Counsel, make their appearance.

10 MR. IRWIN: Good morning, your Honor, Jim Irwin for
11 defendants.

12 MR. HERMAN: Russ Herman for the plaintiffs.

13 THE COURT: This is our monthly meeting with the
14 plaintiff and defendant liaison counsel and the state liaison
15 counsel. As typical, I have received from the parties a draft
16 of the report of the material that we are to be discussing, and
17 I'll take them in the order in which I have been given.

18 Update the Rolling Document Production and
19 Electronic Document Production, Item No. 1.

20 MR. HERMAN: May it please the court, good morning,
21 your Honor. Russ Herman for Herman Mathis and the Plaintiffs
22 Legal Committee. And with respect to Joint Report No. 22,
23 rolling document production is for the most part complete. We
24 have received 709,000 e-mails approximately of which 350,000
25 have been reviewed. And our review is ongoing, there are some

ROUGH DRAFT

New Orleans, Louisiana 70130
(504) 589-7776

Proceedings recorded by mechanical stenography, transcript
produced by computer.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

ROUGH DRAFT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY: DAWN M. BARRIOS, ESQ.
701 Poydras Street, Suite 3650
New Orleans, LA 70119

APPEARANCES CONTINUED:

SEEGER, WEISS, L.L.P.
BY: CHRISTOPHER SEEGER, ESQ.
One William Street
New York, NY 10004

LEVIN, FISHBEIN, DEDRAN & BERMAN
BY: ARNOLD LEVIN, ESQ.
510 Walnut Street, Suite 500
Philadelphia, PA 19106-3697

LEVIN, PAPANTONIO
BY: R. LARRY MORRIS, ESQ.
316 S. Baylen Street, Suite 600
Pensacola, Florida 32501

ANASTOPOULA LAW FIRM
BY: SAM ALLEN ESQ.

FOR DEFENDANTS:

IRWIN, FRITCHIE, URQUHART &
MOORE, L.L.C.
BY: JAMES B. IRWIN, ESQUIRE
MONIQUE GARSAUD, ESQUIRE
400 Poydras Street, Suite 2700
New Orleans, LA 70130

DRINKER, BIDDLE & SHANLEY
BY: THOMAS F. CAMPION, ESQ.
500 Campus Drive
Florham Park, NJ 07932-1047

OFFICIAL COURT REPORTER: Karen A. Ibos, CCR, RPR
501 Magazine Street, Room 406

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ROUGH DRAFT

MR. TARRANTO: Yes, your Honor.

THE COURT: Okay. Thank you very much for visiting with us, sir.

MR. TARRANTO: Thank you, your Honor.

THE COURT: Thank you, bye-bye.

MR. DAVIS: Thank you.

(WHEREUPON, THE PHONE PROCEEDINGS WERE CONCLUDED.)

REPORTER'S CERTIFICATE

I, Karen A. Ibos, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Karen A. Ibos, CCR, RPR
Official Court Reporter