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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: FEMA TRAILER FORMALDEHYDE \* Docket MDL 1873 (N)  
PRODUCTS LIABILITY \*  
LITIGATION \* New Orleans, Louisiana  
\*

This Document Relates to All Cases \* January 17, 2008  
\* \* \* \* \*

STATUS CONFERENCE BEFORE THE  
HONORABLE KURT D. ENGELHARDT  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1   PROCEEDINGS

2   (January 17, 2008)

3                         **THE DEPUTY CLERK:** All rise.

4                         **THE COURT:** Good morning. As you were. First of  
5 all, I want to welcome all of you-all. This is the first  
6 status conference that we have had with all counsel in what we  
7 have come to call the *FEMA Trailer Formaldehyde* multidistrict  
8 litigation.

9                                 I have been working with liaison counsel. They  
10 have been working very diligently to try to get the case off to  
11 a start where we can encounter issues as quickly and as  
12 efficiently as possible. My goal in this case is to try to get  
13 these issues resolved as promptly as possible and get the case  
14 ultimately concluded by way of any of the options of motion  
15 practice, settlement, or by trial. So my goal is to try to get  
16 to the trial portion of the case as quickly as possible if it's  
17 not otherwise resolved in the other two methods.

18                                I have also just met with the committees that  
19 have been appointed. I think that we are off to a good start  
20 in terms of the game plan that we are going to follow. In a  
21 second here, I am going to turn it over to liaison counsel to  
22 present to you that game plan.

23                                We have an agenda which we are going to work  
24 through. My goal is to try to accomplish this agenda in one  
25 hour. That's not to discourage questions or comments. It's

1 just that we do have an armful of things we want to touch on by  
2 way of information that you need to be aware of. I don't want  
3 to get so bogged down that you don't get the information that  
4 you need before you leave here today.

5 I do intend to have meetings such as this on a  
6 monthly basis once the case is further developed. You can go  
7 ahead and mark this down now. We have chosen as the next  
8 status conference for all counsel the date of March 20, 2008,  
9 at 10:00 a.m. That is in the neighborhood of 60 days away.  
10 Quite honestly, when you look at the schedule that's been  
11 developed by liaison counsel, I don't see the purpose in us  
12 meeting sooner than that given the work that's going to be done  
13 between now and then.

14 As I indicated, however, we would like to meet  
15 monthly with all of you-all so that you are completely apprised  
16 of what's going on in the case and have the opportunity to have  
17 input at a meeting such as this. I would encourage all of  
18 you-all to have input, communicate with those on the committees  
19 and with liaison counsel within the framework that's  
20 established. I think it's the most efficient way to get the  
21 case moving forward.

22 I made reference in the earlier order about the  
23 *Manual for Complex Litigation*. I have and will repeatedly  
24 consult with it and encourage you to do so as well. It's going  
25 to be the road map, I think, ultimately of the considerations

1 that are given at various junctures in the case. If you don't  
2 have that or you don't have access to that, you probably should  
3 see to it in the near future that you consult with it and know  
4 what's in it. That will be sort of the toolbox that we will  
5 use to get the case moving forward.

6 All right. We have several items on the agenda  
7 and I don't want to delay further. Mr. Weinstock, you were  
8 going to approach the issue of the report of case inventory. I  
9 will ask you to go ahead and do that. That podium is facing  
10 me, but if you want to either turn it around or just operate  
11 from this side of it so the group can see you.

12 **MR. WEINSTOCK:** At this time there are 18 cases in  
13 the MDL that contain a total of 723 plaintiffs. The cases have  
14 all come from one of the districts in Louisiana, although we  
15 understand that there will be some additional filed in  
16 Mississippi shortly.

17 Judge, as long as I'm here, No. 2 is an item  
18 that really is a defense item. It has to do with the tag-along  
19 cases. I think at this time defendants are satisfied that  
20 logistically we are where we need to be with the tag-along  
21 cases, but we just need to be cognizant of any new filings. It  
22 really falls more to us to make sure it gets to this Court for  
23 our protection, although the clerks do tend to pick them up.

24 **THE COURT:** Okay.

25 **MR. MEUNIER:** Good morning, Your Honor. May it

1 please the Court. Jerry Meunier of Gainsburgh Benjamin as  
2 plaintiffs' co-liaison.

3 Before I discuss Pretrial Order 2, with the  
4 Court's permission, I would like for my co-liaison counsel and  
5 the six members of the plaintiffs' steering committee to  
6 briefly introduce themselves for the people that are here.

7 **THE COURT:** That's a good idea. We'll also do that  
8 at defense counsel's table.

9 **MR. WOODS:** Justin Woods, Gainsburgh Benjamin,  
10 co-liaison counsel.

11 **MR. D'AMICO:** Frank D'Amico Jr. with the PSC,  
12 co-chair of the expert and science and the claims committee.

13 **MR. PENTON:** Ronnie Penton, co-chair of the trial  
14 committee.

15 **MR. MORELAND:** Matthew Moreland of the Becnel Law  
16 Firm, co-chair of the finance and law committee.

17 **MR. BENCOMO:** Good morning, Your Honor. If the Court  
18 please. Raúl Bencomo, co-chair of the media and public  
19 relations committee and a member of other committees, Bencomo &  
20 Associates.

21 **MS. NELSON:** Good morning, Judge. I'm Linda Nelson  
22 with the law firm of Lambert & Nelson. I am co-chair of the  
23 discovery committee.

24 **MR. BUZBEE:** Tony Buzbee, various committees, and the  
25 only lawyer on the committee from Texas, Your Honor.

1           **MR. MEUNIER:** Do the defendant liaison counsel want  
2 to be introduced?

3           **THE COURT:** Yes. Mr. Weinstock.

4           **MR. WEINSTOCK:** Andy Weinstock, liaison counsel.

5           **MR. HINES:** Richard Hines, Your Honor, from Atlanta,  
6 liaison counsel representing Fleetwood.

7           **MR. SAPORITO:** Good morning again, Your Honor. Jerry  
8 Saporito also representing Fleetwood, etc.

9           **MR. GIEGER:** Ernie Gieger representing Forest River.

10          **MR. PERCY:** Jim Percy, Jones Walker, on the liaison  
11 committee representing Starcraft, Pilgrim, Jayco, Keystone, and  
12 Thor.

13          **MR. SCANDURRO:** Tim Scandurro, Scandurro & Layrisson,  
14 on the liaison committee representing Gulf Stream.

15          **MR. THARP:** Stewart Tharp on the defendants'  
16 committee representing Coachmen Industries.

17          **THE COURT:** Thank you. Mr. Meunier, if you would go  
18 forward, then, with the pretrial order that we have established  
19 between liaison counsel.

20          **MR. MEUNIER:** Thank you, Judge. Pretrial Order 2 was  
21 submitted after discussions and negotiations with defendant  
22 counsel through their liaison, and we arrived at a jointly  
23 acceptable pretrial order that we submitted to the Court.

24                   Earlier this week proposed Pretrial Order 2 was  
25 also circulated by Mr. Woods to all plaintiffs' counsel of

1 record. If any plaintiffs' counsel are here and did not  
2 receive it, we would ask that they give Mr. Woods their contact  
3 information today so that we can be sure they are included on  
4 any further mailings. The order, Judge, speaks for itself, but  
5 with the Court's permission, I do want to highlight a few of  
6 its more salient provisions.

7           By February 29 the plaintiffs will file a master  
8 complaint which will incorporate and supersede all prior  
9 pending actions in this MDL. Whether that master complaint  
10 names, in addition to the currently named defendant  
11 manufacturers, FEMA or the United States as a defendant will  
12 depend upon whether by that time the required six months have  
13 elapsed for the filing of the requisite administrative claim  
14 form, Form 95, under the FTCA. As we have advised the Court,  
15 the defendant manufacturers, and counsel for the United States  
16 as well, the plaintiffs do intend in this MDL to assert claims  
17 against the United States through FEMA under the FTCA.

18           I should add, Judge, that in the *Nelson* case,  
19 which was filed in the Western District, there is a pending  
20 motion, as the Court knows, to name FEMA as a defendant on  
21 grounds other than the FTCA, which motion we understand may be  
22 addressed by the Court today. Obviously, to the extent that  
23 that motion might be granted and FEMA is added in that case,  
24 then the master complaint at the end of February will  
25 incorporate those claims against FEMA as well.

1                   Pretrial Order 2 then provides for 12(b) motion  
2 practice by defendants, then a master answer by defendants,  
3 then an initial round of master interrogatories and requests  
4 for production with the express provision, as directed by  
5 Your Honor, that the parties have an obligation to confer  
6 periodically as discovery proceeds and arrive at as many  
7 factual stipulations in this case as possible. The initial  
8 written discovery does not, obviously, contemplate going into  
9 depositions of experts and other witnesses pending FEMA's  
10 appearance in the case as a defendant so that those  
11 depositions, etc., can be properly inclusive.

12                   Finally, Judge, what I mention about  
13 Pretrial Order 2 is its provision for plaintiff fact sheets,  
14 the form for which the parties are ordered to negotiate by  
15 February 29. Each named plaintiff in the MDL will complete  
16 these fact sheets and provide them to the defendants by  
17 July 16, 2008. If this can be accomplished timely, we do  
18 believe this database of essential claims information for all  
19 named plaintiffs will be of enormous help to the Court and to  
20 all parties in the effective management of this MDL.  
21 Otherwise, Judge, I would just urge all plaintiffs' counsel to  
22 become familiar with the provisions in Pretrial Order 2.

23                   **THE COURT:** All right. Thank you, Mr. Meunier.

24                   Several motions were filed in connection with  
25 the original complaints. Those motions, as I think I indicated



1 in my previous order, are going to be deferred until after we  
2 get the master complaint filed, and then we will go ahead and  
3 take up those motions. It probably would be better to go ahead  
4 and term those motions and have them refiled. Even if they are  
5 not grammatically changed, go ahead and have them refiled  
6 pursuant to the scheduling order that Mr. Meunier just covered.

7 Those motions are pending and we're cognizant of  
8 those. Obviously, they have not been ruled on or set for  
9 hearing. I envision that once they are filed and are teed up  
10 for the Court's disposition, we may have oral argument on some  
11 or all of them. Of course, we'll encounter that on the  
12 calendar once we get to that juncture.

13 With regard to the motion to amend in *Nelson*  
14 that Mr. Meunier referenced, there was a motion to amend the  
15 complaint so as to add FEMA as a defendant. I understand that  
16 counsel for FEMA is here today. Am I correct in that regard?

17 **MR. MILLER:** Henry Miller with the United States  
18 Department of Justice. With me also is Michelle Boyle from the  
19 Department of Justice, Jordan Fried from FEMA, and Jan Jones  
20 from FEMA.

21 **THE COURT:** Good morning.

22 **MR. MILLER:** Pursuant to the Court's invitation, we  
23 are here.

24 **THE COURT:** Thank you very much. Would you-all at  
25 some point, preferably today, want to oppose the motion or

1 refer your rights to argue the various issues that I think we  
2 all anticipate and that you have already mentioned to me in  
3 connection with motion practice?

4 I will tell you, in the interest of moving the  
5 case along, my intent is to allow the amendment, reserving of  
6 course to FEMA the right to argue jurisdiction and any other  
7 issues under Rule 12 or any other provision that FEMA relies  
8 upon in connection with the complaint such as it will be filed.

9 In other words, I intend to grant the motion to  
10 amend but also order that any claim against FEMA be stated in  
11 the master complaint which, as Mr. Meunier has suggested, has  
12 not been filed but will be filed pursuant to the schedule. So  
13 you would not have a response to that complaint until the  
14 master complaint is filed. Am I clear on that?

15 **MR. MILLER:** I understand what you are saying,  
16 Your Honor. I would urge you not to take that course of action  
17 because I think the Supreme Court's decision in *McNeil* very  
18 clearly holds that taking jurisdiction is improper until the  
19 claims are exhausted, and that any involvement or requiring the  
20 government to be involved in a case prior to the exhaustion of  
21 the administrative remedies is improper and the Court should  
22 not do that. That's my understanding.

23 In this case, at least to let everybody know, we  
24 have only 20 administrative claims that have been filed against  
25 the United States that we consider legally sufficient. There

1 are another 20 that do not meet what we think is a legally  
2 sufficient requirement. So, at best, when they exhaust the  
3 remedy, we are going to be in here for 20 cases, not 723.

4 **THE COURT:** Let me ask you: With regard to those  
5 that are properly in the FTCA process that are going to be  
6 treated administratively, are we not close or even beyond the  
7 time period with regard to at least one or two of those?

8 **MR. MILLER:** Your Honor, my understanding and from  
9 our review of the records is the first two will pass the  
10 six-month exhaustion stage on or about February 3 and the next  
11 ones come ripe probably at the end of February. Of these 20,  
12 the latest are probably, I believe, in May sometime.

13 **THE COURT:** Well, let me point out again I think  
14 Mr. Meunier mentioned that the master complaint will be filed  
15 on or before February 29. I understand your argument, but it  
16 might well be that we will have at least one individual who has  
17 completed that process and that argument would not be  
18 applicable to that particular person.

19 **MR. MILLER:** Definitely not that one, but if you are  
20 going to join us at this point in the case, that's what's  
21 improper. If they join us in April and they serve the  
22 complaint at that point in time, then it will be appropriate as  
23 to the people who have exhausted. Under *McNeil*, my reading of  
24 it is it would be improper to join the United States as a  
25 defendant until a claim is exhausted. The Supreme Court dealt

1 with that situation and it views such a filing as a nullity.

2           **THE COURT:** Did I understand you correctly that  
3 sometime in early February we will have at least one person who  
4 would qualify for filing a claim in this case?

5           **MR. MILLER:** As of February 3 or thereabouts,  
6 Your Honor, a party can sue the United States. There are two  
7 claimants who will have exhausted their administrative  
8 remedies.

9           **THE COURT:** Well, if I were to grant the motion  
10 provisionally, as I indicated, any such claim be set forth in  
11 the master complaint to be filed on or before February 29,  
12 assuming that it's not filed prior to February 3, wouldn't that  
13 negate the argument you're making under *McNeil*?

14           **MR. MILLER:** I disagree. I think logistically what  
15 you can say is: "I'm going to let parties add the  
16 United States as their administrative claims are exhausted."

17                       Obviously, we would be a tag-along, however it's  
18 filed, but for us to become a party at this point for any  
19 purposes would be improper. That's our position.

20           **THE COURT:** Well, maybe I'm not being clear. Even as  
21 to the one person who we seem to agree is going to have met the  
22 exhaustion requirement by early February -- I understand your  
23 argument that there are many who have not even begun that  
24 process and there are many that are still early in the process  
25 and perhaps they should not be allowed to assert a claim, but

1 if I have one person here who has met the exhaustion  
2 requirement, wouldn't that person be --

3 **MR. MILLER:** Let me step back. The motion that was  
4 brought by I think it's the Rodney & Etter law firm in the  
5 *Nelson* complaint, none of those persons have administrative  
6 claims that are legally sufficient. So as to those persons,  
7 they have got to file administrative claims and wait six months  
8 from that date anyway. So as to them it would be clearly  
9 improper.

10 **THE COURT:** I hear you.

11 **MR. MILLER:** As to the other persons, as of  
12 February 3 or 4, when there's exhaustion, that's when we can be  
13 brought in as a party. As for everyone else, if you want to  
14 say, "I'm going to grant this motion at the time that the  
15 claims are exhausted to join the United States," that's fine,  
16 but we are not a party at this point, however, until that  
17 happens. The Court would lack jurisdiction to make us a party.

18 **THE COURT:** Well, I hear what you are saying, and I  
19 think that that is certainly a valid distinction to make. If  
20 the movant on this motion does not qualify on those grounds,  
21 the Court can deny that motion, but the Court can also at this  
22 juncture grant leave, insofar as this master complaint is  
23 concerned, that any individuals who have met the exhaustion  
24 requirement might at that juncture assert a claim in this case.

25 **MR. MILLER:** Definitely, and that's what we would

1 expect to happen.

2           **THE COURT:** Well, that's what I'm looking for. I  
3 mentioned early on, at the outset of our meeting here today,  
4 that I want to try to move the case along. Now, those other  
5 individuals who either haven't started the process or who are  
6 so early in the process, chances are -- I think there's a  
7 certainty that the position of the government, with regard to  
8 any number of issues in motion practice, are going to be  
9 identical to this first plaintiff to assert a claim shortly  
10 after February 3.

11           **MR. MILLER:** Yes, Your Honor.

12           **THE COURT:** So what I'm trying to do is to say that  
13 we can encounter those issues with one as well as we can  
14 encounter them with 20, or 200, or however many people are  
15 going to comply.

16           **MR. MILLER:** I agree, Your Honor. I think in this  
17 case what the government intends to do, once we are joined as a  
18 party and service is effected pursuant to Rule 4, we would  
19 intend to probably file a motion to dismiss based upon the --

20           **THE COURT:** Right. I reserve all rights, of course,  
21 to the government to file whatever motion practice in response  
22 to the complaint. What I need to get, though, in order to  
23 bring these issues before the Court, is a plaintiff who has met  
24 the exhaustion requirement. We will have at least one, perhaps  
25 two that can be filed in this master complaint. It will be

1 clear that those claims are asserted only for the individuals.  
2 Once the Court gets the motion practice and rules on it, then  
3 those rulings will be applicable probably to all of the other  
4 plaintiffs who come behind them.

5 **MR. MILLER:** I think that would work.

6 **THE COURT:** Well, to be clear on the record, then,  
7 I'm denying the particular motion filed in the *Nelson* case.  
8 However, I am instructing plaintiffs' counsel that as to the  
9 individual or individuals who have met the exhaustion  
10 requirement, they can assert a claim in the master complaint to  
11 be filed on or about February 29.

12 **MR. ETTER:** Your Honor, if I may, I'm John Etter,  
13 counsel for the *Nelson* plaintiffs. I remind the Court that the  
14 *Nelson* plaintiffs not only are seeking Federal Tort Claims Act  
15 damages but also injunctive relief --

16 **THE COURT:** I'm going to get to that.

17 **MR. ETTER:** -- and that injunctive relief can be  
18 pursuant to jurisdiction under the Administrative Procedure  
19 Act.

20 **THE COURT:** I'm going to get to that. Right now I'm  
21 focused primarily on the motion to amend the complaint.

22 **MR. MEUNIER:** Your Honor, I believe the suggestion,  
23 though, is that if it's not an FTCA claim that is sought to be  
24 included by an amendment, then the prerequisite of the  
25 administrative claim form does not apply and that these

1 plaintiffs should be allowed to amend the government in now for  
2 the purpose of seeking injunctive relief, pretermittting the  
3 question what defenses and motions might be in response to that  
4 amendment.

5           **THE COURT:** You can assert those claims as well. I  
6 am trying to get past the issue Mr. Miller raised with regard  
7 to simply the FTCA claims. I'm cognizant -- and I think he is  
8 as well -- that the gamut of claims that the plaintiffs might  
9 seek to assert might go well beyond the scope of FTCA. Those  
10 will be dealt with, I'm sure, by motion practice at some  
11 juncture.

12           I understand that we are not talking about only  
13 FTCA claims. What we are talking about, though, at this point  
14 is adding FEMA as a defendant. The one particular issue that  
15 he has argued with regard to an amendment is the exhaustion  
16 requirement. I'm trying to remove that impediment for at least  
17 one plaintiff so that the Court can take up the broader issues.

18           **MR. ETTER:** We would just note that our motion to  
19 amend in *Nelson* was first filed, I believe, in July, and none  
20 of the present defendants has ever opposed that motion.

21           **THE COURT:** I understand. I understand.

22           **MR. ETTER:** Thank you, Your Honor.

23           **MR. MEUNIER:** Your Honor, the other issue that I  
24 suppose is raised by Mr. Miller's comments is we need to be  
25 clear, I guess, what the process is going to be for the



1 government in response to what it considers to be deficient  
2 Form 95s. In our group we are not aware of receipt of any  
3 deficiency letters. Can we confirm that the government is  
4 promptly declaring what it considers to be a deficiency when it  
5 receives a deficient Form 95?

6 **MR. MILLER:** Counsel, just for everyone's  
7 edification, the requirements for a Form 95 are quite simple:  
8 Naming the claimant; identifying the underlying basis for the  
9 claim; and a sum certain amount that they require or are  
10 demanding. You can't put "to be determined," "possibly this  
11 amount." It has to be a sum certain. Those are the  
12 requirements. Anyone who has filed an administrative claim  
13 that doesn't meet those requirements, it's legally  
14 insufficient. It's quite clear. The Fifth Circuit has ruled  
15 on this quite clearly.

16 I do not know what FEMA's process is in terms of  
17 issuing letters. I know that to the extent I receive the  
18 claims and I have notice of them, I issue letters. I sent  
19 Rodney & Etter two letters explaining that their administrative  
20 claims were insufficient and that they should refile and that  
21 they should dismiss this motion to amend to add the  
22 United States. They chose not to do that. That's their  
23 choice. As soon as I find out that a claim is legally  
24 insufficient and it's been filed or brought in the lawsuit, I  
25 notify counsel.

1           **MR. MEUNIER:** The other question I have, Judge, which  
2 bears on your comment that by February 3, according to this  
3 information, there should be a plaintiff who could be included  
4 in the master complaint naming the government under the FTCA,  
5 is the government willing to provide to us, as Court-appointed  
6 counsel, the identity of either the attorney or the individual  
7 whose claim the government believes will be through the  
8 six-month waiting period as of February 3?

9           **MR. MILLER:** Your Honor, the answer to that is no.  
10 That's Privacy Act information, and that person is represented  
11 by counsel. One would assume that he knows what he wants to  
12 do, whether he wants to pursue that claim and file suit or if  
13 he doesn't want to pursue that claim and file suit.

14           **THE COURT:** Well, can you not disclose the name of  
15 the attorney who is handling the claim and let that attorney  
16 make a decision as to whether or not his client's privacy would  
17 include not participating in this case?

18           **MR. MILLER:** Your Honor, at that point -- I'm not a  
19 privacy rights expert, so I would be stepping out of my bounds  
20 to say one way or the other.

21           **THE COURT:** Well, I'm not asking you to be a privacy  
22 right expert. I'm just asking you to tell them the name of the  
23 attorney. The attorney can say, "Look, I don't want to talk to  
24 Mr. Meunier. I don't want anything to do with New Orleans and  
25 the MDL," or the attorney might be willing to give him the

1 information. I'm not going to let the case get bogged down if  
2 we can avoid that problem.

3           It seems to me the attorney for the party can  
4 determine and protect the privacy of the individual that the  
5 attorney represents. So if you don't feel comfortable, I  
6 understand you don't feel comfortable blurting out names of  
7 claimants, but we are talking about the name of an attorney who  
8 represents someone who has filed a claim. That doesn't seem  
9 like an unreasonable disclosure.

10           **MR. MILLER:** Your Honor, off the top of my head, I  
11 don't see any objection to doing that. I just haven't  
12 considered the ramifications one way or the other. I would  
13 like to at least be able to have the opportunity to mull it  
14 over. If there's not a problem with FEMA handing over that  
15 information, we will obviously provide it. I will provide it  
16 to plaintiffs and defendants' liaison as well.

17           **THE COURT:** The name of the attorney we are talking  
18 about.

19           **MR. MILLER:** I understand.

20           **MR. MEUNIER:** That's all we require.

21           **THE COURT:** Would you let Mr. Meunier know that by  
22 Tuesday --

23           **MR. MILLER:** Certainly, Your Honor. Sure.

24           **THE COURT:** -- if you would, of the decision. The  
25 attorney can either talk to Mr. Meunier or not, but I think we

1 can all trust that that attorney will have the best interests,  
2 including the privacy interests, of his or her client at heart.

3 **MR. MILLER:** I'm inclined to agree with you,  
4 Your Honor.

5 **THE COURT:** Sir.

6 **MR. BECNEL:** Daniel Becnel, Your Honor. I wanted to  
7 give the Court some precedent to deal with this very issue. It  
8 occurred 33 years ago in Washington, DC, *In re: Swine Flu*,  
9 which was one of the first MDLs in the country.

10 Judge Gearhart Gisel, who was the judge in that  
11 MDL, ordered the U.S. government, because they were the main  
12 party defendant in that vaccine case, to participate  
13 immediately in discovery, and ordered the DOJ to participate in  
14 discovery to allow the NIH and the CDC to produce the documents  
15 dealing with that vaccine. I just wanted the Court to be aware  
16 of that first MDL that dealt with the very issue because the  
17 defendant was the U.S. government because of the fact that they  
18 had granted immunity to all of the vaccine manufacturers.

19 **THE COURT:** I appreciate that. I've had some  
20 conversations with liaison counsel and actually Mr. Miller  
21 prior to today. I understand that the issue is not one that is  
22 cut and dry from a simple nonparticipation point of view, that  
23 there have been cases prior, including the one that you cite,  
24 where the government has been involved on the front end. We'll  
25 certainly encounter that. I'm hoping when we do get to the

1 issue which I think is next, protective order for preservation  
2 of evidence and confidentiality order, that counsel who are  
3 negotiating that will be cognizant of that precedent such as it  
4 would apply in this case.

5           Mr. Meunier and Mr. Weinstock indicated to me  
6 that they had been in contact with Mr. Miller and counsel for  
7 the government regarding certain information on trailers and  
8 mobile units that have been either in the process of being  
9 taken out of use or the general location of where these units  
10 might be if they have been taken out of use prior. I  
11 understand that you-all are going to have additional  
12 conversations about that. You're aware of this, Mr. Miller. I  
13 have scheduled a meeting with you and with liaison counsel to  
14 occur on January 30 at 10:45 to discuss precisely that issue,  
15 among others, relative to what can be done.

16           I understand the sensitivities that the  
17 government may have, particularly with regard to privacy, but I  
18 would think that there's an interest in trying to preserve  
19 information and make it available, such as it can be, so that  
20 it can be used in this litigation.

21           Mr. Miller, you're aware about that meeting? I  
22 think counsel told me they talked to you about that.

23           **MR. MILLER:** They certainly did. I'm available that  
24 day and I'm scheduled to be here.

25           **THE COURT:** Anything that can be done to resolve the

1 issues prior to then would be greatly appreciated. My  
2 expectation is that you-all would have conferred quite a bit  
3 and perhaps resolved or established some types of protocols,  
4 such as you have done already on the one issue that we have  
5 had, to try to resolve that prior to that date so that we can  
6 discuss and review the procedures that are going to be in  
7 place.

8 **MR. MILLER:** I would point out to the Court, Judge,  
9 the United States is trying to work with plaintiffs and liaison  
10 counsel to make the trailer available, reasonably governing the  
11 privacy issues. In this sense because the United States at  
12 this stage can only be joined in 20 cases at most, 20  
13 plaintiffs at most, I think the appropriate procedural  
14 mechanism, if there becomes a dispute that we can't negotiate  
15 through, is not a protective order because the truth is for us  
16 being a party, we are only going to be a party as to those 20.

17 This is why this is different from the  
18 *In re: Swine Flu* litigation. We are not the primary defendant  
19 and we can't be the primary defendant at this point in time.  
20 The appropriate way is to file a subpoena against the  
21 United States requesting the material that there is a dispute,  
22 that we basically have friction over. That will probably  
23 present the issue to the Court for resolution one way or the  
24 other. That's my understanding. Then the Court can weigh the  
25 Privacy Act concern. The Court can weigh and balance those and

1 determine what is the appropriate way. In the meantime, I  
2 believe most of this might be able to be resolved just through  
3 negotiation, which obviously is the best way for everybody.

4 **THE COURT:** Well, I agree with you on that. I think  
5 there are certainly going to be some mechanisms available to  
6 the Court, either by way of its own implementation based on  
7 motion practice or by way of agreement, and I certainly  
8 appreciate the creativity and intellect of all of you present.  
9 There are a number of ways all of this can be done to satisfy  
10 the respective concerns, again particularly of privacy, the  
11 confidentiality orders, in whole or in part, over certain  
12 information, over redaction. If it's a tiered protective order  
13 that's necessary, I think there's a way that we can get to a  
14 point where there's a comfort level on all sides.

15 I certainly encourage you to continue to talk  
16 about how that can be done because I'm going to be looking to  
17 you-all for solutions as to how it can be done. I have some  
18 ideas of my own, but I much prefer you-all to establish a  
19 workable framework such that information can be shared.

20 **MR. MILLER:** We have already started that process,  
21 Your Honor. To give the Court a head's up, I'm actually going  
22 to be out of the country starting tomorrow through Sunday the  
23 27th and so most of these issues will be dealt with by  
24 Ms. Boyle and FEMA counsel in my absence. I'll be back up to  
25 speed by the time I come down at the end of the month.

1           **THE COURT:** Thank you. This touches on what  
2 Mr. Etter had raised, also, which we are going to get to  
3 relative to the preservation of evidence. I'll get to your  
4 issues in a second.

5           Mr. Meunier, I think the next thing we have is  
6 the plaintiff fact sheet, if I have not passed over anything.  
7 Would you like to take that up.

8           **MR. MEUNIER:** Yes, Your Honor. As I mentioned, the  
9 burden on plaintiffs of responding to full-fledged sets of  
10 interrogatories under the Federal Rules is obviously  
11 significant. I'm pleased to report that we have been able to  
12 discuss this issue with defendant liaison and we have arrived  
13 at what we feel is a fair solution, which is a plaintiff fact  
14 sheet.

15           The form of that sheet is obviously subject to  
16 our negotiating effort. If we can't work that out, we will  
17 submit those issues to the Court. But as I mentioned earlier,  
18 the timetable is that the form is decided by the end of  
19 February and then by July 16, 2008, the fact sheets are  
20 completed. Obviously, it's done on a rolling basis in that it  
21 applies to named plaintiffs as they come into the MDL.

22           These fact sheets, Judge, the reason we think  
23 it's so important to get this information established early is  
24 that if the Court contemplates in this case a trial plaintiff  
25 selection protocol, bellwether trial, representative cases



1 actually being tried on the merits, we think it's important  
2 that early on we establish the database, we establish the  
3 profile that allows us to pick representative and instructive  
4 plaintiffs.

5           As the Court has pointed out, this case perhaps  
6 is unique from other mass tort cases in the sense that there is  
7 a known population, a finite group of trailer residents out  
8 there of potential claims. So we are not talking about the  
9 universe; there's a finite number. Once we can establish  
10 within that population who is interested in proceeding, the  
11 fact sheet gives us an early tool to bring them forward for the  
12 Court and defendants.

13           **THE COURT:** We are certainly not at this juncture  
14 yet, but my intent would be to have those type of exemplar  
15 cases that have been identified by counsel and have been worked  
16 up such that they can be tried individually, or even tiered  
17 cases to the extent there's some breakdown characteristics  
18 amongst the group of plaintiffs. I can't think of any now, but  
19 again we are at the threshold of this thing. It may develop  
20 such that we have tiered cases. My intent would be to try to  
21 select some exemplar cases and get those tried as soon as  
22 possible, and I think that will help facilitate that if we can  
23 identify those people.

24           I mentioned to liaison counsel -- and  
25 Mr. Meunier just made reference to it -- this MDL will probably

1 be different than several others that are around right now in  
2 the sense that, in the mass tort context, there is a finite  
3 number of people, a quantifiable number of people who have  
4 availed themselves of the FEMA housing, the units that are the  
5 subject of this case, unlike a case where perhaps a product has  
6 been sold over the counter and there are untold thousands,  
7 hundreds of thousands, maybe even millions of consumers that  
8 have purchased that particular product and may have a claim for  
9 damages as a result.

10 So the upshot of that fact and why that's  
11 significant to me is that we should be able to move this case  
12 along maybe a little quicker than that other type of case.  
13 We'll see if that bears out. That's certainly my thought  
14 process, that this will be a case that can be developed a  
15 little bit quicker than a mass tort case with unknown numbers  
16 of plaintiffs who purchased a product and there's no record of  
17 their purchase.

18 Anything else, Mr. Meunier?

19 **MR. MEUNIER:** Not on the fact sheets, Judge. The  
20 next item is joint notice protocol. From a plaintiff's  
21 standpoint, Your Honor, Rule 23 as a class action device is  
22 critically important in the mass tort cases because of the  
23 unique procedural protocols and safeguards that Rule 23 offers  
24 for absent unnamed claimants.

25 In this case the plaintiffs' counsel are also

1 aware of the delay and the expense involved in class  
2 certification, which can delay the merits discovery and the  
3 case development pending the Rule 23 analysis by this Court and  
4 on appeal. Especially, Your Honor, in a case such as this,  
5 where the plaintiffs have already been through quite a bit --  
6 they are displaced citizens and they can ill afford, frankly,  
7 the time-consuming litigation process -- we feel we're obliged  
8 to consider alternatives that expedite the process and the mass  
9 joinder approach, culminating not in a post-certification  
10 common issues trial but hopefully in a series of instructive  
11 bellwether trials that give the parties information about the  
12 different states that are involved, the different manufacturers  
13 that are involved and, of course, FEMA and its legal  
14 responsibility.

15 I would mention to the Court that in the recent  
16 pharmaceutical MDLs in this Court, in the Eastern District --  
17 *Propulsid, Vioxx*, and in the mass joinder case of the *Katrina*  
18 litigation -- this same idea has been successfully pursued;  
19 that class certification while a pending issue and while  
20 Rule 23 is available with certain safeguards in the interim is  
21 not a front-loaded concern of the court so much as something  
22 that is deferred and allows the court and the parties to mature  
23 the claims through a bellwether trial process that hopefully at  
24 the end leads to resolution without the necessity of even  
25 addressing class cert.

1                   Now, with that background, of course, what class  
2 actions give us is a formality of notice to absent class  
3 members. We have to figure a way, if we are going to take this  
4 mass joinder approach, to come up with a notice protocol that,  
5 again, can issue to this known universe of trailer occupants to  
6 discern who is interested in pursuing a claim, to give a fair  
7 deadline for them to come forward, complete the plaintiff fact  
8 sheet, failing which it's understood that they are not  
9 proceeding in this litigation, and then from there the  
10 appropriate selection process.

11                   So we have talked to Mr. Weinstock about the  
12 possibility -- and I hope it's a real possibility -- of  
13 presenting to the Court no later than the next status  
14 conference, if not sooner, a proposed protocol, jointly funded  
15 by the parties, which would allow us to send out a fair notice  
16 comporting with what Rule 23 has in mind in class actions to  
17 this known universe of claimants, and then proceed from there  
18 with the fact sheet and other steps that are spelled out in the  
19 pretrial order. So we are not at the point where we can  
20 delineate that for the Court, but it's an important concept I  
21 wanted to mention for those assembled to make sure that we are  
22 all aware of how we intend to proceed.

23                   **THE COURT:** Yes. Thank you.

24                   Mr. Weinstock, do you want to respond?

25                   **MR. WEINSTOCK:** Without prearguing why class

1 certification, in our mind, would never work in this case --  
2 and this is not a hearing on class certification, certainly.  
3 With 10 or 11 different manufacturers and numerous models of  
4 vehicles and different levels of whatever chemicals  
5 plaintiffs -- formaldehyde -- specifically claim exposure to  
6 and different injuries, we feel it would never work as a class  
7 action, so it makes perfect sense to see if we can move it to  
8 mass joinder. We definitely have discussed it and will  
9 continue to discuss and negotiate it.

10 As with anything, the devil is in the details  
11 because where we break ranks from class action is very  
12 important to us because of prescription issues. When we get a  
13 finite number of plaintiffs, we want to know that that's the  
14 end of the universe, try representative plaintiffs, see what  
15 happens, but not then come back and say, "Oh, by the way, we  
16 have this class of additional people. We just want to go the  
17 same route and start all over."

18 **THE COURT:** Well, it sounds like an efficient way.  
19 As I told you, my focus is on trying to get the case in a  
20 position to be resolved one way or the other as promptly as  
21 possible. It sounds like an efficient way to do that given  
22 that, again, we have a finite number of people that we are  
23 dealing with. We do have the notice and the joinder issue, so  
24 I will be interested in hearing more from you-all about that.

25 Mr. Miller, did you want to --

1           **MR. MILLER:** Your Honor, I just wanted to point out  
2 that for class certification purposes, although we are not a  
3 party yet, every putative class member, for purposes of the  
4 government, would have to exhaust their administrative  
5 remedies.

6           **THE COURT:** Well, I understand. You have been pretty  
7 consistent on that, so I understand your position on that. I  
8 think what Mr. Meunier is suggesting is a way that can -- this  
9 may even facilitate that because it might be a way to put that  
10 on the back end such that those processes can be encountered by  
11 the government, for those who are going to file claims, prior  
12 to them being identified as a class member, if I understand.

13                   If you look at the calendar, it might well be  
14 that those persons who need to do that can do that. Again,  
15 that's putting aside the issue of any other claims that the  
16 parties will include that are non-FTCA claims, such as they  
17 are. It might serve your purposes, as well, by putting even  
18 class issue at the rear after we do some bellwether cases or  
19 possibly simply having a joinder of the claims and not going  
20 down the class route. Certainly, with the joinder of claims,  
21 if it's an FTCA claim, then I think we are dead on.

22                   Okay. Mr. Etter, you had sought injunctive  
23 relief, I believe, in December, and the Court at that time had  
24 broached the issue with counsel for FEMA. I think that was my  
25 first conversation with Mr. Miller. This was about the time,

1 if I remember correctly, at least in terms of public  
2 information, that FEMA was going to embark upon some testing of  
3 units.

4 FEMA was embarking on the testing starting on  
5 December 21, sum certain of the units. Your injunctive relief,  
6 as set forth in the original motion, was pretty  
7 all-encompassing. In my opinion the irreparable harm portion  
8 of that motion was addressed and rendered moot. I know you  
9 probably disagree with that, but it was addressed and rendered  
10 moot insofar as you were seeking testing. You were also  
11 seeking relocation of individuals, assuming that there was a  
12 positive test result. I think FEMA has established a protocol  
13 including liaison counsel and notification to certain counsel  
14 in this case with regard to that testing.

15 Now, those were the two issues that I think  
16 warranted treatment under the injunctive relief. You had a  
17 series of other issues that you raised also relative to the  
18 preservation of information, dissemination of information,  
19 disclosure, so on, and so forth. I was given this morning and  
20 you have kindly handed out a bench memorandum which you have  
21 prepared, which I believe purports to set forth things that  
22 would be the subject of your motion that you believe FEMA has  
23 not addressed and that you would have the Court order them to  
24 address.

25 **MR. ETTER:** Actually, if I may, Your Honor, I

1 understand the Court's ruling that the items announced in  
2 FEMA's December 13 press release were, in the Court's view,  
3 sufficient to address issues of irreparable injury and that you  
4 considered our motion for a preliminary injunction moot based  
5 on that.

6           What I suggest in this bench memo is that FEMA  
7 and the Centers for Disease Control December 13 press release  
8 listed a whole series of actions that FEMA, with the assistance  
9 of the CDC and others, were going to do. What I would suggest  
10 is it would be appropriate for this Court to require FEMA to  
11 regularly report on their progress on accomplishing those steps  
12 and if, per chance, FEMA encountered difficulties, wanted to  
13 change what it was doing or, heaven forbid, became delayed or  
14 bogged down, that this Court and counsel could then confer with  
15 FEMA and encourage FEMA to continue what it promised to do.

16           I think it would be appropriate for this Court  
17 to retain jurisdiction and supervision over FEMA's announced  
18 action plan. I don't know that that requires a separate  
19 hearing, and that's why I have put this forward as a bench memo  
20 for this Court's consideration rather than as a motion for  
21 further relief.

22           **THE COURT:** Well, my reaction to your bench memo  
23 here, which is comprehensive, is to allow FEMA, if it chooses  
24 to do so, to respond to these. They haven't seen this yet, and  
25 I'm sure they have proceeded with the established procedure



1 that they have set forth and announced. Their position  
2 undoubtedly will be that they have complied with the things  
3 that they have announced that they are going to do.

4           The previous issue was relative to disclosure of  
5 when testing was going to occur, how it was going to occur, and  
6 we have gotten the liaison counsel involved in that process.  
7 In this form or another form, have you provided this to counsel  
8 for FEMA?

9           **MR. ETTER:** I just did, Your Honor, but not  
10 previously.

11           **THE COURT:** I appreciate that, and I'm sure they do  
12 too, but I need them to be able to, if they choose to do so, to  
13 be able to respond to this. I will give you-all a deadline to  
14 give me some response to this if you choose to do so.

15           My appreciation of the injunctive relief you  
16 sought included several things that were not necessarily the  
17 stuff of temporary restraining orders or preliminary  
18 injunctions because that would be discussed, probably some of  
19 it, with Mr. Meunier such as retention of documents, records,  
20 things of that sort.

21           **MR. ETTER:** I appreciate Mr. Meunier, Mr. Weinstock,  
22 and Your Honor's efforts with Mr. Miller to address protecting  
23 and preserving evidence and cooperating in testing. That's why  
24 I think, agreeing with Your Honor's earlier observation, it  
25 appears those things can be handled as long as FEMA is

1 cooperating and responsive with counsel and is willing to  
2 provide some reporting to Your Honor to say what they are  
3 doing.

4 I know they have just begun some of this. What  
5 FEMA is reporting publicly in the documents that I can locate  
6 does not address yet the details of how all this testing  
7 program is going. So a reason for FEMA to be in this Court  
8 either informally, as Mr. Miller is today, or formally is so  
9 that we can keep track of what FEMA is doing and setting aside  
10 arguments of whether, in my view, FEMA's response is too little  
11 too late.

12 I realize I'm not setting forth a clear motion  
13 here is exactly what I want today, but I was wanting to provide  
14 this for the Court's consideration.

15 **THE COURT:** Are you suggesting -- my understanding is  
16 that you were -- that this memorandum that you have given me  
17 and that you have handed out contains elements of what you  
18 sought as injunctive relief or is this generally -- I don't  
19 mean to demean it by saying it's sort of a gripe list because  
20 these are very important issues. In other words, is this on my  
21 plate as part of your motion for injunctive relief or is this  
22 something you would simply like to see treated by all counsel  
23 and counsel for FEMA?

24 **MR. ETTER:** First, I would like to see this treated  
25 by counsel, all counsel and counsel for FEMA. Second, this

1 list of items were each lifted from the FEMA and Centers for  
2 Disease Control December 13 press release. This is their list  
3 of what they told you they were going to do.

4 **THE COURT:** I understand that. So actually that's  
5 encouraging in the sense that they have already said that they  
6 are going to do it. So if it's on this list and they say, "We  
7 are in the process of doing these things," then what is there  
8 for the Court to decide at this point? Are you looking for  
9 simply an oversight role for the Court?

10 **MR. ETTER:** Exactly. An oversight role for the Court  
11 and reporting to this Court by FEMA on a regular basis, say  
12 monthly, to report: We have now tested 300 trailers and here's  
13 what we found; we have now talked to 200 trailer occupants; we  
14 now are following up on the recommendations of the CDC's panel  
15 of experts; the testing at the Lawrence Berkeley lab is under  
16 way. Just as a reporting matter.

17 **THE COURT:** Here's what I think would be appropriate  
18 at this point. I have already talked to counsel about  
19 establishing some type of order that can be followed; and that  
20 if it can't be done, it will be discussed at our meeting on  
21 January 30. Are all of these items part of what FEMA announced  
22 on the 13th?

23 **MR. ETTER:** Yes.

24 **THE COURT:** I would like to go ahead and have the  
25 issues that are listed in your memo that you have handed out be

1 the subject of further discussion between liaison counsel and  
2 the attorneys for the government so that to the extent they can  
3 be included in any such joint order, that's fine. If that's  
4 not satisfactory from your point of view, then we will raise  
5 the issue by way of a motion for appropriate relief.

6 Now, I'm going to ask you to work through the  
7 committee and liaison counsel framework because if we get to  
8 the point where everybody is filing a motion because of the  
9 slightest little thing, we can get down to the point where we  
10 are disagreeing on verbiage and then I have 50 motions on one  
11 issue. Lord knows, we can't make everybody happy all at once,  
12 but we are going to do the best we can.

13 I am going to strongly suggest that you work  
14 through the committee framework and liaison counsel to try to  
15 establish a satisfactory procedure not only for communication  
16 between the three entities we have here -- that being the  
17 plaintiffs, the defendants, and the government -- but also with  
18 regard to the Court's role.

19 **MR. ETTER:** I understand that and will do that.  
20 Today I had discussed it with plaintiffs' liaison and they  
21 suggested that I was the one probably to best present this  
22 small piece.

23 **THE COURT:** Well, I'm glad you have, and I'm glad  
24 that you provided this to counsel for FEMA because I'm sure  
25 they will want to respond to it either directly to you or

1 through liaison counsel or to me.

2           **MR. ETTER:** I have done this as a bench memo today  
3 partly because I wasn't sure, if I was going to electronically  
4 file it, what I would call it.

5           **THE COURT:** Well, it hasn't been filed. I'm not  
6 suggesting you file it today. Quite honestly, I think that we  
7 have to have the conversation leading up to January 30, and I  
8 would prefer that these items be addressed between counsel  
9 before then. If you were to file it, if you want to renew the  
10 motion for injunctive relief -- the problem that I have with  
11 injunctive relief is, again, there's relief and then there's  
12 relief that needs to be granted in short order.

13           **MR. ETTER:** I understand that, and so I will defer  
14 further filings pending discussion and hopefully positive  
15 resolution of all of this.

16           **THE COURT:** I think that would be the prudent thing  
17 to do at this point.

18                   Mr. Miller, did you want to --

19           **MR. MILLER:** I did want to address a couple points  
20 that were just raised just to make sure what the government  
21 position on this is. First of all, it's the government  
22 position the basis of the amended complaint that Mr. Etter  
23 filed does not assert any basis that could provide this Court  
24 with authority to issue injunctive relief.

25                   Specifically, the 1983 Civil Rights Act claims

1 do not authorize that remedy because they are suing a federal  
2 official and 1983 does not authorize claims against federal  
3 officials. The other claims are tort claims, Louisiana law and  
4 FTCA. As we explained, Mr. Etter's clients, none of them have  
5 filed legally sufficient administrative claims. So what we  
6 have is a case where Mr. Etter has filed a brief and said,  
7 "There's a possibility that I could file a new revised amended  
8 complaint that would assert grounds that the Court could have  
9 jurisdiction to grant injunctive relief."

10 In addition, at least in the context of the  
11 cases we have here, in the *Hilliard* case, which is one of the  
12 cases that was joined in, the Court actually addressed the  
13 Stafford Act and ADA issues and said it doesn't have  
14 jurisdiction because it's totally discretionary, which will  
15 then be the government's motion on the tort as well. That  
16 actually had a hearing and everything that addressed it, and it  
17 was pretty much resolved that there is no jurisdiction under  
18 the Stafford Act and ADA to grant this type of relief.

19 The second thing: As to Mr. Etter's position at  
20 this time, the Court ruled on the motion at the end of  
21 December. Procedurally, the appropriate method for him to  
22 bring this to the Court's attention was a motion for  
23 reconsideration within ten days. That time period has run.  
24 The appropriate relief for him, if he challenges any issues of  
25 the Court's order, is to now take that up on appeal, and he has

1 60 days from the Court's order to do that.

2           Finally, Your Honor, this is the first I'm had  
3 any discussions with you. Michelle and myself are with the  
4 torts branch. The people you have been dealing with, Michael  
5 Sitcov, are federal programs.

6           **THE COURT:** Right, right. No, I understand. I  
7 understand. I apologize if I was melding you-all together for  
8 better or worse. But, no, I appreciate you pointing this out.  
9 It was Mr. Sitcov.

10           **MR. MILLER:** I think there's a reason for the  
11 distinction.

12           **THE COURT:** Before I let you take the podium here,  
13 Mr. Meunier, insofar as the record is concerned in this case,  
14 the motion has been disposed of. To that extent I think  
15 Mr. Miller is correct. Now, does that preclude raising these  
16 issues either by way of negotiation or by way of motion  
17 practice? Not necessarily. But the motion itself that you  
18 filed, in my opinion and as I have reflected it in the record,  
19 the issues have either been disposed of, perhaps are moot, or  
20 have been deferred to the procedure we are going to establish  
21 for preservation of evidence and records and the sharing and  
22 dissemination of that information.

23           **MR. ETTER:** I understand that, Your Honor. Why I  
24 bring this today, the information was shared by liaison counsel  
25 that Your Honor did have an interest in knowing the current

1 situation.

2           **THE COURT:** Yes, and I appreciate you doing that. I  
3 am glad you brought it up. You have given us something that  
4 can certainly be the subject of further discussion and will be.  
5 It will be because these are all good points that you have  
6 listed.

7           **MR. MEUNIER:** I simply wanted to thank Mr. Etter on  
8 behalf of the plaintiffs' committee and to confirm that in  
9 discussions that I suppose will be with Ms. Boyle -- Mr. Miller  
10 said he is leaving the country -- by next Tuesday, we will put  
11 on the agenda not just the name of the attorney in that Form 95  
12 case, not just the travel trailer testing issue, but also the  
13 discussion points in this bench memo from Mr. Etter.

14           **THE COURT:** All right. Thank you. There are two  
15 other things I'm going to mention here just briefly in passing,  
16 and we are getting down the road here a ways. I'm going to  
17 expect at various benchmark times that have yet to be  
18 established that there be some stipulations. We are going to  
19 try to achieve stipulations at various junctures in this case  
20 in the interest of saving time and money. What those will be  
21 and on what particular aspects of the litigation, it's probably  
22 too early to tell, but I will expect counsel to confer as we  
23 get into this and set forth stipulations such that they can be  
24 reached, which I think is going to save us, again, time and  
25 money.



1           With regard to experts, I also would expect that  
2 shortly we would have some type of framework where experts can  
3 confer and be provided access, depending on where these units  
4 are and in whose control they are in, but I think we need to  
5 get our experts on this. I know some of you have already  
6 gotten experts involved, and that's going to be very beneficial  
7 to the extent that some of the legwork on this has already been  
8 done. Maybe some of the ultimate opinions that will be offered  
9 in this case have already been established. But it seems to me  
10 getting expert evaluation, testing, and conclusions formed by  
11 experts is something that can be done sooner rather than later,  
12 if it hasn't been done already, so I would encourage you to  
13 work in that regard as well.

14           I indicated to you that the next status  
15 conference for all counsel will be held here on March 20, 2008,  
16 at 10:00. Is there anything that we have not touched upon that  
17 needs to be discussed here today with the group in general?

18           **MR. WOODS:** Yes, Your Honor. We wanted to make sure  
19 that all plaintiffs' counsel is aware that immediately  
20 following this status conference we will have a meeting taking  
21 place at the office of Lambert & Nelson. The address is  
22 701 Magazine Street.

23           **THE COURT:** All right. Mr. Becnel.

24           **MR. BECNEL:** Judge, one of the things that has been  
25 helpful in many MDLs around the country is setting some date in

1 advance for what's called the science day. Judge Fallon did  
2 it. Judge Katz did it. They are doing it all over the country  
3 now, and it's relatively new. It's just been started in the  
4 last year with MDL judges. I would suggest to the Court it's  
5 an educational program. It's not binding on anybody. But the  
6 Court would be able to understand -- whether it's toxicology,  
7 or chemistry, or right-to-know laws under the MDLs, or whatever  
8 it is, you have a certain, finite amount of time with experts  
9 that come in and educate the Court and all of the parties  
10 involved on the issues dealing with science.

11 **THE COURT:** I'm familiar with that. As a matter of  
12 fact, Judge Fallon, in a conversation I had with him recently  
13 at lunch, had mentioned that that was very helpful. So that's  
14 certainly something that the Court would entertain doing at the  
15 appropriate time, and I will ask counsel to certainly keep that  
16 in mind. I think it's a good suggestion. It's probably  
17 appropriate it be done at some juncture in this case, and I  
18 appreciate you bringing it up. Judge Fallon, as I indicated,  
19 found it very, very helpful in his case. Certainly anything we  
20 can do to get our brains around these issues and get the case  
21 resolved, I think that would contribute to it, so I appreciate  
22 it.

23 **MR. BECNEL:** One other thing, Your Honor, I would  
24 suggest that has been done in the *Fen-Phen* litigation with  
25 Judge Bechtel, who was both an MDL judge and sat on the MDL

1 Panel for years that handled many MDLs, the issue of  
2 certification or bringing people together, one of the big  
3 issues that you would have if you don't at least hear the  
4 certification issue -- and what Judge Bechtel did in *Fen-Phen*  
5 was have the parties brief and argue certification but not rule  
6 on it. That way people knew they had a time frame running  
7 because you have some places and people maybe dislocated to,  
8 let's say, Minnesota, where you have a six-year statute, or  
9 some other places where you have a three-year statute.

10 So if you are trying to get your arms around  
11 what are the cases you have, unless you bring it to the Court  
12 where people know that you have already heard class cert and  
13 their statute might be running, depending on whether the case  
14 in their respective states is gone, that's the only way you  
15 really, truly get them in here. And then again, you may have,  
16 at least as to the manufacturers, people asserting claims not  
17 against the federal government but just against individual  
18 manufacturers for less than the jurisdictional amount.

19 **THE COURT:** Well, that touches upon something that I  
20 think Mr. Meunier was talking about earlier relative to when  
21 that process of class certification or joinder, depending on  
22 which route we go in this case, is taken. That's something you  
23 can raise with Mr. Meunier and your committee. That might not  
24 be a bad idea if we decide to go down that route relative to  
25 the Rule 23 issues.

1           I have several ideas along those lines to try to  
2 get things done earlier in the case than later. One of them I  
3 will tell you now is perhaps once we start identifying some  
4 bellwether cases, have you-all work on what a jury  
5 interrogatory form is going to look like, for instance, or what  
6 the jury instructions will look like, and do all of this type  
7 of stuff many months before trial rather than in the normal  
8 time delays, where it would be done in the week or two leading  
9 up to trial, because I think it would focus the issues a lot  
10 more.

11           So I'm going to try to front-end load that, for  
12 lack of a better term, and that's along the lines that you are  
13 suggesting with regard to class certification; in other words,  
14 to get the information exchanged, get these things worked  
15 through long before we get to the brink of a bellwether trial.

16           We'll talk about that as we develop this  
17 schedule further. I think we have a good game plan that  
18 counsel have established for getting the case pled and getting  
19 the issue joined and getting the motion practice under way, and  
20 I think that's where the heavy lifting is going to be in the  
21 next few months. I'm anxious to go ahead and get that taken  
22 care of.

23           Okay. Thank you all very much for being here.  
24 We appreciate it. Thank you all, those on the committees, as  
25 well as liaison counsel, Mr. Weinstock, Mr. Woods, and

1 Mr. Meunier. Thank you very much.

2 Did everybody sign in, by the way? There is a  
3 sign-in sheet. All in attendance, including those who are not  
4 counsel or who are staff with counsel or even just visiting and  
5 attending, we would like to have a record of all of those who  
6 are in attendance. So if you have not signed in, we would  
7 appreciate it if you do so. The sign-in sheet is here. We  
8 would like to have a record of all who are in the courtroom  
9 today. If you haven't signed in, please come up here and do  
10 so. Thank you all.

11 **THE DEPUTY CLERK:** All rise.

12 (WHEREUPON the Court was in recess.)

13 \* \* \*

14 **CERTIFICATE**

15 I, Toni Doyle Tusa, CCR, FCRR, Official Court  
16 Reporter for the United States District Court, Eastern District  
17 of Louisiana, do hereby certify that the foregoing is a true  
18 and correct transcript, to the best of my ability and  
19 understanding, from the record of the proceedings in the  
20 above-entitled and numbered matter.

21  
22  
23 s/ Toni Doyle Tusa  
24 Toni Doyle Tusa, CCR, FCRR  
25 Official Court Reporter