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CHAMBERS OF
U.S. DISTRICT JUDGE
ELDON E. FALLON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: PROPULSID PRODUCTS MDL No. 1335
LIABILITY LITIGATION SECTION "L"
New Orleans, Louisiana
Thursday, May 17, 2001
9:00 a.m.

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

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P R O C E E D I N G S

(THURSDAY, MAY 17, 2001)

(STATUS CONFERENCE)

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

8 THE DEPUTY CLERK: Propulsid Products Liability
9 Litigation, MDL 1355.

10 THE COURT: Counsel make the appearance for the record,
11 please.

12 MR. HERMAN: Good morning, Judge Fallon, may it please
13 the court. My name is Russ Herman with Herman Mathis of New
14 Orleans, and I'm here on behalf of the PSC.

15 MR. IRWIN: And Jim Irwin for defendants.

16 THE COURT: We're here for the monthly status
17 conference. Counsel have given to me a proposed agenda, and
18 we'll take it from the top.

19 No. 1 - the virtual document depository. Counsel
20 report that they have been producing documents in CD ROM format
21 and that's serving a lot of the same purpose that they were
22 trying to accomplish in the virtual discovery document
23 depository, and feel at this point it may not be necessary any
24 longer to pursue the establishment of a virtual depository. Is
25 that about it?

ROUGH DRAFT

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2 MR. HERMAN: Yes, your Honor.

3 THE COURT: Let's go to No. 2, the master complaint and
4 answer.

5 MR. HERMAN: We're waiting a response from defense
6 counsel. After we got it we may be able to resolve the issue
7 I think, indicate to that court that Mr. Levin, Mr. Murray,
8 those firms are working on a master complaint so that in the
9 event that the Court rules we must have master complaints
10 and/or we reach some agreement with the defendants, it'll be
11 ready to go without a delay.

12 THE COURT: I'm ^{aware} ~~conscience~~ of the problems associated
13 with it. A situation like this poses rather difficult,
14 complicated problems involving the class actions and various
15 prescriptive periods and what is necessary to trigger the
16 prescriptive period and so forth. But I do think the concept
17 is worthwhile pursuing to see if we can get some order into a
18 rather chaotic situation. But I do understand the difficulty
19 with it.

20 Let me hear from the defendant.

21 MR. IRWIN: Your Honor, Mr. Herman and I are still
22 trying to learn how to download attachments from our e-mails,
23 but we did e-mail his office on Tuesday, late Tuesday I believe
24 our response, our position paper so his office does have it.
25 And we had hoped to get it to him earlier, and I can certainly

ROUGH DRAFT

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2 understand why they have not had a chance to take a look at it
3 yet. But it's in your computer system.

4 MR. HERMAN: Being computer disadvantaged, I'm certain
5 Mr. Irwin is right and we'll review it today and we'll get a
6 quick response.

7 THE COURT: All right. No. 3 - the document
8 production, how is that going?

9 MR. HERMAN: We received 700,000 pages of documents
10 this week, we're advised by defense counsel we'll have another
11 800,000 documents by the end of June, that would constitute 3
12 million pages of documents having been furnished by the
13 defendants. They apply to domestic issues only.

14 Electronic discovery should proceed at some time
15 in June and following that some foreign document discovery
16 consistent with this court's rulings and the agreement of
17 counsel. Basically it's proceeding in regular order. It's
18 time consuming for the defendants and for the plaintiffs, but
19 we have not had any substantial delays or impediment to this
20 progress.

21 THE COURT: How about coordinating with states, is that
22 working out with the document production procedure?

23 MR. HERMAN: I believe that they're receiving
24 simultaneous production. We have agreed that in any event that
25 there's some problem with the state folks, they haven't

ROUGH DRAFT

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2 received documents, they get in touch with Mr. Irwin and either
3 Mr. Irwin provides copies of whatever documents they say they
4 haven't received or we will provide them after consulting with
5 Mr. Irwin.

6 THE COURT: Mr. Arsenault, do you from the state
7 standpoint have any input on this?

8 MR. ARSENAULT: We're working on that, your Honor, and
9 we've been attending the depositions that have been noticed by
10 the state attorneys and that's a good opportunity for us to
11 network with those people to get lists of people who have cases
12 and so forth.

13 And the latest thing in our radar screen are
14 individuals who have cases in state cases that they're
15 attempting to monitor and all of that is working pretty well
16 and the depositions have been a good opportunity for us to
17 network.

18 MR. HERMAN: I want to thank on behalf of the PSC
19 particularly Mr. Arsenault and Ms. Barrios who have attended
20 these depositions. I want to report to the Court that there is
21 now an opportunity for any lawyer, if they desire, to monitor
22 from their own offices via the internet any deposition that's
23 taken.

24 We have reached an agreement with defense counsel
25 this week that with respect to depositions taken in state cases

ROUGH DRAFT

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2 that are not cross noticed will be advised of those notices
3 when they're issued so that we can participate and monitor
4 those depositions. There is one deposition that we were not
5 present at, and defense counsel has graciously indicated that
6 they'll provide a copy of that deposition at our cost. We
7 appreciate that.

8 THE COURT: Okay. Fine. I do from the Court's
9 standpoint appreciate the cooperation that counsel are
10 extending to each other. Let's keep aware of the fact that the
11 discovery aspect of this case is somewhat of a procedural
12 vehicle, it's only a vehicle to get to the substance, to carry
13 the substance to the trial, carry the substance to the
14 settlement table, whatever.

15 If you focus too much on the vehicle and it gets
16 stalled, you never get there. And so it's necessary to focus
17 on the important parts of the case and not be distracted, and I
18 think all of you are doing that and I appreciate it from the
19 Court's standpoint.

20 MR. HERMAN: There is one other state liaison matter
21 that your Honor asked the plaintiffs particularly to address.
22 Your Honor is interested in having a meeting with state liaison
23 counsel. I wish to advise the Court that Mealeys is having a
24 Propulsid education conference in New Orleans scheduled for the
25 14th and 15th of June.

ROUGH DRAFT

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2 Permitting your Honor's schedule and your Honor's
3 desire, the PSC would be agreeable to hosting a breakfast
4 meeting for your Honor with the PSC state liaison counsel or
5 whomever your Honor thinks should be present. We can do that
6 at the court, we can do it at our office, we can do it some
7 other site.

8 But I think since there is already going to be a
9 large number of Propulsid lawyers in town those dates, any of
10 those dates meet with your Honor.

11 Secondly, I would suggest, and I apologize to Jim
12 because I haven't had a chance to discuss it, I was only
13 alerted this morning, that perhaps it might be time saving, et
14 cetera, if the June conference was scheduled on the Thursday of
15 that week, which I believe is the 14th, rather than the next
16 Thursday which is the 21st. I'm suggesting that perhaps your
17 Honor could meet with liaison counsel according to your
18 schedule and the PSC and defense counsel monthly meeting with
19 your Honor could also be the same date.

20 If that is not agreeable and it doesn't comport
21 with your Honor's wishes and schedule, then I would suggest a
22 meeting, your Honor, with the state liaison counsel before the
23 regular third Thursday meeting and, again, the PSC would offer
24 to host a continental breakfast or something of that sort for
25 your Honor to meet with the state liaison folks.

ROUGH DRAFT

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2 THE COURT: I'll have to get with counsel to see if I
3 can work it out.

4 MR. HERMAN: Of course the defense counsel may have
5 some conflicts, too.

6 MR. IRWIN: Judge, we have no problem with the notion
7 of a meeting with the state liaison counsel on the 14th or
8 15th, we think that would be a very constructive thing to do.
9 However, we do have a scheduling problem with changing the
10 monthly status conference and moving it up a week. Mr. Campion
11 can't be here and, of course, Mr. Campion needs to be here for
12 that.

13 THE COURT: I'll work it out. We'll get with you all
14 to see what we can do with that. I do want to meet with
15 liaison counsel.

16 At the appropriate time I would also like to meet
17 with the entire PSC to hear from each of the members as to what
18 each of you are doing, what you have done, what you plan to do.
19 Then I'd like to then meet either on the same date or at
20 another time when it's convenient with the parties to meet with
21 the defense group to get the same type of report from the
22 members of the DSC.

23 But I'll get with liaison counsel and select some
24 dates that I can meet with each group.

25 MR. HERMAN: In that connection, your Honor, I had much

ROUGH DRAFT

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2 earlier at an earlier conference with defense counsel and your
3 Honor suggested that it might be instructive for the Court in
4 terms of what the work effort is of the PLC. I must say I've
5 had cooperation from every law firm.

6 For a view, a tour of the document depository
7 itself either by yourself or by your staff or yourself and your
8 staff, I think it would give your Honor at an early stage a
9 very accurate view of the work and work product that the PSC
10 has ongoing and is producing. And I throw that out as a
11 suggestion also.

12 THE COURT: Anything from defense counsel on the
13 document production, any problems you're having?

14 MR. IRWIN: I knock on wood when I say this, but we're
15 optimistic about meeting the June 30th deadline that we
16 reported to your Honor over the last couple of months and then
17 we will turn to the foreign production after that.

18 And I will be most grateful to join and willing to
19 join in the inspection of the plaintiff's document depository
20 if you invited me.

21 MR. HERMAN: Your Honor, Jim, I'll invite you to have
22 dinner at my home, but I don't think I'll invite you to the
23 depository. Unless, unless it's reciprocal and then we will
24 certainly accept the invitation.

25 THE COURT: Let's see. Next item is electronic

ROUGH DRAFT

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2 service, Verilaw, how is that working out?

3 MR. HERMAN: Pretty well. Mr. Irwin and Mr. Davis have
4 met several times. They are in contact with the president of
5 the Verilaw, which the security has to be upgraded and needs to
6 be implemented and we've agreed on cost sharing to do that.

7 So there is a security issue there that we're
8 working on and will be remedied.

9 THE COURT: That's important to focus on because you
10 have to have some comfort with that, and so it's important that
11 you at least get a handle on the security aspect of the system.

12 MR. HERMAN: Your Honor, in that connection, I have a
13 docket sheet I'd like to present to the Court, I've yellow
14 tagged it. The docket sheet notes sealed material but we have
15 no indication of what that sealed material is. And we need at
16 least some more identification rather than just an indication
17 that the material is sealed.

18 THE COURT: Any problem with some log?

19 MR. IRWIN: No, your Honor. We agree with that. That
20 is an item, a new agenda item for your Honor at the end of the
21 agenda, and we both agree that some sort of descriptive title
22 would be appropriate.

23 THE COURT: What I'd like each of you to do is to focus
24 on something like a privilege log that we use in dealing with
25 privilege objections.

ROUGH DRAFT

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2 MR. HERMAN: To, from, date, general subject matter.

3 THE COURT: Just basically a brief description of what
4 the material is without disclosing its substance. That ought
5 to be able to be worked out, the concept of the privilege log
6 is where you need to start to fashion something each of you can
7 live with.

8 Okay. We talked about state liaison counsel.
9 Anything further on that?

10 MR. HERMAN: No, your Honor, not from my end.

11 MR. IRWIN: Judge, may I take us back to Verilaw for
12 just a second?

13 THE COURT: Sure.

14 MR. IRWIN: We think the system is working very well.
15 We believe that it's very convenient to serve electronically.
16 I believe that the security questions will be worked out.

17 I just wanted to report to the Court that since
18 we're having a few new defense attorneys come on board, we want
19 to make sure that they get properly registered, so we'll be
20 filing a motion today or tomorrow, a joint motion to supplement
21 Pretrial Order No. 4, I believe, which is the original Verilaw
22 order, providing that new defense counsel execute a form
23 similar to the kind that plaintiff counsel are executing
24 setting forth their e-mail address and what not.

25 We're learning as we go along a little bit with

ROUGH DRAFT

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2 this E service, but it's a very good device.

3 THE COURT: Well, you are on the cutting edge in this
4 litigation technology and I think we're going to find that in
5 the learning process we've got to be flexible enough to
6 recognize that if something doesn't work we have to jettison it
7 and seek a different route always keeping an eye on the
8 ultimate objective. But with regard to new or additional
9 counsel, the ball is in your court; let me know if or when it
10 is appropriate and I'll deal with it.

11 What about the Item 6, electronic production?

12 MR. HERMAN: We'll be presenting the joint motion and
13 the exhibits to the joint motion to your Honor this afternoon.

14 THE COURT: How about the 30(b)(6) deposition?

15 MR. HERMAN: Yes, the 30(b)(6) deposition of a
16 corporate representative will be taken in Beerse, Belgium on
17 June 5th, 2001 by David Buchanan of Mr. Seeger's firm and
18 Leonard Davis. Arrangements have been made, we've had
19 continuous discussions with Mr. Campion and do not anticipate a
20 problem.

21 We particularly appreciate Mr. Seeger's firm's
22 participation in the 30(b)(6) deposition and the electronic
23 discovery. So they're proceeding and proceeding well, your
24 Honor.

25 THE COURT: Next item is the plaintiff profile form,

ROUGH DRAFT

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2 looks like while you're getting some from the defendant's
3 standpoint you need more. Is there anything appropriate at
4 this time for the Court to do? What's your discussion or input
5 as to what I can do?

6 MR. HERMAN: If I might address the issue and then I'll
7 turn the microphone over to defense counsel. We've agreed and
8 defense counsel provides us weekly with a list of the attorneys
9 and cases in which patient profile forms have not yet been
10 returned. At that point we write every attorney and we advise
11 every attorney that's on the list of the various deadlines and
12 what they should do.

13 And in an adjunct to that, after consultation with
14 defense counsel, any new plaintiff or attorney receives from
15 the PSC this letter notifying the new lawyers, new plaintiff
16 lawyers of who the defense liaison counsel are, the address,
17 phone number, a Verilaw questionnaire, the court's web site,
18 Pretrial Order No. 4, and particularly under No. 5 deals with
19 the patient's profile form.

20 So not only are attorneys getting follow-up
21 letters who are already of record, but any new attorney is
22 specifically getting something from the Plaintiffs Legal
23 Committee regarding the patient profile form and other issues
24 and orders which this Court has directed. Jim.

25 MR. IRWIN: Judge, after we send the weekly letter to

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2 Mr. Herman's office describing, according to our tally, what is
3 overdue and what's coming due, we then follow-up with a letter
4 directly to the enrolled plaintiff counsel. If the PPF forms
5 are 30 days overdue.

6 We have started that process and I think we've
7 reported to your Honor here in the joint report that we sent
8 out 22 such letters recently. If we do not get -- in response
9 to those letters we have gotten a couple of phone calls. We
10 usually work up an agreed deadline date. We confirm it in
11 writing.

12 And if we get to next month's conference in June
13 and we have some problem cases that are not resolved, that may
14 be the first time we come to your Honor. And we will come to
15 your Honor with what we believe is an appropriate record of
16 letters and notices.

17 THE COURT: And what I will do at the appropriate time
18 is issue an order, a Rule to Show Cause why the cases should
19 not be dismissed. I would give a date, week or two, whatever
20 is appropriate. I will need some input from plaintiff's
21 counsel on that.

22 I don't want to willy-nilly dismiss cases, but I
23 think it is appropriate to dismiss a case in which nothing is
24 forthcoming after diligent requests. If people don't cooperate
25 I'm ready to dismiss their case.

ROUGH DRAFT

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2 MR. IRWIN: Judge, on one other matter. In response to
3 your new consolidation orders where you indicate now in the
4 minute entry and in the order that new counsel should contact
5 the plaintiff's liaison counsel and the defense liaison
6 counsel, I can report to your Honor that I am now getting phone
7 calls from those newly enrolled attorneys and I think that that
8 is helping the communication process. I'm assuming that
9 plaintiffs liaison counsel is getting calls like that as well.

10 THE COURT: Okay. Depositions in state matters cross
11 notice.

12 MR. HERMAN: Your Honor, if I might step back for just
13 a minute.

14 Your appointed plaintiffs committee recognizes it
15 has certain fiduciary obligations to the attorneys around this
16 country who by MDL, many of them file in state court, they're
17 removed, that's not a pleasant view that they take of the
18 removal.

19 With all due respect to the Court and defense
20 counsel, we send letters and we answer calls, they're not meant
21 to give us cover. They're meant to alert these attorneys that
22 they have certain obligations to fill out these forms. But I
23 would be remiss if I didn't say on their behalf that there are
24 considerable delays these attorneys face in obtaining medical
25 records in these cases that are a bit unusual.

ROUGH DRAFT

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2 When I say these cases, not just this case but in
3 any case that involves a drug that's been taken off of the
4 market. Many of these individual claimants may have been on
5 Propulsid, for example, a number of years back and the delay in
6 getting some of the medical records in order to answer these
7 plaintiff profile forms, we have been advised and we've looked
8 into it ourselves, can be considerable.

9 I would expect that, your Honor, to follow your
10 Honor's orders, I would expect that these folks do have notice.
11 I would not be surprised, however, that when Rules to Show
12 Cause come forward that there are attorneys who for one reason
13 or another may not have paid the attention to the matter, but I
14 will expect there are a number who have paid attention and who
15 have faced some delay, not of their own making with regard to
16 obtaining enough medical records.

17 One of the problems in these cases that's
18 different from the usual case is that physicians, many of them
19 because of advice they've received regarding learned
20 intermediary and potential medical negligence exposure in
21 concomitant and correlated matter arising out of the same facts
22 are not very cooperative with a number of plaintiff's counsel
23 in providing their own patient's records necessitating either
24 arbitration or state litigation just to get a physician
25 records. So I point that out.

ROUGH DRAFT

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2 I also point out that unfortunately a number of
3 states have laws still on the books which enable hospitals not
4 to produce patient records which are complete. I don't offer
5 these as excuses because I believe that attorneys have an
6 obligation to complete the best they can these forms, get them
7 in and make a note. I have been unable to answer this question
8 because of such and such.

9 But I think that it is incumbent upon the
10 plaintiffs legal committee to at least point out on the record
11 to the court that this is not perfunctory performance of a
12 duty. There are certain obstacles here.

13 THE COURT: I am aware of that and I think all of us
14 have been there and done that with these and other cases, but
15 we also know in cases like this that there are some litigants
16 or other attorneys who knee jerk the situation, file and join
17 in something at an early stage before analyzing the long term
18 commitment and then they just forget it and it just goes by the
19 board and nothing is done.

20 And we can't let that happen. The defendants are
21 participating in the discovery process, the other side has to
22 participate in the discovery process, too. I understand and
23 that there may be good reason for a delay and I'll give a Rule
24 to Show Cause rather than just dismiss it, because I do think
25 that every case involves a different situation, but the

ROUGH DRAFT

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2 litigant's attorney ought to come before the court and say
3 basically what you've just said.

4 But they have to do something to show that they're
5 serious or wish to pursue the matter. If they're not, then
6 they'll be out of the lawsuit.

7 MR. HERMAN: Your Honor, we will following the hearing
8 today send out an additional letter to all counsel indicating
9 there are deadlines, and in the event they can't complete the
10 profiles for some reason they should end in what they have by
11 the deadline with an explanation of why they're unable to
12 complete the forms and we'll attempt to resolve those
13 incomplete form issues with defense counsel.

14 THE COURT: All right. Let's go to the next item:
15 Deposition in state matters, No. 9.

16 MR. HERMAN: Yes. The deposition of Stephen Spielberg,
17 Ed Jansen, Vice-president of Pediatric Drug Development
18 occurred on May 10th and 11th. Mr. Arsenault and Ms. Barrios
19 monitored that for the PSC. I believe, I don't know whether it
20 was Richard or Dawn, but one of you attended by internet.
21 Richard.

22 THE COURT: How did that work out?

23 MR. ARSENAULT: It worked out very well, Judge. You
24 have the realtime transcript, you can actually see the
25 deponent. You can hear all of the dialogue and there's even a

ROUGH DRAFT

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2 menu of objections that you can click on if you want to make
3 objections to preserve your rights and so forth.

4 And then there are chat rooms if you want to be
5 able to network with one or two colleagues to be able to visit
6 with them. It's extraordinary technology.

7 THE COURT: How do you deal with the objection, if you
8 have an objection? Can you alert the person that's asking the
9 question?

10 MR. ARSENAULT: Apparently the court reporter is
11 monitoring, there are about 10, 12 objections, generic
12 objections, and you click on and the individual monitoring it
13 at the location, that goes right to the court reporter at that
14 time.

15 MR. HERMAN: We're going to be providing specific
16 information to the PSC members as to how they may monitor these
17 depositions on the internet as they occur. We'll also
18 communicate that to the Court in the event that the Court has
19 inquiries or would like to investigate how this technology is
20 working.

21 THE COURT: Sounds good, sounds interesting. Anything
22 from defense counsel on that?

23 MR. IRWIN: Judge, I don't think we have anything to
24 add to that. The depositions in some instances are being cross
25 noticed and others are not, and we are communicating those to

ROUGH DRAFT

1
2 the Plaintiff Steering Committee.

3 THE COURT: The important thing or better stated the
4 purpose for cross noticing is take the deposition one time and
5 have it available for use in multiple proceedings.

6 MR. HERMAN: Your Honor, again, we're doing the best we
7 can to cooperate. Our rights have been reserved in these
8 depositions that we have not noticed or initiated. There are
9 two views, one's a pop gun just go in and take depositions.
10 The other view, and it's a view to which your court appointed
11 committee subscribes, as you get the documents first you review
12 them and then you take depositions.

13 We certainly don't intend to go over the same
14 material, but I am certain we're going to retake some of these
15 depositions to the extent that we have analyzed the documents
16 once they're all in.

17 I have a printout on the technology that perhaps I
18 should read something into the record. It's internet
19 depositions, it's I-DEP, L.L.C., 312 North May, Suite 100,
20 Chicago, Illinois. There's a toll-free number 800-498-IDEP.
21 That's 800-498-4337. There's a fax number, 312-738-0748.

22 And anyone that will like to monitor these
23 depositions may contact this outfit, and I have this printout
24 for the Court.

25 THE COURT: Let's make sure we put that on our website,

ROUGH DRAFT

Jonathan.

The next item on the agenda is No. 10, subpoena, what's going on with FDA subpoena?

MR. HERMAN: It's moving along. In fact, we received, Mr. Irwin and I, the letter this morning from the FDA, I'll just provide copies to the Court. Without going into any great detail, they've accelerated their production, a procedure has been negotiated for the production of many of the documents. It's outlined in DHH's letter of May 16, 2001 by Ms. Taylor, chief associate counsel, addressed to Mr. Irwin and Mr. Davis with copies to Ted Parr who is consultant to the PSC and then Ken Conour, defense counsel.

Particularly want to recognize in connection with ongoing discovery Mr. Gauthier's firm, Mr. Sadin's firm in addition to the other firms I've mentioned, who have participated and will be participating in connection with the FDA discovery that we intend to proceed with.

THE COURT: Any input from defense counsel on that?

MR. HERMAN: Just one more issue with regard to this. Ms. Evans and Mr. Papantonio's firm have been invaluable in her advices regarding science issues as well as FDA issues.

MR. IRWIN: Your Honor, our input would be that we have found that the FDA in this instance has been very accessible, which is not always been the case in my experience over the

ROUGH DRAFT

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2 years.

3 And I don't think that is a criticism, I think
4 it's a fact, I think it's a fact of life. But I think they
5 have been very accessible. Ms. Taylor is the contact that we
6 deal with at the FDA, she is responsive to our phone calls.

7 Mr. Davis and I spoke to her the other day. She
8 had a couple of issues, we tried to respond to those in
9 writing, and the letter that is before your Honor is response
10 and follow-up to those issues. My impression is the FDA is
11 being very cooperative in this regard.

12 MR. HERMAN: There may be some time delays if there is
13 a problem as we addressed, your Honor, in our last meeting, we
14 certainly will call them immediately to your attention. But I
15 think as Mr. Irwin has indicated to the Court and as the letter
16 indicates, the FDA is attempting to be responsive and certainly
17 acting in the best interest of its agency as well as the
18 litigation itself.

19 THE COURT: I'm glad to hear that, because the subpoena
20 is significant and the court will stand behind the subpoena.

21 MR. HERMAN: We appreciate that, your Honor.

22 THE COURT: The next item is plaintiffs time and
23 billing matters.

24 MR. HERMAN: Yes. They're proceeding as the court has
25 ordered. Some initial explanations were needed to folks who

ROUGH DRAFT

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2 were submitting time and billing. Those problems were small.
3 They've been worked out and we're receiving things timely and
4 consistently, and the outside CPA that we retained to audit,
5 check the time and billing has indicated that they're receiving
6 cooperation from every member submitting.

7 There may be one issue of attorneys, regarding
8 attorneys who are not either liaison counsel nor are they court
9 appointed members of the plaintiffs committee that we will
10 address, if need be, with the Court after requesting in camera
11 discussion. But hopefully we can resolve those by next month.

12 THE COURT: Okay. Next item: Defendant liaison and
13 lead counsel.

14 MR. IRWIN: Your Honor, we're following the question of
15 whether we think there is a need for an additional defendants
16 liaison counsel to represent and manage the interests of
17 pharmacy defendants or other defendants. At the present time
18 from our point of view there is not such a need. We believe
19 that we can communicate adequately at this point.

20 However, there may be the viewpoint from some of
21 the other attorneys involved may be different. I don't know.
22 I have spoken to a number of new pharmacy attorneys recently
23 and none has expressed that view at this point. So I think
24 from our point of view we are comfortable in proceeding as we
25 have so far.

ROUGH DRAFT

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2 THE COURT: Well, as I said earlier, the ball is in
3 your court. If you get to the point where you need additional
4 liaison counsel. You have to bring it to the Court's attention
5 and I will be responsive to it.

6 MR. IRWIN: We understand that, your Honor.

7 THE COURT: Next item: Pretrial order providing
8 discovery on ongoing studies.

9 MR. HERMAN: We're continuing to discuss those issues.
10 Defense counsel has indicated that they have produced some
11 information of ongoing studies and will attempt to help me
12 shortcut finding those documents by giving their best effort to
13 produce the Bates numbers that relate to ongoing studies.

14 We don't think at this time it's an issue. We
15 still have much more discussion to do in terms of the ongoing
16 studies and hopefully we can resolve it the same way we did
17 with electronic production. We think we can save the Court's
18 valuable time and reach some middle of the road agreement by
19 continuing to discuss this issue.

20 MR. IRWIN: Your Honor, we agree with that. We think
21 we should be able to resolve that. And we have also spoken to
22 Mr. Davis about discovery we will be directing to the
23 Plaintiffs Steering Committee on the subject of ongoing studies
24 which should go out shortly.

25 THE COURT: We have some new matters on today's agenda

ROUGH DRAFT

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2 that you want covered; first, the third party subpoena duces
3 tecum.

4 MR. HERMAN: We advised the Court that we have issued
5 on May 8th a subpoena duces tecum to the North American Society
6 for Pediatric Gastroenterology for documents only. Secondly,
7 we've advised defense counsel that we will be issuing subpoena
8 duces tecum and perhaps identification of document depositions
9 in connection therewith to various advertising agencies which
10 were employed by the defendants and which we have reason to
11 believe had some role in the advertising or marketing of the
12 drug in question.

13 Along this line or within this category, we filed
14 a second request for documents to the defendants regarding a
15 sister drug Norcisapride. One of the names for Propulsid is
16 Cisapride. They're a sister drug which has been identified
17 previously in some depositions, and we understand Norcisapride
18 have either been voluntarily taken off the market or suspended.

19 We filed a subpoena for documents relating to that
20 Norcisapride. And those are the third party subpoenas in
21 addition to the FDA matter we discussed.

22 MR. IRWIN: Yes, your Honor. We did receive their
23 request for production regarding Norcisapride. We are looking
24 at it. I would point out that Norcisapride was never on the
25 market. It was never NDA'd or IND'd, so I just want to make

ROUGH DRAFT

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2 that clear for the record.

3 With respect to the subpoenas issued to third
4 parties, we understand that such a subpoena has been issued to
5 one professional society and the other subpoenas might be
6 issued to distributors or marketers. And we appreciate the
7 advanced notice about that and we understand we will continue
8 to get advanced notice about that.

9 To the extent that any such subpoenas might go to
10 contractors of the defendants with whom there would be a
11 legitimate confidential relationship, we would then want to be
12 interested in preserving that confidential relationship with
13 respect to the production of such documents and we'll discuss
14 that with plaintiff's committee as needs be.

15 THE COURT: There may be some technicalities which
16 arise in this area, but they ought to be able to be resolved if
17 both sides are keyed into it; for example, I can put things
18 under seal, we can deal with it in some way to solve any
19 confidential concerns.

20 MR. HERMAN: With respect to Norcisapride, we believe
21 actually that that product was distributed overseas and that
22 there are comparative studies, et cetera, which would impact
23 this case, and I suppose we'll sort out our misunderstanding in
24 the process of discovery.

25 MR. IRWIN: Excuse me, your Honor, I thought Item 12 on

ROUGH DRAFT

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2 the agenda former, current matters.

3 THE COURT: Sure.

4 MR. IRWIN: I may have missed something.

5 THE COURT: We may not have taken that.

6 MR. IRWIN: I thought it would be helpful to report to
7 the Court about that. Mr. Davis and a representative of his
8 office and representatives of my office met last week, or maybe
9 it was this week, with respect to the service list.

10 I think we had all met a week or two ago with
11 Gaylynn Lambert of your staff to make sure we had what we had
12 the best service list from your office. We're then working on
13 our service list as well, and our plan is this, to each month
14 update the service list as best as we can.

15 We're going to put the information in access
16 database form, and we will give it to The court each month in
17 electronic form. We'll use it and share it among one another
18 in electronic form, and we will also update Verilaw each month
19 with the same list. And we will try to do that at the same
20 time we have a monthly status conference. And that is the
21 plan.

22 And it is hoped that the next monthly status
23 conference in June we will present you with the first such
24 electronic version of that service list.

25 THE COURT: I think that's particularly important to

ROUGH DRAFT

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2 get everybody aboard and to be able to communicate with
3 everybody. I think a problem that you have in a case like this
4 is lack of communication and we want to try to avoid that by
5 doing this.

6 MR. HERMAN: We've had discussions of scheduling a
7 presentation of a class certification motions. The discussions
8 have centered around the progress of the written discovery,
9 potential class discovery, potential merits discovery in
10 connection with class discovery and filing of a master
11 complaint or whatever ruling your Honor makes or whatever
12 agreement we reach with your Honor's consent.

13 The best thought that we have right now is perhaps
14 October. May not be October, but that's the best we've been
15 able to come up with scheduling. And we'll be meeting on this
16 or talking about it, I suspect almost weekly, and can give your
17 Honor a better view perhaps in the June meeting.

18 THE COURT: I think this is going to be particularly
19 difficult to work through because there are some issues that
20 may be just non-certifiable. If they're not class certifiable
21 issues let's not spend a lot of time on them.

22 MR. HERMAN: I just say this now because it's an
23 indication of thinking that will alert the Court and will alert
24 defense counsel. Some of the thinking we have and one of the
25 difficulties we have in drafting a class cert petition for an

ROUGH DRAFT

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2 MDL under the present law is perhaps a generic class complaint
3 and then specific paragraphs with specific issues on a state by
4 state basis that have been pled in various state actions in
5 order to avoid any due process or problems down the road. So
6 that's where our thinking is right now.

7 Second, and of course as my friend Mr. Levin has
8 pointed out a number of times, he and Mr. Murray have also
9 pointed out a number of times, they are the people on our
10 committee that have looked at these issues very closely. We
11 have an obligation to this Court not to bring issues before it
12 that we don't think are certifiable. We're aware of that and
13 we're trying to balance that with the due process concerns and
14 I think we've got a pretty good handle on it.

15 MR. IRWIN: Your Honor, we are very interested from the
16 defense side in bringing this issue to a resolution. We would
17 like to see it happen in October, and we agree with Mr. Herman
18 that it will be necessary for us to have extensive discussions
19 on the subject. It is our hope that some of the class issues
20 could be resolved efficiently, because it is our view that some
21 should be.

22 And it may be that a hearing before your Honor
23 could be necessary, that would include not only submission of
24 the matter in a traditional argument setting but perhaps
25 testimony as well. But that is all something that we will have

ROUGH DRAFT

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2 to work through, and we agree that it's going to take sometime
3 but we think from the defendant's point of view that the time
4 is now to start getting to work on that.

5 THE COURT: And I think it may well be profitable to
6 have a two-step process in this area: First, define the issues
7 of contention; and second, conduct hearings if necessary.

8 We'll just see whether or not you can do it
9 agreeably; if not, then I'll refine or attempt to refine some
10 of the issues and then we'll go into the hearing if that's a
11 necessary phase.

12 MR. IRWIN: That's what we'll do, Judge.

13 MR. HERMAN: On behalf of the court appointed
14 committee, I can say we have some great concerns about
15 typicality, for instance, before we've had an opportunity to
16 review the documents that are being produced in substance and
17 to take some initial depositions regarding those documents. So
18 we will do everything we can to move this issue along, but
19 based upon the volume of documents and the production of those
20 documents can take some time.

21 I want to state that Mr. Becnel's firm in
22 particular and also Mr. Wright's firm have been very
23 instrumental in the review of these documents and helping to
24 set up the depository.

25 And as I had indicated to your Honor before, from

ROUGH DRAFT

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2 this liaison counsel's point of view, every member firm on our
3 committee has made a substantial contribution to our work
4 effort thus far.

5 THE COURT: The scheduling list, we have that one.
6 Documents, sealed documents, do you want to speak on that?

7 MR. HERMAN: We've covered that, your Honor. We have
8 discussed with the defendants possibility of a toll agreements
9 where they apply in various states. Mr. Gauthier's firm,
10 Mr. Levin's firm and Mr. Zimmerman's firm are working on
11 providing a basic tolling agreement that we can provide the
12 defendants, Mr. Seeger has also analyzed tolling agreements
13 including those entered in Propulsid cases and Resulin cases in
14 our venues.

15 MR. CAMPION: Your Honor, Tom Campion. If I may to the
16 issue of tolling agreements so there can be no
17 misunderstanding, the defendants are prepared to enter into
18 tolling agreements with respect to any claimants whom
19 membership of the plaintiff's bar have been engaged to
20 represent.

21 About the only thing that we really need other
22 than the traditional language which appears in every tolling
23 agreement you ever see would be the name, address and the
24 Social Security number of the person. We're starting to get
25 repeats of last names and indeed repeats of first names and

ROUGH DRAFT

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2 last names and indeed we think we may need them.

3 I understand there may be some provision in
4 Louisiana law that makes this difficult to achieve, and I would
5 like to enter into a dialogue with the plaintiff's bar about
6 that. I have an idea, too, as to how we might take care of
7 Louisiana.

8 Your Honor, you should know --

9 MR. HERMAN: We accept.

10 MR. CAMPION: Your Honor, you should know, you either
11 have before you now in the form of the CTO which has in it
12 1,050 plaintiffs in your court. It is therefore reasonable to
13 conclude that any possible class representative, any possible
14 diseased, disability, injury or whatever is now before you or
15 will shortly be here.

16 The cases throughout the rest of the country have
17 this, that, and the other things, but the heart of the
18 litigation remains here and you now have enough to do
19 everything.

20 THE COURT: How is that working out with the states
21 from your vantage point?

22 MR. CAMPION: Well, in the state of Texas we have
23 plaintiffs attorneys who are determined they will proceed on
24 their own, essentially independent of what's happening here.
25 There is some cordiality, and I strike the word some, but

ROUGH DRAFT

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2 they're going their own way.

3 It is also apparent that Judge Corodemus in New
4 Jersey who presides over the master class action motion
5 presently scheduled now for the end of August, it has not yet
6 been approved. The discovery has started on that.

7 With the exception of those two states, I do not
8 see anything which would impact upon the cooperation point.

9 THE COURT: Are they all in one court in Texas?

10 MR. CAMPION: Not yet, but think may be moving in that
11 direction. There is a dialogue ongoing as to whether most of
12 the cases can be consolidated before one judge in one county,
13 and I have some reason to hope.

14 By the way, I don't mean by the comments I made
15 about Texas or New Jersey that they are not cooperating, I'm
16 simply pointing out that they have their own agendas, your
17 Honor.

18 MR. HERMAN: I might supplement that by indicating that
19 there are some trial dates in June in Mississippi, and the
20 attorneys, some of the attorneys in those cases met with me in
21 my office last week. The expectation they have is that the
22 cases will go forward to trial. But we have not had a problem
23 in terms of any cooperation with those folks.

24 Your Honor, that pretty well concludes our
25 discussions. We will be having a PSC meeting in our office

ROUGH DRAFT

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2 immediately following liaison committee members, we appreciate
3 them coming. You're welcome to come and sit in on anything
4 that we don't have under executive discussion, and we would
5 appreciate you being there.

6 I want to indicate for the record that every
7 single firm in your court appointed committee and many of the
8 liaison committee firms have sent on ongoing basis and have
9 assigned on an ongoing basis, lawyers and paralegals to the
10 document depository for which we are very grateful, and I'd be
11 remiss if I didn't state that for the record.

12 I think the committee, the members of your
13 committee are very happy with each other and their collective
14 work effort. Thank you, your Honor.

15 THE COURT: It's always good to hear that, because I do
16 think that a good working relationship is a necessary part of a
17 well-run process for the benefit of all sides and for the
18 benefit of the system and the court is accomplished by that.

19 And as I indicated, I will be meeting with the
20 individual members of the committee for both side at an
21 appropriate time to hear from them as to what they have done
22 and what they are doing. I think it's helpful to do that.

23 Anything before we leave? Anything from the
24 defendants, any comments, any observations, any difficulties
25 you're having?

ROUGH DRAFT

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2 MR. IRWIN: No thank you, your Honor. We think it's
3 moving along at a deliberate pace.

4 THE COURT: Anything from the liaison counsel, problems
5 you all are having any difficulty or any material that you
6 need, things you need?

7 Okay. Our next meeting is when?

8 MR. HERMAN: I believe it's the 21st, your Honor.

9 Yes, your Honor. I would like to point out again
10 that the convention in July will in all probability conflict
11 with the July meeting date, and I'm going to poll the members
12 of the Plaintiffs Legal Committee today and the liaison
13 committee as to what their availability would be in July.

14 THE COURT: And check with defense counsel, and if you
15 can agree to rearrange that date, we'll work it out some kind
16 of way.

17 MR. HERMAN: If we can't, we certainly will have a
18 report at the regularly scheduled meeting, someone from the PSC
19 will be empowered to present that.

20 THE COURT: Okay. Thank you, gentlemen. The court
21 will stand in recess.

22 MR. IRWIN: Thank you, your Honor.

23 MR. HERMAN: Thank you, your Honor.

24 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)
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ROUGH DRAFT

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