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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANACHAMBERS OF
U.S. DISTRICT JUDGE
ELDON E. FALLON

MDL No. 1335
SECTION "L"
New Orleans, Louisiana
Thursday, November 16, 2000
3:30 p.m.

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

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Proceedings recorded by mechanical stenography, transcript
produced by computer.

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P R O C E E D I N G S

(STATUS CONFERENCE)

(THURSDAY, NOVEMBER 16, 2000)

THE COURT: Good afternoon, folks. Well, I guess I ought to start by welcoming you all to the court. I wish we could meet in the back, but we have too many people here so I have to meet with you in court. I'm Eldon Fallon, I work here. Let's go around the table and introduce yourself.

MR. HERMAN: Your Honor, Russ Herman with Herman Middleton. With me today is Leonard Davis.

MR. GAUTHIER: Wendell Gauthier with Gauthier, Downing, and with me here is James Dugan.

MR. LEVIN: Arnold Levin, Levin Fishbein, good to be here, and my partner Fred Longer is seated in the back.

MR. ZIMMERMAN: Charles Zimmerman, Zimmerman, Reed in Minneapolis.

MR. MORRIS: Larry Morris from Pensacola from Levin, Middlebrooks.

MR. WRIGHT: Bob Wright from Lafayette; Domengeaux, Wright.

MR. SEEGER: Chris Seeger, Seeger Weiss, New York. With me is David Buchanan.

MR. BECNEL: Daniel Becnel from LaPlace, I'm here with

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my brother Robert.

MR. MURRAY: Stephen Murray, Jr., the Murray Law Firm in New Orleans, for my father Steve Murray.

THE COURT: Right. I got word that he was not going to be here.

MR. IRWIN: Your Honor, my name is James Irwin, I'm here with my partner Quentin Urquhart from the Irwin, Fritchie firm, we represent the defendant.

MR. CAMPION: Tom Campion, New Jersey, one of the attorneys for the defendants.

MR. PREUSS: Chuck Preuss, San Francisco, representing the defendant.

THE COURT: Okay. Fine. Let's talk about future meetings. I don't mind people showing up, but from the standpoint of whether or not you have to, I'd like to see the executive committee at the meetings from the plaintiffs standpoint and the executive committee from the defendant's standpoint.

In addition to the executive committee, you might want to have some people, you can, you don't have to, but it might be helpful if one of the members of the plaintiff's committee has something to report, something that they're working on, some sort of project that's important to the meeting, they may want to come.

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I'd like to hear from you all also on whether or not liaison counsel would be helpful. When I say liaison counsel, I'm really talking about state liaison. I mentioned to and I met with liaison counsel for plaintiff and liaison counsel for defendant last week to talk a little bit about this meeting, and one thing that I talked to them about is the potential of having some person from the state, if you feel it would be helpful.

A state liaison counsel, I understand that potentially there's going to be three or four states who might have cases, which might have cases lodged in that state going on at the same time. If that's so, you might want to think about having liaison counsel for those states. It would be helpful for them to know what's going on, it would also make it hopefully easier to work with. But I leave that to you.

I don't want anybody to feel that they can take over the litigation; on the other hand, I think they ought to have access to what's going on, it makes it easier. I don't want anybody trying to throw any anchors to keep the boat from moving, and some of this if we do it at the outset will make it easier going later on.

Dates of the meetings, I mentioned to liaison counsel at the meeting that it would probably be best for me, a Thursday would probably be best for me. If that's impossible

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2 with you folks, I'll listen to you. Sometime around 3:30 or
3 thereabouts I'd like to meet in the beginning at least once a
4 month. If we need to meet more than that I have to hear from
5 liaison counsel on that. I'll meet with you as often as we
6 need to. Hopefully in the beginning we might have to meet more
7 frequently. When we get it started or moving we may not have
8 to meet as frequently, but I want to at the beginning do some
9 meeting. What about Thursdays, third Thursday of the month?

10 MR. HERMAN: Your Honor, we've conferred, recommend or
11 suggest that the third Thursday of each month, 3:30 with your
12 Honor.

13 MR. IRWIN: Your Honor, if we could consider maybe a
14 little bit earlier in the afternoon if it would accommodate
15 your schedule, because some of our people need to get back to
16 the far coasts.

17 THE COURT: Two o'clock, would that work?

18 MR. IRWIN: That would be great, thank you.

19 THE COURT: Let's do it at two.

20 MR. HERMAN: Judge, I do have a report for you,
21 whenever you'd like it as to the state liaison.

22 THE COURT: Why don't we talk about that now.

23 MR. HERMAN: The Plaintiffs Legal Committee met today.
24 We will recommend to the Court that a liaison committee be
25 established. It will basically have representatives from the

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states that where the largest state litigation is. We want to confirm with the individuals that they're willing to serve that we would like to recommend to you.

We've advised defense liaison counsel we'll provide the names in advance and would like to submit an order for your consideration sometime next week as soon as these confirmations are made.

It's our view that the primary states today as we know them are California, Texas, Mississippi, West Virginia and the nexus of cases in Pennsylvania, New Jersey, New York. I believe we desire to recommend to your Honor one person from California, one from Texas, one from Mississippi, one from West Virginia and one for the nexus of those three states, New Jersey, Pennsylvania and New York.

We would also recommend co-chairs so that when it's necessary for you to meet you may not want to meet with all of these folks, you may just want to meet with co-chairs. We also are taking into consideration the number of individual lawyers who by ethnic, sex, race, et cetera, to make sure that the liaison committee is reflective of the bar.

THE COURT: I think that's something that ought to be focused on. I think that we want to keep that in mind when you're doing that.

With the liaison committee, once the liaison

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committee is established, I'm going to ask them to vote their co-chairs so you can tell them that at the beginning.

Next, with regard to technology. I want to talk with you a little bit because I had some of my staff confer with representatives of Verilaw. I received a letter from Verilaw indicating that they would establish a web page for the court free of charge and not charge the court anything. I appreciate that and we called them back and told them we appreciate that, but we're going to do our own web page.

I don't have any problem with Verilaw doing, assuming that you folks agree with it, you pick the people you're most satisfied with, but if you're interested in them doing service, if you're interested in them doing or participating in or anybody else doing docket depository or any other functions, that's fine. We'll give them a link, and if you pick Verilaw, or whoever you pick, let us know and we're going to put our systems people in touch with them so they can coordinate what we'll do.

We'll have a web page and we've got it in the works. We are going to try to get it on-line by next week sometime. We have and we've been working with some samples of it. Conceptually, we are going to put things like our docket, things like the orders, things like the court calendar and then links to wherever that you can get into, Verilaw document

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depository or perhaps case calendar.

You may have calendars that you want to work out and schedule or minutes of meetings, things of that sort that you can work out. And we'll try to coordinate that with Verilaw or whoever you pick.

MR. IRWIN: Your Honor, we submitted to the court in our joint report our recommendation of Verilaw with respect to the service.

THE COURT: Is that the feeling?

MR. HERMAN: Yes, it is.

THE COURT: Okay. Let's go with Verilaw then. Contact Verilaw, let me know when you contact them. I won't contact them until you've contacted them. But when you contact them and tell me they're on board, we're going to put our systems people with them and they'll work out some kind of --

MR. IRWIN: We will probably need to submit to your Honor a joint order, proposed order for their appointment.

THE COURT: That's fine.

MR. CAMPION: The subject of Verilaw, the New Jersey mass tort court indicated they will order appointing Verilaw as the repository and electronic filing service. The order should be entered shortly and I'll see that it gets served on all counsel and a copy sent to your Honor.

THE COURT: Fine. And I'll touch base with the judge

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2 there. I've talked with her before and I'll do that. And I'd
3 like to know once you get the judges or once the cases get
4 logged in the other states so that I can touch base with at
5 least those judges out of courtesy and tell them what we're
6 doing.

7 THE COURT: Patty, do you have anything to say or
8 Loretta, Denny?

9 MS. SOULE: The only other thing that I had thought
10 about, since Verilaw is doing the electronic servicing,
11 frequently people want to see that the service list is with
12 names and addresses and phone numbers. Y'all might possibly
13 ask Verilaw if they can also maintain that list for everybody
14 involved so that you can just quick click on a button and see a
15 service list, if necessary, with names and addresses and phone
16 numbers.

17 MR. HERMAN: We have spoken to Verilaw about that, they
18 told us they can do that and something that we've considered.

19 MS. SOILEAU: Perfect. Thank you.

20 THE COURT: Just going through what we've discussed.
21 You're going to let me know about liaison counsel and I'll do
22 an order to that extent.

23 With regard to the joint order, give me something
24 with Verilaw. How long do you need to do that to get me
25 something?

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MR. HERMAN: We can get that to you, I would think, certainly probably Monday afternoon I would think.

MR. IRWIN: I would say before Thanksgiving, your Honor, we could get it to you.

THE COURT: Give it to me Monday and I'll sign the order and we'll get that off.

MR. HERMAN: On the liaison issue, I would say Wednesday, if that's all right, Judge.

THE COURT: All right. By Wednesday.

MR. HERMAN: We'll need some time to contact those folks.

THE COURT: And once I sign the order with Verilaw or even before I sign the order with Verilaw, if you can let me know that, I won't contact them until you because they asked us whether or not they were designated and, of course, we said we didn't know anything about that at this point.

But when you do that, let me know so I can put our people in touch with them because I would like to go forward with our web page and get that up as fast as we can. If we can do it by next week, we want to do it by next week.

Let's go through the agenda that I was given. The virtual depository was the first thing.

MR. HERMAN: Your Honor, if I may, I'd like to ask from the plaintiffs side Leonard Davis and David Buchanan, who are

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2 the individuals who have been meeting primarily with the
3 technicians and with the defendants to give you a very short
4 report on that. And I know that my counterpart also wants to
5 speak to that. So, Leonard, do you want to lead off?

6 MR. DAVIS: We have contacted approximately four or
7 five different companies that we understand have created
8 depositories in the past. There is one in particular that has
9 done a joint depository, the others have familiarity.

10 As I appreciate it, the court has in its thought
11 process all documents that will be produced in discovery will
12 be put in this that the court's calling a virtual depository
13 and that these documents will be searchable by all counsel.

14 THE COURT: Right.

15 MR. DAVIS: And in doing that we have several technical
16 issues that will have to be addressed. Dave, you may want to
17 jump in here.

18 MR. BUCHANAN: The good thing is we don't have to
19 reinvent the wheel. There are vendors that do this. There are
20 some technical issues that may be unique to this situation that
21 we have to explore a bit.

22 Some of what we've done, just to perhaps take a
23 different path to tell you where we are, evaluate the utility
24 of this, not just for people with high speed connections to the
25 virtual repository, the people in the interland, so to speak,

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2 who may be accessing these things on less speedy highways so to
3 speak, 56K modem, and evaluate whether these people can
4 effectively use this, and currently that's what we're testing
5 now with a few venders which dwindles our list down.

6 We have yet to coordinate with the defense on that
7 particular list.

8 THE COURT: Do they have any facilities when you're
9 taking depositions instead of carrying, like we've done in the
10 past, the thousand documents or 50 document boxes to each
11 deposition that you can pull it up?

12 MR. BUCHANAN: There's many different components.

13 THE COURT: Seemed to me that would be helpful to you
14 all.

15 MR. BUCHANAN: Currently you can go to a deposition
16 disk in hand, you can display it with a computer assisted
17 device that can be mirrored on the video for display purposes
18 on the video. And it can be displayed to the witness like that
19 on a screen. I'm not sure that that's really necessarily
20 connected with the virtual repository, I think that's more of a
21 deposition guideline issue. We haven't explored that for this
22 case.

23 But what we have explored is the capability or the
24 capabilities of various venders to handle a case of this size
25 and their prior experience doing it. We think that the

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2 technical issues are surmountable. Obviously there is an issue
3 of how do you get access to all of these documents, you can't
4 just put images on a server and try to find things because
5 they're not full-tech searchable. There's got to be a database
6 that tells you how do I find the one that has my name on it.
7 So that's part of what we're trying to explore.

8 The capabilities of the system as far as the speed
9 with which this can be used is the primary issue that we're
10 currently wrestling with, so I think we would like to evaluate
11 that a little further.

12 MR. HERMAN: I want to just very distinctly tell the
13 judge what the primary vendor that we're looking at, what their
14 experience is.

15 MR. BUCHANAN: There are two that we've gotten to the
16 demo stage with. Case Central is one, they're probably one of
17 the largest and they've been doing it for the longest. They
18 are currently hosting images over 60 million images. We don't
19 anticipate this case to be of that magnitude.

20 THE COURT: What are you all looking at ball park wise?

21 MR. BUCHANAN: The defendant --

22 MR. HERMAN: Three and a half million documents I
23 believe was the last count, but we also -- two to three
24 million, but I think that we don't know in the international
25 area how many documents are going to be in translated form. So

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from the plaintiff's point of view, if the figure's three million, it's probably four million. But I would think less than five million. Three to five million.

MR. CAMPION: In the United States we had estimated two million, it looks like it's going to be two, three, maybe a little more; abroad our best estimate remains two million.

MR. BUCHANAN: So we're well within their capabilities obviously. They're hosting 34 cases now, this isn't necessarily a novel, it may be more common in high tech cases. But it's nothing that is an impediment to do in this instance.

UR-Law, which is a division of Merrill Corporation, a very large copy organization, public company. They're a newer player to the field, although they do have some experience in the large cases in the past year or so.

MR. DAVIS: Both of them have experience in joint defense depository type cases.

MR. HERMAN: The other factor that we might want to say, your Honor, is that dollar wise the economies are that the company that's been doing it the longest and has been in, up and running and had an opportunity to really deal with problems and glitches is a bit more expensive, that's Case Central; but right now all things being equal, we would probably recommend the company that's had the most experience.

THE COURT: Is everybody on the same page with costs,

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have you all agreed?

MR. IRWIN: We're not as far long as Russ' group is. We've had two conference calls with them, with our technical lawyers who can speak this techno language. Another one is scheduled for next Tuesday. Mr. Buchanan gave us the names of three vendors. We have contacted two of them and maybe today or tomorrow may be contacting the third. So I think that this is going to take some more work on our side.

THE COURT: Where are we though, we're talking about one vendor for both?

MR. BUCHANAN: The concept is that there would be one vendor would host all of the images with perhaps two separate databases that point to the issues.

THE COURT: All right.

MR. BUCHANAN: So we can keep any type of subjective work product protected.

THE COURT: You all, I'm sure, will look after your clients, I'm confident of that, with regard to issues that are proprietary and of interest to you and are of concern to them.

I'm mainly interested because you have no duty or responsibility to do it, so I have a duty and responsibility to be concerned about privacy issues of people who are not at the table, people who come in to depositions or come in to documents simply because they come into it. I'm concerned

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about those folks being out there for the rest of their lives when they haven't even done anything at all to get into this litigation.

So I don't know the answer to that, but we want to be sensitive to some privacy issues that come up in cases in a discovery mode where people have to tell their life stories or where they've been or who they've been with and all of that sort of thing and people get dragged in or put into litigation when they have no reason to be into it. So on the road, we've got, everybody's got to be heads up on that and let's keep an eye out for it.

Any other questions on any of the things we're talking about or particularly on the depository or those things? With regard to servicing, I'd like to get that up to speed as quickly as I can.

With regard to depository I would like to set another meeting, I don't want to just talk about it and then throw it out. So I want to get another meeting set up with liaison counsel at least to fill me in because I want to get this up and running. It's not going to be of any help to you if you go through half of the litigation in hard copy and then half of litigation without, it's a mess. So we might as well get started immediately with it so that you can, and I don't want to put off the discovery and put off production unduly

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because it's not going to help anybody. What's a realistic time frame that we ought to be meeting again?

MR. IRWIN: I would say, your Honor, after Thanksgiving. We're having a conference call next Tuesday. We have to contact another vendor.

THE DEPUTY CLERK: Tuesday the 28th.

THE COURT: Liaison counsel and anybody that they want to bring to the meeting to talk about it.

THE DEPUTY CLERK: Judge, could we do it at 8:30?

THE COURT: Can you all make it at 8:30?

MR. DAVIS: Does the court want representatives from these vendors present?

THE COURT: You tell me. I don't need it unless you feel that it's necessary. If you feel it's necessary we'll meet with them. If not, no. I'll leave it in the air now, you make that decision.

MR. HERMAN: 8:30 on Tuesday the 28th.

What we'll do is I'll have someone, I'll attend but I'll have Lenny and David actually be the ones to present. I am not wholly inadequate but I'm close to it.

THE COURT: The things that I'll need from you all at least to discuss is a way of funding it, equally seems to me to be the way to go, and we'll talk about how we get reimbursement. But we've got to get it up and running first.

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We'll talk about how the states participate in it funding wise on the user spaces or some other way, but at least you can be thinking about that.

MR. HERMAN: We're more concerned, and I bring the issue now because your Honor's instructed us that there's a potential problem, give it to you. I think the access problem and user fees, et cetera, can be worked out. We have appointed a committee to make recommendations and they've gathered orders from other cases, et cetera.

The real question gets into the work product in terms of, in terms of work product, which is another issue that we're looking at. And once this liaison committee order goes out, we're going to meet with those folks and attempt to work out something we can bring to the court dealing with the pure work product issue.

THE COURT: All right. And in matters of this sort, when we're on new ground or so, we don't have to write it in stone immediately. If we need to change it or fiddle with it, we'll fiddle with it and change it. So let's keep it in mind.

I want to get it up and running but we don't have to have everything doted and crossed, with the understanding that we want to get it doted and crossed later on. If we have to zig or zag along the way we'll do it if it works.

MR. HERMAN: Your Honor, I'll attempt to have a, on

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2 behalf of the PSC, a liaison recommended order to you certainly
3 by Wednesday of next week. I'll attempt to get the liaison
4 committee, which reflects what your Honor has directed to meet
5 on the 27th and then report to you on the 28th.

6 MR. LEVIN: If you bring in new people who don't have
7 much notice, we may want to move that out a little bit.

8 MR. HERMAN: I'll try to get it done.

9 THE COURT: If we need to move it back, we'll move it
10 back. Let's leave it like it is. If it can be done let's do
11 it. If we have to move it a day or so we'll do it.

12 Anything on systems so that our systems people can
13 leave if they need to, anything on any of that sort?

14 Let me talk a little bit before you leave about
15 the master complaint. You've got that and that's something
16 that at least Loretta Whyte would be interested in. What's the
17 concept there? Talk to me a little bit about it. First tell
18 me how many cases we're looking at, potentially in this court.

19 MR. CAMPION: While they're thinking, I can give you
20 the statistics as of today. This remains primarily federal
21 litigation. There are 575 plaintiffs, as of a very recent
22 count, and 79 to 80 percent of them are plaintiffs in this
23 litigation.

24 In the case before you they're either here or on
25 their way here through the tag along notices. There are 96

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cases pending in the United States, you've got or will have approximately 44 of them. The ratio of plaintiffs cases goes like this: For every federal case there's an average of ten plaintiffs, for every state there's an average of two plaintiffs, the federal cases average one death case for every ten plaintiffs, and that's how it's playing out.

Our expectation is based upon intuition, if nothing else, that this will remain a federal litigation primarily. Every case which has been put into state court which is possibly removal we removed, except for Pennsylvania and New Jersey where by law they are not removable when being a New Jersey resident, another a Pennsylvania resident. The remand matter has been very, very modest to date.

A couple of remand motions in some Mississippi cases, one is still before the MDL panel and a couple were decided by the district court judge who did remand them. That basically is where it is. Whether it's possible to estimate that this case is going to have 5,000 plaintiffs or some number around that, they would have a better insight than we will.

But we are now coming towards the end of, I guess, the eight or nine month period after this product was the subject of attention, so we're drawing near to a period where people are going to start thinking about the statute of limitations.

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2 THE COURT: When we talked the other day I think
3 plaintiffs estimated some 15,000 potentially.

4 MR. HERMAN: Maximum. I think on the bottom end from
5 what we know two to 3,000. Now, whether all of those cases
6 will be actually filed cases is another question because there
7 are some class actions that have been filed that have been MDL
8 and I believe, if some lawyers depending upon where their cases
9 are, I believe they under American Pipe --

10 THE COURT: Interrupted prescription.

11 MR. HERMAN: Right. I also, without getting into the
12 substance of the case, believe that the numbers are going to be
13 affected by the science and discovery in the case, because
14 within the first year and certainly maybe a sooner period of
15 time the effects of the drug once the plaintiffs have made the
16 discovery may very well determine the numbers.

17 I think rather than disclosing plaintiff's
18 position at the time, that's why there is such a great
19 variation between 3,000 cases and 15,000.

20 MR. BECNEL: Judge, as a practical matter what happens,
21 and Arnold Levin can tell us best, for example, in PhenPhen
22 there were only a few thousand cases totally filed. The bulk
23 of the people, once you file a case like this, Jim and
24 everybody else knows, you get 20 to 30 depositions per case
25 filed. So you try to hold back your inventory. Other than

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that you're going to take on 60 cases, for example, that I filed in PhenPhen I took 700 depositions.

So people have learned don't file cases quickly because they'll work you to death and if they get resolved you can always come into the picture. So I think that's one of the things that people are holding back on.

MR. HERMAN: I believe that what we envision in the master complaint is that we would file a master complaint or perhaps two, depending, perhaps one for individual cases and one for class actions or a master complaint that is separated within one document individual complaints, class actions, subclasses that we would have a check off system that's been used by some other courts in which any plaintiff rather than filing a separate complaint could check off on a form the allegations that relate to their claim, file in the MDL, the defendants would maintain whatever defenses they have except as a filing in the MDL when that case or if that case is sent back to the home jurisdiction there would have been no objection to venue by filing in the Eastern District.

In other words, they may designate the Western District of California would be filed in the MDL, they would check off very simply and the cases go back, they would go back to the home jurisdiction. The defendants would file their answers to the master complaint and their answers in the master

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complaint would suffice so that they don't have to file a --

THE COURT: Subsequent answers.

MR. HERMAN: -- subsequent answer in every case. At least that's what the plaintiffs are envisioning.

THE COURT: How do you all see it?

MR. CAMPION: Sounds fine, Judge.

THE COURT: Do we need a deadline or anything for that?

MR. HERMAN: We had --

THE COURT: You said something about that you would report to me -- let's see. There's an initial deadline by January 31st, additional discussions on this issue should include the advisability and so forth. Where are we with those discussions?

MR. IRWIN: I think where we are is that we're shooting for a January 31 deadline for the master complaint and either one or two forms to be shaped up. And we are going to continue our discussions about preparation of a complimentary master answer. And I would think that we should be able to conclude these discussions in fairly short order.

THE COURT: Let's put that on the agenda for the next meeting and report by then and let me hear from you.

MR. IRWIN: Do you want us to bring that to your attention on the November 28th meeting, your Honor?

THE COURT: Right. Okay. I think that's all we have

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1
2 with you all. You're welcome to stay. Do you need anything
3 else on logistics from the court?

4 MS. WHYTE: We are trying to estimate the volume of
5 paper.

6 THE COURT: She's here particularly to estimate volume
7 and get some feeling for what she's going to be up against.
8 She's our clerk of court for those of you who have not met her,
9 Loretta Whyte. Anything else?

10 MS. WHYTE: No, that's fine. Thank you very much,
11 Judge. Thank you.

12 THE COURT: The confidentiality order, I know you're
13 working at it. We wanted to discuss this, where are we with
14 the confidentiality order?

15 MR. HERMAN: We have about 20 pages of order, but we
16 have only three or four subjects left. And we're going to meet
17 again after this conference with your Honor and attempt to
18 resolve that discovery deposition guidelines. I believe we
19 only have one issue left.

20 THE COURT: What's a realistic date for submission of
21 that?

22 MR. CAMPION: Confidential order, I think we can work
23 out our compromises today and an order can be submitted next
24 week.

25 MR. HERMAN: On deposition guidelines, Jim and I then

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2 informally agreed not to bring to the court any controversy
3 until we discussed it, so I'm not going to bring up the issue
4 that's causing plaintiff's concern and the defendants concern,
5 but we have one substantial issue that I think we should bring
6 to the court. If we can't resolve it this afternoon we should
7 bring it to the court at the next meeting and let the court
8 resolve it.

9 MR. IRWIN: You might have to decide it.

10 THE COURT: Is this something the liaison can do?

11 MR. IRWIN: We're very close except for this one issue
12 we may need to cut the knot on.

13 THE COURT: Bring it to me when we meet with liaison,
14 when we meet for our meeting on Verilaw.

15 MR. HERMAN: I have no problem, Jim, in at least
16 alerting the judge of what that issue is.

17 MR. IRWIN: We don't either. The issue, Judge, is
18 whether there should be disclosure in advance of the deposition
19 by the questioner of the documents that the questioner intends
20 to use.

21 THE COURT: What's the adverse to that, why not?

22 MR. HERMAN: We really strenuously object because first
23 of all it means that we are providing our work product, what
24 documents we select to cross-examine a witness on involving
25 intellectual process.

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Secondly, your Honor, we're entitled to spontaneous answers in a deposition. If a witness has ten days to review the documents that that witness is going to be questioned on, and it is a good practice at the bar for lawyers to meet with their witnesses to review these materials, but the answers often come out the way interrogatory answers come out.

And we have no problem with agreeing that at any deposition the questioner, whether it be plaintiff questioner or defense questioner providing the other side with multiple sets of the documents or whatever. But we believe that the interrogation ought to proceed in such a way that we don't expose in advance our work product thinking and strategy in a deposition.

And in addition to that that the witness not be over prepared with respect to being questioned.

THE COURT: What's your response to that?

MR. IRWIN: Your Honor, our response is that this type of provision has been ordered in other MDL settings, Bone Screw is a good example, and we have language from Judge Beckett's order in Bone Screw and in PhenPhen for the use of this kind of procedure, because with all of the depositions that are going to take place, this accounts for depositions being better prepared and better processed.

This same order is model order which we would

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submit to you also includes a provision for reserving impeachment documents. So if there are impeachment documents under Rule 603, I think, they are clearly reservable and should be reserved at the deposition.

But if you're going to show a witness a lot of documents, was this document prepared by you in the ordinary course of business, those are the kinds of things that can greatly promote efficiency. And that's why we think this order has been entered in other settings like this and should be appropriate.

MR. HERMAN: May I respond to that, your Honor?

THE COURT: Yes.

MR. HERMAN: For every time that it's been ordered there are a number of times it's been denied in the complex litigation, particularly in the district courts in Louisiana, it's a very rare situation.

Secondly, we have, we believe, an agreement as to authenticity of documents produced. The real issue is whether we can be advocates and whether we have to disclose our thinking in advance and whether we're going to get spontaneous answers to questions.

THE COURT: I'll give you an opportunity to brief it, I don't really need a long brief on it. Three, four pages is enough for me. I understand the issue.

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2 If there are any orders that I need to see, give
3 me the orders. If there is a response to the orders, give me a
4 response to the orders, that's where we are. I got the issue,
5 I understand.

6 MR. BECNEL: Judge, there's one thing I would like to
7 tell you that happens practically. And I've seen this in
8 numerous cases. What happens to defeat that order people will
9 send you ten cases of documents, knowing full well in ten days
10 you couldn't possibly do it and that's trying to break that
11 rule if it's ordered, they give you so much you can't possibly
12 prepare or they give you so much that he might testify from you
13 can't possibly go through them. And that needs to be addressed
14 also.

15 THE COURT: I understand. We've all been there, done
16 that. I understand the issue. I got it.

17 MR. IRWIN: Your Honor, when would you like us to
18 submit that to you?

19 THE COURT: What's realistic?

20 MR. IRWIN: I guess we were going to try to take this
21 up no later than the 28th; is that right? Or I think we can
22 submit --

23 THE COURT: We have some holidays, I'm conscious of
24 that.

25 MR. IRWIN: Judge, there is no rush on this actually

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1 while we're staying on ourselves over the work project, this is
2 not one where there are not going to be any depositions for
3 tomorrow or the next day. Could we get this December 11th
4 because that's ten days before our next regularly scheduled
5 meeting on December 21st?
6

7 THE COURT: That's all right. I don't have any problem
8 with that.

9 Let's just finalize the other thing that we were
10 talking about, what's realistic?

11 MR. CAMPION: We can submit a consent order to you next
12 week, by the end of next week; or if we haven't reached
13 agreement, we'll each send in our separate orders.

14 THE COURT: Try to reach agreement. If you can't, give
15 me separate orders and I'll make the cut.

16 MR. DAVIS: By November 29?

17 THE COURT: On the order by, what's the date?

18 MR. IRWIN: It would be November 23.

19 THE COURT: With regard to the other matter I'll need
20 to hear from you all before then on a brief standpoint. You'll
21 want until the 10th you're saying?

22 MR. IRWIN: The issue surrounding the ten day rule, we
23 would propose to submit that to your Honor on December 11th.
24 And with regards to the confidentiality order, whatever we
25 disagree on we would submit to your Honor competing proposals

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by next Wednesday, November 23.

THE COURT: I don't have any problem but you're going to have to respond, you're going to have to see what he's writing to respond. Two days after that give me your brief.

MR. HERMAN: The 13th, sure.

THE COURT: Defendant by the 11th, the plaintiff response by the 13th.

The non-destructive preservation of evidence order, who wants to talk about that?

MR. IRWIN: Judge, I thought we had an agreement more or less on that, we submitted language to your Honor that I believe was issued resulted in issuance of an order, pretrial order No. 2 providing for preservation of evidence. I believe we're okay on that.

MR. HERMAN: We're okay. The only question --

THE COURT: I had that as four on the report that you all gave to me, non-destructive order, you said something about you thought that you had something to do on follow-up.

MR. HERMAN: We want to clarify that it covered the hard drives and we've said it does, so we don't have a problem.

THE COURT: What about the Bates numbering?

MR. IRWIN: We've agreed on the Bates numbering format.

THE COURT: The authentication, you have an agreement on that?

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2 MR. IRWIN: Yes, your Honor, we set forth our agreement
3 with respect to authentication, I believe, in the joint report.

4 MR. HERMAN: We need to clarify --

5 THE COURT: You said you were going to but you needed
6 to clarify it with a stipulation. Do you anticipate doing a
7 stipulation?

8 MR. HERMAN: It's in one of the orders we'll submit.
9 The thing that needed to be clarified, and I think we did it
10 over the phone, is I thought the language that we had submitted
11 and agreed on was a bit ambiguous. The defendants' position is
12 that the stipulation on authenticity does not cover exceptions
13 to the hearsay rule, that it's only a stipulation as to
14 authenticity, it's not a stipulation as to business record.
15 The plaintiff's position was that if the document was a
16 document of the defendants produced and was in the ordinary
17 course of business, that that order be stipulated as well in
18 light of the exception to I believe it's 803.

19 THE COURT: 803. If it's a 901 problem, we can deal
20 with a 901; if it's an 803 problem, that's another issue. It
21 may not carry, one may not carry the other. It's easier if you
22 do both together but need not be done together. If you're
23 agreeing on stipulation, by stipulation with authenticity,
24 let's do a 901 stipulation. We can get to the other one.

25 MR. HERMAN: We have a 901 agreement. The 803 we

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2 don't. But what I was hoping to avoid was a large number,
3 several 100,000 requests for admissions following the formula
4 set forth in FRCP as to the 803 issue and have that issue just
5 resolved by request for admissions if we can't reach some
6 agreement on it so that when we go into, for example, expert
7 depositions or key depositions we don't have the foundation and
8 hearsay problems, those have been, for the most part, resolved.

9 MR. IRWIN: Your Honor, we have, I think, resolved the
10 901 issue, and that was the issue which we took up because that
11 is what traditionally in the early case management orders in
12 the manual for complex litigation. And in those early case
13 management orders, the 803(6) issues are ordinarily not taken
14 up --

15 THE COURT: The 803(6) issues is it's very difficult
16 sometimes to blanket that, it's easier to do a 901, but most of
17 the 803(6) issues ought to go away. But you're going to have
18 some comfort sometimes when they look at the document he's
19 urged, he's not boxed in by stipulation. I can see that
20 potential problem.

21 MR. HERMAN: My recommendation was except as otherwise
22 objected to if the document is, if the document is stipulated
23 as authentic, unless there's an 803 reservation then it fit the
24 803 formula. Otherwise the only other way to do it is through
25 a request for admissions.

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2 THE COURT: That's an easier stipulation, take a look
3 at it.

4 MR. IRWIN: We'll look at it, Judge.

5 THE COURT: I'd like to see that stipulation if it's
6 possible.

7 Give me an answer, what's a realistic date for an
8 answer to that?

9 MR. IRWIN: Can I confer with my colleagues, your
10 Honor?

11 THE COURT: Yes.

12 MR. IRWIN: Can we get back to the court, get back to
13 our opposing counsel sufficiently in advance to be able to talk
14 to the court about this on December 21?

15 THE COURT: Fine.

16 MR. DAVIS: Just so I'm clear, you want a separate
17 written stipulation submitted jointly on the 901?

18 THE COURT: I would think that it would be easier if
19 you're 901 included the 803(6) in it, but give a reservation in
20 that type situation. I think the point is well taken. I think
21 you need some kind of comfort. It's easier to blanket 901 you
22 are producing a document so they're authentic, otherwise you're
23 not going to produce something that's not your document. So
24 it's easy to make a 901 blanket. But some of the 803(6)
25 material, it's hard to just blanket that, it might come up.

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2 MR. HERMAN: A 901 stipulation as it reads as of today
3 so the court will be aware does not include third party
4 documents generated outside that find their way in a file. We
5 believe we can handle that through other discovery devices.

6 THE COURT: Okay. The document production protocol,
7 where are we with that?

8 MR. IRWIN: Your Honor, we've been having discussions
9 in the context of the discussions about the virtual document
10 depository. We've also had discussions about the conventions
11 or common language for marking, identifying, imaging the
12 documents because you really have to do one to do the other.
13 Those are the same technical discussions that we were trying to
14 allude to a little bit earlier, another conference call is
15 occurring next Tuesday on that.

16 It is complicated. We have a number of *** areas,
17 for example, with respect to the Bates numbering, to the format
18 of the imaged files, which will be TIF files, but there are
19 still elements of that that we are working on. It is a very
20 technical topic.

21 THE COURT: Let's just put that on the agenda for our
22 next meeting. When is our next meeting, what was the 21st?

23 MR. IRWIN: The third Thursday meeting would be
24 December 21.

25 THE COURT: Okay. With the depository location we're

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keeping that under wraps presently to see where we go with the virtual repository.

MR. HERMAN: Plaintiffs depository is going to be at 429 West Airline, LaPlace, Louisiana. It's about 15 minutes from the airport, convenient to our folks. We've decided that since there are no economic burdens at that facility, that if that facility does not prove adequate or convenient at some point we may move it to the Central Business District.

We've investigated Central Business District locations. Right now the best location with space available, to advise the court, appears to be the old bank of New Orleans building at 1010 Common. They have a lot of space and square footage price is fairly reasonable.

THE COURT: Some of this might be moot or at least not as necessary if we get on-line as quickly as we can.

Guideline depositions, guidelines for deposition, deposition guidelines.

MR. IRWIN: Your Honor, we have worked, we've accomplished a great deal on that, and I think with the exception of this matter that we're going to submit to you on the ten day issue, I think we're very close to resolving everything else. And I think we're going to finish off what few issues we have left after this meeting today.

THE COURT: And we ought to have that in writing from

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the standpoint of depositions get something for me that I can adopt in a pretrial order so that we can put it out there.

MR. HERMAN: Yes. Your Honor, we can submit that, I guess, at the same time we submit the other issue and leave a space for whatever your Honor directs on that issue.

THE COURT: Okay. That's fine.

At 14 on your matter you have: ETO-2, Section 7(b) issues, the parties have had numerous meetings regarding document production, sequencing of documents, depositions. PLC has furnished DC with a layout of sequencing of such and such. Written proposals are being worked out and conference calls scheduled for Tuesday, November the 14th for follow-up regarding depositions. The parties have exchanged proposed deposition guidelines, there are a number of areas where the parties agree in a separate conference call for November 14th in an effort to iron out differences. Where are we with that?

MR. IRWIN: Those calls occurred. I believe we've ironed out most of the differences with respect to the deposition guidelines. We are having another call with respect to the document production protocol and conventions next Tuesday. We have been presented with a proposal for the sequencing of the discovery and the production of the documents in the order that they have suggested would be appropriate. We are and Mr. Preuss' office is reviewing that. We just got that

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recently. And that's where we are on that, your Honor.

THE COURT: It makes sense to try to get some sequencing because it makes sense at the deposition that you're going to be taking on both sides. Otherwise you've got to wait until all of the documents are in before you begin depositions and then you may have to take some back again.

It would just be easier, whatever sequencing. If you're not comfortable with one, let's try to get a sequencing worked out. It just makes sense in a case like this with this many documents.

MR. HERMAN: Your Honor, we provided our first request for production to opposite number. We've asked that the sequence be, the request for document production has alphabetical categories of documents, and we've asked that they be produced in the sequence A, B, C, F, D, E, H, G, I, J and expect the defendants will respond with an agreement to produce in that sequence or some alternative we can talk about.

But we'd like to have that as soon as possible because as your order reads now we can't serve our request for production until 30 days after the initial production and we'd like to get the initial production and then serve the request for production.

THE COURT: Have you all talked about this?

MR. PREUSS: On the sequencing, we obviously have been

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2 at the documents for quite sometime, so we will be happy to
3 chat with them afterwards. The initial one, their No. 1
4 happens to be an area that's not relating to Propulsid per se,
5 so we're having to do that so that may be slow.

6 But we're virtually ready as of right now to our
7 documents with the MDA that was previously November 15th. So
8 once we get the confidentiality, once we get the production
9 protocol set we're ready to produce these, about 350,000
10 documents. And obviously that's got adverse experience
11 reports, clinical testing, update reports, et cetera.

12 MR. HERMAN: One of the practical considerations, and
13 we appreciate that counsel has been ready to produce those, is
14 that not only is the sequencing important but without a
15 request, a formal request for production when documents just
16 come in we don't know what issue or request that we've made
17 they're responding to. With MDA it's easy, we can identify
18 that. With the others, we're not. So we will be ready as soon
19 as the virtual depository issue is decided to receive the
20 documents.

21 The Plaintiffs Legal Committee again stresses its
22 universal concern having been through this on a number of the
23 cases that review of hard documents does go a lot faster and
24 more efficiently than a review on CD ROM. But nevertheless
25 we're going to, we will have to take it on ourselves to

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download and make hard copies, et cetera.

But we'll be ready when we receive those documents immediately to review them and then we may ask the court to accelerate the time at which we can file our request for production so that at least it's of record. Now, whether that will necessitate more time for the defendants to produce in sequence is another issue.

MR. PREUSS: We won't maintain the dialogue and try to accommodate their sequence as best we can, and I think that's all we can do at this point.

THE COURT: I think some of it is logistics and put your heads together and tell him your problems and see if you can solve them. And if you have an legitimate reason for objecting, object and I'll cut that knot.

And with regard to objections, at least at the outset, we're going to have to work out some kind of method. I don't want to have everything on briefs and paper, some of this I can get to immediately. If there's problems at a deposition, we want to see if we can work them out. If you can't work them out either call, I may have to work out something that you can either call me or Judge Africk and we can get on it right away and give you an answer immediately so that we don't have to have a motion filing of documents and things of this sort, briefs.

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Also in some of these as you all know better than I, it's not unusual to have a court date, an open court, regularly scheduled date. I'm not going to set any of that sort. But let's keep our eye on it, there's an initial problem with cases like this that some folks feel they're being kept in the dark and that has a way of creating problems that nobody anticipates.

If that's something that's potential in a case like this, you have to give me a heads up so we can deal with it immediately. I don't want it to just linger there and fester and present itself in different forms down the road apiece.

Subpoenas, entities outside of the country, how do we deal with that? We're going to have to do Haig with this type situation or do we get around that?

MR. HERMAN: We've asked that the defendants consider not having or not requiring us to use the Haig convention.

THE COURT: Is there a problem?

MR. CAMPION: Your Honor, if it comes to pass the deposition has to be taken of people in Europe who are employees, we will produce them, there will be no need to go through Haig.

MR. HERMAN: I'm sorry?

MR. DAVIS: No need.

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MR. HERMAN: Thank you.

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MR. CAMPION: Is that a yes?

4

MR. BECNEL: I think he was still in shock.

5

6

7

THE COURT: He said if you need witnesses that are outside of the country and they're employed by him, let him know and he'll produce them.

8

9

MR. HERMAN: We'll just send you the notice, will that suffice?

10

11

MR. CAMPION: Send us a notice, we'll work out dates and places.

12

13

14

15

THE COURT: We have a problem on the 21st with just logistics around here. Can we work that out as a nine o'clock meeting instead of two o'clock meeting, does that create any problems?

16

MR. IRWIN: Certainly.

17

MR. HERMAN: Okay.

18

THE COURT: All right. Let's do it at nine.

19

MR. HERMAN: That's December 21st?

20

21

22

THE COURT: Yes. Subpoenas on corporate employees, officers, directors, what's the problem or potential problem there?

23

MR. CAMPION: Shouldn't be one.

24

25

MR. HERMAN: Shouldn't be one as we understand it. We will send the notices and the subpoenas duces tecum or 1442 to

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the defendants, they will round up the witnesses and we'll mutually agree on dates if there's a scheduling problem.

THE COURT: Fair enough?

MR. CAMPION: Satisfactory.

THE COURT: All right. Let's see. We've gone through 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. Twelve the plaintiff counsel expense. Do you have some form?

MR. HERMAN: Your Honor, it's the form that -- well, we have several things to report. I don't have a form on expenses to bring your Honor, but I will submit one next week.

With regard to hourly keeping, we have a form that conforms with the ABA guidelines. We have retained an outside CPA to audit the forms. They will be forwarded and sealed as your Honor's directed. We do ask your Honor to let us make that filing the first filing in December so that we have time to get all of this in place rather than this month.

THE COURT: I don't have any problem with that. Let's do it with the first of December.

MR. HERMAN: We have also one other matter. Now that Verilaw is selected from the plaintiff's point of view, if I may approach. And, Jim, I think you have a copy.

MR. IRWIN: Yes, I do.

MR. HERMAN: This form we would like as part of an order or attachment to an order requiring the lawyers that

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2 represent plaintiffs that are in this court to fill out and
3 send in so that we make sure that we have the right information
4 for Verilaw and that in the event that the information changes,
5 for example, a phone number or E-mail or whatever, they're
6 responsible to update it rather than putting the onus on the
7 PSC, the defendants or the court.

8 THE COURT: You may not have a dog in this fight, but
9 do you have any problem?

10 MR. IRWIN: We're okay with that.

11 THE COURT: We'll do it.

12 Verilaw questionnaires, what is that about?

13 MR. IRWIN: That was it.

14 THE COURT: Anything from your standpoint, any
15 documents that you need, any stuff you're working out? Have
16 you worked out a plaintiff informational form?

17 MR. IRWIN: We have given our colleagues across the way
18 a plaintiff questionnaire and they're working on it. I believe
19 they have a committee working on it and they're going to get
20 back on it.

21 THE COURT: When can you get back to him, what's a
22 realistic date?

23 MR. HERMAN: Well, I would think we need a week at
24 least after the Thanksgiving break. I would say whatever that
25 December 11th reporting date is we could report at that time.

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THE COURT: Is that okay with you?

MR. IRWIN: That's fine.

MR. CAMPION: I would like to add an amend to what Mr. Herman said about the federal-state cooperation thing. It is a fact that the Plaintiffs Steering Committee and the defendants view this matter of federal-state cooperation view the same way.

To the extent this litigation is going to remain under control, it's going to remain under control if there is cooperation. There will be some breakdown from time to time I expect, but to the extent that can be kept under control it's wonderful. Part of it is being done by the Plaintiffs Steering Committee trying to bring plaintiffs who are otherwise in state court into the system. We'll do what we can on our side. And I think we're going to need the court's assistance with other judges.

THE COURT: I think with other judges I would like to get up to speed and communicate as quickly as I can so that they don't have to contact me. I would like to contact them and make the initial contact so that they know I'm concerned about their problems.

But it's also, I want to meet with the liaison counsel, we ought to have all of the liaison counsel present at one time. I don't need the liaison counsel to meet every

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meeting, but they ought to feel at least a part of this group. I think if we get them in at the beginning, I believe it's important to get them in at the beginning.

MR. HERMAN: Your Honor, I heard with respect to liaison counsel your Honor's directive, but I think I should on behalf of the PSC state that rather than having the liaison counsel vote, we would rather have the PSC unanimously vote on co-chairs so that we do not have a conflict down the line. If your Honor would reconsider that we'd appreciate it, but of course we will do whatever your Honor directs.

THE COURT: How does everybody feel with that? Does that make more sense? I hear you on that but let's get some consensus. If we get leaders that they're not interested in following we're going to create a problem, so it's got to be done. I'll let you have your way but it's got to be done that way to make it work rather than my beating into it.

With something like this I think cooperation is going, if we get it started it'll work that way. If they don't cooperate voluntarily I'll make them cooperate, but I would like to go the first route if we possibly can.

MR. SEEGER: My office has firms in New Jersey and New York, we're also involved in the state wide coordinating cases in Jersey.

THE COURT: I think it's particularly helpful to the

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defendants, and I think we ought to keep that in mind because I know that it's obviously helpful to the plaintiffs and it'll come back to mean something to you personally as well as other ways from your standpoint. But from their standpoint I don't want them to be dragged all over the lot two or three and four and five times, not fair to them, I won't put up with it.

So let's make the state people aware of that in as gentle a way as you feel appropriate, but that's my thinking on it. Anything else that we need to talk about? Okay. Folks, thank you for your input. Appreciate it.

MR. HERMAN: Thank you, Judge.

MR. IRWIN: Thank you.

(WHEREUPON, THE STATUS CONFERENCE WAS CONCLUDED.)

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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