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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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MDL No. 1335  
SECTION "L"  
New Orleans, Louisiana  
Tuesday, November 28, 2000  
8:30 a.m.

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

APPEARANCES:

FOR THE PLAINTIFFS:                   HERMAN, MIDDLETON, CASEY & KITCHENS  
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FOR THE DEFENDANTS:                   IRWIN, FRITCHIE, URQUHART & MOORE  
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P R O C E E D I N G S

(STATUS CONFERENCE)

(TUESDAY, NOVEMBER 28, 2000)

MR. IRWIN: I don't know where Russ is.

MR. BECNEL: Russ had a death in his family. I called yesterday evening, but I think on his wife's side somebody died and he had to go deal with that yesterday. This just happened.

MR. IRWIN: So Russ isn't going to be here?

THE COURT: I called his office and he's on his way, but I didn't want to keep you all waiting. I wanted to meet with you all as I said at the last meeting to talk primarily with you about the virtual depository and to get some sense from you all as to what's happening.

Also I'd like to take the opportunity while we're together to discuss with you and to show you our website. We have it up and running, and I'm going to give you the address and let you take a look at it and see whether you have any suggestions as to what I can do to make it better.

(MR. HERMAN, MR. DAVIS AND MR. BUCHANAN ENTERED THE ROOM.)

MR. HERMAN: Hi, good morning. I apologize for our tardiness, your Honor.

THE COURT: We are just getting started. I mentioned

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1  
2 that the reason, primary purpose of the meeting was to meet  
3 with you all and follow-up on the virtual depository and also  
4 talk with you about the website, I wanted to show it to you.

5 I've asked Patty to be with us today to answer any  
6 questions and to discuss anything that you may need discussing.  
7 I'm also interested in getting any suggestions you have on the  
8 website when I do show it to you.

9 Let me hear from you first of all as to what's  
10 happening with your depository.

11 MR. HERMAN: I'm going to ask Lenny Davis to address  
12 that if I may, your Honor.

13 MR. DAVIS: We've had discussions with four different  
14 venders. Dave Buchanan and myself have primarily been involved  
15 in that aspect. We have spoken to defense liaison counsel Jim  
16 and Ken Conour, who is their California counterpart whose been  
17 involved and had discussions with them concerning these  
18 different venders.

19 We took your directives from the last meeting as  
20 to what you envisioned a virtual depository to be and had  
21 additional discussions amongst ourselves as to how a depository  
22 would be created and what we understand the court to want in a  
23 site, what the court has called a website, so to say, or a  
24 location on the internet whereby a lawyer can go with relative  
25 ease but with security to view the various documents or things

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1  
2 that are produced.

3           And I say "or things" on purpose. Documents are  
4 relatively easy to handle. We envision electronic discovery  
5 also that would be present, for instance, lawyers would be able  
6 to search e-mails, lawyers would be able to get depositions,  
7 lawyers would be able to get any type of things that are  
8 subject to discovery through this virtual depository or  
9 repository that would be posted on the internet.

10           There are companies out there that have created  
11 repositories or depositories, primarily they've been done in a  
12 joint prosecution type, but there have been some discussions  
13 that we've had with people who are familiar and are able to put  
14 a depository such as the court envisions out on the internet.  
15 That's the general overview.

16           THE COURT: Have you made any commitments, have you  
17 solidified anything? I would like to get this rolling because  
18 I think everything is waiting for us to move along that line.

19           MR. DAVIS: We're prepared to go forward.

20           MR. BUCHANAN: We've narrowed it down to I'd say three  
21 vendors who are real contenders, and, frankly, what we propose  
22 is a shoot-out among the three of them on both price and  
23 features, perhaps with defense counsel available to participate  
24 in that so they can evaluate any of their concerns  
25 simultaneously and make a decision pretty promptly after that.

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2 THE COURT: Have you folks been involved in this?

3 MR. IRWIN: Yes, sir. Ken Conour is the lawyer in  
4 Chuck Preuss' office who has been working on this project. He  
5 spoke to all three of the venders that Dave Buchanan told us  
6 about. He tells me that by Thursday of this week he expects  
7 that our vendor or our supplier for our document production is  
8 going to give us, that vendor is going to spec out for us the  
9 document production protocol, the formatting that you guys  
10 wanted to have and to see to what extent the work that we  
11 already have done can be accommodated by your specifications,  
12 to what extent it can be done, to what extent it's going to  
13 cost more money, to what extent it might be associated with  
14 some delays and if we're going to accommodate these changes.  
15 And we're supposed to have that speced out by Thursday. And I  
16 think that that's moving along satisfactorily.

17 But I did want to tell your Honor about a couple  
18 of issues that we saw. Mindful that you always wanted to hear  
19 from us what the problems were, give you a heads up on this. I  
20 mentioned this to Lenny yesterday.

21 One of the issues we see is the issue of cost.  
22 And your Honor mentioned the other day at our hearing that you  
23 are envisioning a 50/50 type of idea here. And we are  
24 wondering whether that is really an appropriate allocation  
25 considering who is going to get the most value out of this

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1  
2 document depository, and we think, and while we are very much  
3 in favor of a document depository, we think it's an efficient  
4 way to do things, we think it will enhance federal-state  
5 cooperation which we acknowledge is to our benefit and is a  
6 value to us, yet we think that the greatest value is to the  
7 plaintiffs.

8           So whether there should be an equal cost sharing  
9 in the funding of this depends on in some respects what it's  
10 going to cost. It also depends on what type of costs we're  
11 talking about sharing.

12           So much of the costs associated with the document  
13 depository relate to how one subjectively catalogs and codes  
14 one's documents so they can be searched and retrieved. What  
15 I'm assuming that my friends across the aisle are going to  
16 approach that intelligently and they're going to code their  
17 documents and develop search and retrieval engines that they  
18 think are appropriate for them to prosecute their case.

19           We won't have access to that, we shouldn't, that's  
20 work product, but we shouldn't pay for that either. We, of  
21 course, will be doing that on our side. We're trying to start  
22 that now. They shouldn't pay for that.

23           So I think we have some cost issues that are not  
24 as easily worked out as they were with respect to the service  
25 application website that we did with Verilaw. And a suggestion

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1  
2 that we would like to make is that while these conference calls  
3 have been helpful and we're making progress, we think there  
4 ought to be a face-to-face meeting down here just to hash this  
5 thing out, we need the technical people here.

6 I have tried to get dates from our people, I  
7 mentioned this to Lenny yesterday, and I would like to suggest  
8 a meeting here in New Orleans, if we could get the proper  
9 vendor down here by then, on December 6, 7 and 8. It will be  
10 attended by Ken Conour, who I mentioned earlier, your Honor,  
11 Jeff Hewitt, who is a technical representative I think in the  
12 New Jersey office, Diane Barasso who is also involved in the  
13 technical side, and I would attend it as well.

14 And all of us have a clear calendar for those  
15 three days, and we would just sit down as long as it took to  
16 try to hash through those issues.

17 MR. HERMAN: Your Honor, there are a number of issues  
18 that I'd like to bring up in this context that are very  
19 troubling to me, when I say me I mean to the PSC. And we have  
20 had numerous discussions.

21 With respect to the confidentiality order, we  
22 worked that out. It was give and take on both sides. I'm  
23 happy that the court, we're both happy that we don't have to  
24 burden the court with that issue.

25 Let me discuss some other issues. As to costs,

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2 one thing that concerns the PSC is the fact of whether we're  
3 going to be getting hard copy from the defendants in addition  
4 to electronic CD ROM imaging. The defense position is, no,  
5 they'll just provide CD ROM.

6 I think at this point rather than bring that issue  
7 to the court I think the PSC is willing to say, okay. You  
8 maintain the originals that the images are from, we will  
9 undergo the expense of downloading hard copy because our people  
10 feel they have to work from hard copy. That is going to take  
11 some considerable expense, it's going to take some time.

12 We have expenses in terms of the search engines  
13 that we're going to need, we have an issue that I'm going to  
14 ask David Buchanan to address in a moment. We have been  
15 engaged in a tug of war because, frankly, the defense has had  
16 six or seven months to begin assembling documents and coding  
17 them.

18 There are two types of codes, as your Honor is  
19 familiar with, there's the objective code which generally gives  
20 the date, the general subject matter, the recipients, the  
21 senders and the custodian. The defendants have said, well,  
22 look. We will give you the subject matter, general subject  
23 matter, we will give you who had the custody of the document,  
24 we'll give you the date, but we're not going to give you author  
25 and recipients, and the reason we're not going to do that is



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2 because we went to some considerable costs to get that done. I  
3 think I fairly stated our discussions.

4 Well, what that means is we are going to have to  
5 be engaged as plaintiffs doing subjective coding on an index  
6 that's already been done and it's going to duplicate expense  
7 and it's going to duplicate time. In order to arrive at a  
8 confidentiality order on confidential documents, the plaintiffs  
9 were willing to give up the objective coding that I've just  
10 described that the defense has, but in the broad context of  
11 production that issue is still alive and it is a serious cost  
12 issue.

13 Just the getting enough lawyers to go through  
14 these documents and accelerate a process that the defendants  
15 have had ongoing now for a number of months is problematical  
16 for us.

17 There is another expense that I'm particularly  
18 concerned with, and that is how do you fairly share this  
19 burden? What I would like to do is present to the court before  
20 the meeting on the 6th, 7th and 8th with a copy to liaison  
21 counsel, a series of orders that have been used in other cases  
22 that your Honor might want to consider.

23 What we are concerned about is budgeting generally  
24 \$1 million just in the initial phase of discovery, and then  
25 having lawyers who haven't participated either economically or

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1  
2 with their work effort in the process we're undertaking, then  
3 having available to them for a very nominal amount access to  
4 all of this work product. And to us that's very serious,  
5 because we not only have an out-of-pocket cost but we're going  
6 to have a terrific number of lawyers involved.

7 We've endeavored to do in the 1355 MDL something  
8 that has not been done in other MDLs, and that is to make it  
9 more democratic. We have invited every lawyer who has an MDL  
10 case to participate in some way, both in cost contribution and  
11 in work effort to the MDL effort.

12 Usually it's been controlled by a very small  
13 close-knit group who do 90 percent of the work and pay lip  
14 service to the other lawyers. We really have attempted to  
15 change that, and I believe by the next time we meet formally  
16 we'll be able to give your Honor a written list of whose on  
17 committees, et cetera. So those things trouble me.

18 So in the general context of cost and a virtual  
19 depository, I think we ought to proceed as quickly as we can as  
20 your Honor's directed to get it up and running. I confess  
21 again, I am not technically able to deal with the technical  
22 issues, that's why David Buchanan is here. In that regard he  
23 has an issue that he would like to bring up that's been the  
24 subject of discussion, and I'm going to ask him to do that in a  
25 moment.

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2 I have had over the holidays numerous discussions  
3 with various lawyers who have state cases. Generally the Texas  
4 lawyer that I spoke with said he'd be honored to serve on a  
5 liaison committee appointed by the court, but indicated that he  
6 was hesitant because he did not know what the duties were and  
7 he did not want to do anything that would jeopardize the  
8 movement of state cases. And I indicated to him that I felt  
9 that, first of all, I couldn't commit for the court or for the  
10 defendants or for the plaintiffs that the liaison committees  
11 activities would not delay or affect any state court  
12 proceeding, because the whole idea was going to be to try and  
13 coordinate particularly the discovery issues.

14 THE COURT: I see it as facilitating the states, not  
15 hurting them. That's the purpose of it.

16 MR. HERMAN: So he was hesitant to make a commitment.  
17 I spoke with another group of attorneys in Texas, and they said  
18 that they did not want to serve on a liaison committee but they  
19 had confidence in Richard Arceneaux. We wanted someone to  
20 liaison with him, they preferred Richard.

21 In terms of New Jersey, I think it's fair to say  
22 to you that many, not all, but many of the lawyers who have  
23 cases in New Jersey state court do not want to participate in a  
24 liaison situation. They indicate that they believe that the  
25 state court in New Jersey will not entertain a federal type

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1  
2 confidentiality order, they are not willing to negotiate with  
3 the defendants a confidentiality order.

4           They would like access to the virtual depository  
5 and the work product, deposition work product, briefs, motions,  
6 requests for production. In making an overture to them I even  
7 provided them with the same Request for Production that we have  
8 not filed or formally served but which we've given the  
9 defendants as well as the sequencing hoping that since they  
10 didn't have a product like that it would alleviate the defense  
11 by dealing with one Request for Production. And frankly, we  
12 expected them to cannibalize it for their own purposes, and I  
13 use that in the best sense of the word.

14           These are lawyers who really believe, many of  
15 them, that they want to ride their own horse. Now,  
16 Mr. Buchanan and Mr. Seeger who also have a law firm in New  
17 York and an office in New Jersey who know these lawyers very  
18 well, who have been in other cases with them, who are on the  
19 PSC liaison with those folks, and I hope to meet with them face  
20 to face.

21           But I must tell you with California and West  
22 Virginia there isn't a problem. With Texas there may be a  
23 problem and in New Jersey there certainly is a problem. I  
24 don't have really any suggestion to the court other than the  
25 PSC has recommended appointments to you and the people who have

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1  
2 been appointed represent a broad spectrum of the bar as your  
3 Honor requested.

4           And they're good people and they'll do a good job.  
5 But there are problems. I hope that I can meet with Danny  
6 Becnel and the two of us can go over together and talk with the  
7 Texas lawyer who we believe is very important in this process.  
8 And at this time I'd rather not use any names because I don't  
9 think it would be fair to either the New Jersey lawyers or the  
10 Texas lawyers.

11           I'm hopeful that -- well, I know that I talked  
12 with David's partner Chris Seeger, he is going to set up a  
13 meeting with me to meet with liaison counsel in New Jersey and  
14 some of the other leaders to see if we can work this out. But  
15 I wanted to tell you now, this is going to be a difficult  
16 problem. It may be that it can only be handled at the judicial  
17 level.

18           THE COURT: Let's not worry about getting all of our  
19 ducks in order if we have some ducks already in order. And I  
20 mean that both from the standpoint of cost as well as liaison  
21 counsels' present position. I think in a case like this we  
22 make a mistake if we feel that we have to have everything  
23 nailed down before we take a step.

24           I understand the problems that you're going  
25 through, and, first with costs, I hear you, I understand that.

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2 If it's unfair, we'll make it fair. The fact that you do 50/50  
3 in the beginning doesn't mean that's the way it ought to be or  
4 that's the way that it ought to eventually be. But we have to  
5 get it started at first and then we'll take a look at it.

6           Some of these problems may go away, some of them  
7 may not go away. If they don't go away, I would be receptive  
8 to hearing from both sides.

9           From the standpoint of indexes or material that  
10 either the plaintiffs have prepared that you would benefit from  
11 or you have prepared that the plaintiffs would benefit from, we  
12 have to step back and look at this thing. It's to everybody's  
13 advantage to share material that can be shared. I don't want  
14 you to be doing things a second time if they've already been  
15 done, and I don't want them to be doing things a second time if  
16 they've already been done, it's not fair to anybody.

17           I want everybody to protect their clients, and I  
18 understand advocacy and I understand how to go about doing it,  
19 but we have to get over some of the resistance generated by the  
20 approach that I don't want to share with you because it's going  
21 to help me if you work. We've worked, I now want you to work.  
22 There will be enough opportunity for everybody to swap effort.  
23 What you share today he's going to have to share tomorrow and  
24 what he shares today you're going to have to share tomorrow.  
25 That's just the way it works, that's the way I see it working

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1  
2 even.

3           But with regards to state liaison counsel, even if  
4 we get some aboard let's go with it. We can always appoint new  
5 people in Texas, we can always appoint new people in New  
6 Jersey, and I'll be in contact with some judiciary in New  
7 Jersey to see what the problems are and see whether or not I  
8 can help facilitate matters.

9           MR. IRWIN: Judge, can I speak to that? I mentioned  
10 this to Mr. Davis yesterday that I want to raise this today.  
11 May I raise this with the judge today?

12           MR. HERMAN: Certainly. I'm aware of it, we discussed  
13 it.

14           MR. IRWIN: Judge, we have two burning kind of problems  
15 coming up this Friday in two state court settings. They both  
16 involve 30(b)(6) deposition type discovery, interrogatories and  
17 Request for Production of documents that have been directed to  
18 Janssen and Johnson & Johnson. They called for really  
19 wholesale discovery to be taken place in the month of December,  
20 one of them in the New Jersey litigation that Mr. Herman  
21 alluded to, the other is in one of the Texas cases.

22           What I've handed to you is the name and telephone  
23 number of Judge Corodemus in New Jersey and Judge Neill in the  
24 Texas case. A motion for protective order is being heard in  
25 each one of those cases this coming Friday where we are doing

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1  
2 our best to ask those judges to please hold off just a little  
3 while while we try to get the general MDL going.

4 We would try to say as diplomatically to these  
5 judges at this point at least 80 percent of the cases at this  
6 point are in federal court. And it would make sense to allow  
7 this to get started here because we think at the end of the day  
8 it would be more efficient all across in all settings, federal  
9 and state.

10 So to the extent that we could appeal to your  
11 Honor as it might be appropriate in the context of  
12 state-federal coordination, to call these judges and suggest  
13 that we are very interested in serving both their needs and the  
14 needs here in the court to move this sufficiently. We think  
15 the best way to do it would be to give us a little breather in  
16 those two litigations and we would ask the court, your Honor,  
17 to please consider calling those judge in the context.

18 THE COURT: What's the problem, a motion for productive  
19 order in both cases?

20 MR. IRWIN: Yes. I have not seen the motion. I  
21 believe it's basically the same. I think they're asking the  
22 judge in New Jersey and the judge in Texas to postpone this  
23 discovery. I don't know how long at this point.

24 THE COURT: You mean you all are doing --

25 MR. IRWIN: Yes, we are.



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1  
2 THE COURT: -- the defense?

3 MR. IRWIN: Yes. My colleagues are in New Jersey and  
4 in Texas. And I think they're asking to postpone that  
5 discovery in New Jersey and in Texas until such time as we can  
6 here get the discovery initiated and produced here so we can  
7 get the virtual document depository set up.

8 I mentioned earlier we're very interested in doing  
9 that, and we think this is one of the great benefits to us of  
10 participating in promoting a virtual document depository. We  
11 think it's of great value to us in that regard. But we think  
12 at the end of the day both in the state court setting and in  
13 the federal court setting that all parties, plaintiffs and  
14 defendants will have their, will be better served in terms of  
15 efficiency and judicial economy and litigants expense if this  
16 can be done once and be done right the first time.

17 THE COURT: With regard to the state court, what's the  
18 feeling of their having access to the virtual depository? Is  
19 there some way that they can have access but pay for it?

20 MR. BECNEL: Judge, let me suggest what we have talked  
21 about with Lenny and those. I've offered a 7,500 square foot  
22 building for free that was built for a document depository and  
23 a proof of claim office. We're going to put computers that  
24 I've also offered for nothing there available. That's one of  
25 the big issues why Russ wants the hard copy so that if we got a

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1  
2 hard copy, put them in file boxes for those lawyers that don't  
3 use computers, and there's a lot of them out there, and have  
4 computer access there, it's 15 minutes from the airport and  
5 nobody's going to get charged for that. If we could do that  
6 and bring them into the fold.

7           What Jim and I were talking, just because I was  
8 reading the latest issue of this, "Did you see what they just  
9 did?" And I made a copy, asked your staff to make copies this  
10 morning and gave me and Russ one of what Judge Motz just did to  
11 help coordinate that kind of stuff. I don't think the bulk of  
12 the lawyers, because I know both of the lawyers in these cases,  
13 and in fact, I'm co-counsel with one of them in the Phen-Phen  
14 litigation, that I think if they realized -- because some of  
15 them even applied to be on the PLC.

16           I think if they realized that this is not some  
17 only point deal to charge them money that it would work. But  
18 if they knew they had a hard copy and they didn't have to  
19 regenerate it, they had access to the virtual depository and  
20 cross notice of the depositions without impeding their state  
21 cases per se, but at least get us all on one track.

22           But I think and the reason I suggested when I read  
23 this this morning because if you would have a meeting with  
24 these, some of these state judges, and there was a program he  
25 and I, Jim and I were talking about again the federal and state

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1  
2 user fund to fund it -- at that point they had used that a  
3 bunch, but I think the funding has run out -- invite the  
4 lawyers in addition to state judges at a neutral site, I think  
5 it would go a long way to coordinate everything.

6 THE COURT: We're mixing apples and oranges at this  
7 point. I want to focus first of all on the virtual depository.

8 MR. BUCHANAN: If I could address that for you.  
9 Technologically I don't think there's impediment to assess  
10 users as they access the site or assessing them on a monthly  
11 basis to access the site. I think it's more of a matter of  
12 developing a model that we're comfortable with that's going be  
13 inclusive and striking the right balance between what covers  
14 cost and what is not an impediment to people using it, I think  
15 we have to decide amongst ourselves and make a determination  
16 what we think would work for everybody.

17 But I'm pretty confident that the venders we're  
18 talking about have the technology in place to basically, you  
19 know, do billing or at least provide us information with which  
20 we can do the billing.

21 I did want to address a few other points in the  
22 virtual depository. I know we talked about a meeting in  
23 December, there's a few issues we should think about.

24 These virtual depository require a relatively high  
25 connection to the internet. It may be desirable to confer with

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1  
2 counsel to pick a site that will both have the facilities to  
3 display what each of these vendors come in to display, because  
4 it's going to require an internet access connection to do so.

5 THE COURT: Patty, do we have anything around here?

6 MS. SOULE: We have it in the courtroom. Just any kind  
7 of access to internet access?

8 MR. BUCHANAN: They generally require a very high speed  
9 connection, what lawyers probably have in their office a T1 or  
10 DSL connection. I don't know what the court has.

11 THE COURT: What do we have?

12 MS. SOULE: It's kind of more complicated. It's a  
13 network, we're all networked. You have 100 megabits to the  
14 Fifth Circuit which is 100 and they have T3 coming out of them.

15 MR. BUCHANAN: You may indeed have sufficient capacity  
16 it sounds like. Maybe we can work on that so we can agree on a  
17 location that will provide everybody -- I would like the  
18 capability to be, the functionality of the service to be  
19 realistic to what users are going to see so we can make a  
20 realistic assessment.

21 THE COURT: The thing you have to think of, focus on is  
22 I don't have any problem not having it here, but if it gives  
23 you some clout or gives you some credibility or gives you  
24 something to have it in federal court or in this court or Fifth  
25 Circuit, take advantage of that and we'll make it available to

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1  
2 you.

3 MR. BUCHANAN: I appreciate that, it's a good  
4 suggestion.

5 THE COURT: Sometimes vendors are interested in doing  
6 their demonstration in a courtroom.

7 MR. BUCHANAN: To make that meeting productive, your  
8 Honor, I think one thing that would be helpful is to understand  
9 from Jim's side, and I guess Ken Conour is the person to get  
10 that from, what issues they have, perhaps in writing. We can  
11 submit it to the people, we can get written responses from them  
12 in advance together with proposals so that whatever day in  
13 December we can choose we can really make a decision that day  
14 or within the days following so we don't delay into January.

15 MR. IRWIN: I agree with that.

16 MR. BUCHANAN: There was one other item I know that  
17 Russ did want me to talk about, that's about electronic  
18 discovery.

19 MR. DAVIS: And I have to tell you we think this is  
20 very important. I know Russ isn't here to address it.

21 MR. BUCHANAN: The electronic discovery as your Honor's  
22 aware and the court is probably benefiting from e-mails and  
23 other high tech electronically creation of document services  
24 today, is a very effective way to communicate. It's also a  
25 very efficient way to store information.

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2           Another benefit is it's very easy to search, you  
3 can search across the equivalent of a file room's document by  
4 doing word searches. Obviously one of our interests in this  
5 case is to make sure we've captured with a reasonable level of  
6 certainty with information that may benefit the lawyers in this  
7 case when they go back to their various state courts or federal  
8 courts.

9           If we can get electronic production of documents  
10 existing in electronic format, we can, first of all, get the  
11 assurance from defendants that they have in fact captured the  
12 universe of responsive or relevant information. We can also  
13 then use the electronic searchability of those documents to  
14 prepare deposition, prepare issues, highlight certain documents  
15 that may be of greater relevance to the case.

16           So one of our goals in this case is to get the  
17 electronic data that they have, and they can produce it after  
18 they've searched it and screened it, post it in a way that will  
19 be accessible to the lawyers in this case and we believe  
20 through the virtual depository. The vendors I have spoken with  
21 in addition to specializing in posting imagine data, can also  
22 post electronic data so the lawyers in the interland will have  
23 access to a wealth of information in perhaps ways they didn't  
24 have access to it before without having to have an MIS staff of  
25 20.

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MR. IRWIN: Judge, this is a major issue.

THE COURT: All right.

MR. IRWIN: I'll back up just a little bit, not too much because I know we have a lot to do today. But they're basically asking us for each document in three forms, in three mediums.

Let's just use an e-mail as an example. They want us to give them the TIF imaged copy on the CD ROM, which we are prepared to do. We get the e-mail, we print it up, we scan it into a TIF file, we then burn that on to a CD and we give it to them. We give it to them in that medium. Everybody's agreed to that.

They also want us to give them a hard copy, a Xerox copy of that document which they alluded to earlier. We would give it to them the same way they would get it if they did it themselves, we would blow it off and Xerox it. It seems to me they can do it just as easily as we can.

The third medium they want us to give them that e-mail in electronic form, they want us to also give them that same document on a disc so it is not an electronic form. Well, that is a lot. It's easy to say, it's a lot harder to do. And one of the reasons it's so hard to do is because e-mails and other forms of electronic data such as word processing documents are all subject to being examined by certain software

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2 and you can read behind the electronic form of it.

3           For example, if we had to redact the name of a  
4 patient from an e-mail, which we are statutorily required to  
5 do, we would produce that in imaged form on a TIF file and it  
6 would be appropriately redacted. In an electronic form, we  
7 cannot guarantee that it can be appropriately redacted. There  
8 are major issues about that. And Mr. Conour can speak more  
9 effectively to that than I can.

10           It does not only arise in the context of e-mails,  
11 it arises in the context of all sorts of word processing  
12 documents. I think this is a major issue, too. We would think  
13 that if the court were inclined to entertain such a production  
14 in a limited or in a global way that this is something we  
15 should present to the court in motions.

16           THE COURT: Sure. That's fine. I don't have any  
17 problem doing it that way, meaning in a motion form. I  
18 understand the situation, I've got it.

19           We're seeing that across the board in many cases,  
20 I'm seeing it now a lot or reading about it a lot in different  
21 type cases where someone's trying to show or prove that there  
22 is a discriminatory atmosphere in a particular business and has  
23 been for many years, and they advocate is interested in getting  
24 access to e-mails or hard drives, we all know now that when you  
25 delete something you don't actually delete it; you just paint



JUDGE'S COPY

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2 over it like you do a room and then software, when it gets very  
3 sophisticated, can peel back that paint and reveal what's under  
4 it. That's creating some problems now.

5 But it does at least present its own peculiar  
6 problems, and it's the type of thing that one ought not to knee  
7 jerk and I'll not knee jerk it, so I'll listen to both sides  
8 and make a finding.

9 MR. BUCHANAN: Your Honor, I want to make sure we  
10 separate it into three areas to make sure we're talking about  
11 the same thing. I don't want the lines to blur.

12 The first is one of the concerns we have is have  
13 all of the electronic data preserved so if we need to go back  
14 and look at it. So one thing we want to do is understand their  
15 process for all responsive relevant e-mail or electronic data.

16 Second item is what searches were used in that  
17 electronic data to gather the universe of information they will  
18 then review after they printed it out to produce to us to make  
19 sure at least we've gotten, if it's in inferior form of the  
20 document produced to us, if it's responsive.

21 And the third then is really the issue that most  
22 of the discussion was directed to, is whether that electronic  
23 data should be electronically or paper form. But I think the  
24 first two are somewhat different and I think we had some  
25 protocol to address those two.

JUDGE'S COPY

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2 THE COURT: I think so and I think there are separate  
3 issues involved. One is the question of whether or not it's  
4 burdensome. The other issue is whether or not they have  
5 accurate data. And maybe there's a way of assuring that you  
6 have accurate data by giving access and at the same time not be  
7 overly burdensome.

8 But we're really talking about two or three issues  
9 wrapped into one, and we need to peel them out and unpack them  
10 a little bit to get to the bottom.

11 MR. HERMAN: I have a suggestion and that is that we  
12 meet with liaison counsel, we list the issues, we agree to  
13 ourselves to bring them in motion form rather than piecemealing  
14 them, bring them in one motion, one brief, one response  
15 consistent with when your Honor can hear them, and we try to do  
16 that as expeditiously as possible. I think it'll be helpful if  
17 we get together and at least we can agree on what the issues  
18 are.

19 THE COURT: Meet and disclose what your concerns are.  
20 Remember when you start talking like this sometimes you are  
21 reluctant to tell your total concern. Resist is natural  
22 tendency because you plaintiffs have to make defendants aware  
23 of your concerns. And you defendants must make the plaintiffs  
24 aware of your concerns. There's going to be some obvious  
25 concerns but there are going to be some hidden and different

JUDGE'S COPY

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2 level concerns that you have to get to the bottom of, and then  
3 express the concerns so I can understand them. If you don't  
4 tell me the concerns, I'm not going to be able to get in your  
5 mind and look at them.

6 MR. HERMAN: The PSC has a conference call tomorrow  
7 morning and I'll make sure that the issue of this motion is on  
8 the calendar, we get it assigned very quickly.

9 The other issue that we'll put in addition to some  
10 other matters is access charges. I think one of the questions,  
11 and we're sort of moving around in the dark, is someone's got  
12 300 cases and someone has one, someone's got one good case and  
13 someone's got 20 bad cases or they have six lawyers working on  
14 a case in a large law office and one fella sitting out there in  
15 Nebraska who may have three cases.

16 And how do you reasonably have an access cost,  
17 fee, whatever it's called. But we intend to come to you with a  
18 concrete proposal and our reasoning, and we should be able to  
19 do that fairly quickly.

20 THE COURT: Okay. And I think liaison counsel have  
21 some input on something of this sort, too. And again, it's not  
22 unusual and it may be expected that when you start out  
23 something like this, you're blazing some new trails so that  
24 much of it's not going to work and some of it's going to need  
25 to be massaged and some of it's going to have to be changed.

JUDGE'S COPY

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2 And you're going to have to periodically analyze whether it's  
3 fair, whether it's appropriate and if it needs correcting I'll  
4 do it.

5 MR. BUCHANAN: Your Honor, I want to make sure in your  
6 presence we address this with Jim. I don't think we want them  
7 to do the same thing three times; frankly, I don't want them to  
8 have to review the same document twice. If they're going to  
9 review it electronically and on paper.

10 We had a conversation with Ken Conour and he  
11 indicated he had gone down the road of reviewing the e-mails  
12 they printed out. I want to make sure that we don't create  
13 some type of burden to do it twice until this issue has been  
14 resolved, so for them I guess, you know, we can hold off on  
15 reviewing those e-mails until we have some direction from the  
16 court.

17 THE COURT: So let's not image all of the e-mails at  
18 this point, let's just hold off until we see where we're going.

19 MR. HERMAN: I wanted to indicate to the court I  
20 believe that around five o'clock yesterday we submitted a  
21 confidential order.

22 THE COURT: I got it, I had a chance to look it over  
23 and I understand it's agreeable to all sides. I don't have a  
24 problem with it.

25 MR. IRWIN: Yes, sir.

JUDGE'S COPY

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2 THE COURT: I don't have a problem with it, I'll go  
3 ahead and sign it.

4 MR. HERMAN: A motion with proposed order on liaison  
5 counsel.

6 THE COURT: I don't have any problem with the  
7 suggestions for liaison counsel. I'm probably going to add  
8 just a paragraph on the responsibilities on what I contemplate  
9 their responsibilities, somewhat flesh it out a little bit  
10 more. I want to make sure that they have comfort in  
11 participating at the meeting, attending the meeting and  
12 bringing to the table whatever problems they have so that we  
13 can focus on them.

14 With respect to the designation of state liaison,  
15 while we're talking about it, let me mention that I have  
16 received a motion from a Louisiana attorney Mr. Dumas. I  
17 received a request that he be included on the committee. And  
18 he brings to the court's attention the fact that he's an  
19 African American and is interested in participating both  
20 because he feels he has interest, an interest in and is  
21 talented and has the ability and also is an African American.

22 I want to be sensitive to that, that's why I  
23 mentioned to all of you all at the outset that I am sensitive  
24 to the fact that when committees are formed we ought to get the  
25 full breath of the bar, at least the people who are involved in

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2 the litigation, assuming, of course, everybody's talented and  
3 everybody's capable, experienced.

4 Give me some input on him insofar as his  
5 membership on any committee or participating in the work going  
6 on, things of that sort.

7 MR. HERMAN: We have seven committees structured  
8 basically right now. Walter is a fine lawyer. Walter received  
9 in writing and in our meeting an invitation of what committees  
10 he wanted to serve on. No committees have been appointed other  
11 than really the depository committee to handle these issues of  
12 virtual depository website, et cetera.

13 He will be offered full participation in those  
14 committees he wants to participate in. I have not received  
15 from Walter a response, but I don't think he's ignoring the PSC  
16 request. And indeed that's one of the things that we're  
17 working on now, between now and November 6 we should have  
18 committees in place.

19 On the liaison committee there are a large number  
20 of African Americans who have taken Propulsid for  
21 gastroenterological problems, and when I say large I don't know  
22 the statistics but I know from the types of cases that are  
23 coming in. Isaac Burr, Jr., from Mississippi is an African  
24 American on the liaison committee, he has indicated that he's  
25 more than willing to cooperate, he has the attention and

JUDGE'S COPY

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2 respect of lawyers in Louisiana and Mississippi.

3           It might be beneficial for Walter also to serve in  
4 a liaison capacity because of his relationships with a number  
5 of lawyers, so I think we can assure you that he's been offered  
6 the full panoply of involvement and may be an additional person  
7 your Honor may want to consider for the liaison.

8           He's very personable, lawyers like him. He does  
9 his work. He has been involved, to my knowledge, in at least  
10 ten complex cases. I've had personal knowledge of his ability  
11 through the Kaiser explosion case where he serves on the  
12 committee. And basically that's it.

13           MR. BECNEL: Judge, last night we had a meeting to sign  
14 a settlement of Kaiser at my house, and I met with Walter last  
15 night and I also at Russ' request met with Diane Nass in  
16 Indianapolis, and virtually begged both of them to become  
17 involved.

18           I think what the biggest stumbling block has been  
19 is in some other committees people get appointed and then they  
20 never get to meet, they have no input, they have nothing, just  
21 sort of buy them off. And I think the biggest issue that any  
22 of the people that Russ has been talking about is some judicial  
23 imprimatur where they don't feel that they're excluded, that  
24 somebody is just buying them off because they can cause a  
25 ruckus right now and they'll never be heard from again. To me

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2 that's the bottom line.

3 MR. HERMAN: Well, you know, and they have good reason  
4 many of them for feeling that way because that has been the  
5 practice in a number of cases.

6 THE COURT: Right. I understand.

7 MR. HERMAN: The other thing I want to add to that is  
8 we are making a concerted effort to see that this case is  
9 handled the way that will give the clients the best  
10 representation we can and at the same time assure the judiciary  
11 that it's been handled the way it should be handled from our  
12 side.

13 THE COURT: I urge you to continue to do that because  
14 it's very, very important.

15 MR. HERMAN: Just one other comment I might make. We  
16 have had to date over 100 names of individuals submitted who  
17 really want to serve on committees. A number of them are from  
18 the same firm, but we believe that there will be 60 to 70 law  
19 firms very active on the various committees.

20 THE COURT: Okay. Anything else that we have?

21 MR. DAVIS: Judge, just a couple of housekeeping  
22 questions.

23 THE COURT: Sure.

24 MR. DAVIS: We have been submitting motions to file  
25 these orders. The clerk's office yesterday told my paralegal



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2 that they didn't want them, bring them up to chambers.

3 THE COURT: How do we deal with these, Gaylyn?

4 THE DEPUTY CLERK: Motions to appoint, motion for an  
5 order, court order, pretrial order appointing state liaison?

6 MR. DAVIS: They just said we won't accept those, they  
7 were just motions to file the order that the court asked for.

8 THE DEPUTY CLERK: And they gave no reason?

9 MR. DAVIS: They sent her up to chambers.

10 THE DEPUTY CLERK: Judge, I'll have to speak to the  
11 clerk's office, may be because it's MDL.

12 THE COURT: We'll take care of that.

13 MR. DAVIS: We want to know procedurally. Jonathan was  
14 helpful, he took it.

15 THE COURT: Let's check with downstairs and then talk  
16 with counsel and give them some guidance.

17 MR. DAVIS: We have been leaving the order and not  
18 filling in the numbers. The numbering system Jim and I believe  
19 is going to be very helpful.

20 THE COURT: Right.

21 MR. DAVIS: I presume you do not want to number them  
22 and you will number them?

23 THE COURT: I will do the numbering because I know the  
24 numbers.

25 MR. DAVIS: And then lastly, how do you want this

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2 motion addressed? Do you want one party to bring this motion  
3 and do we have to set it for a hearing so we know the time  
4 constraints?

5 THE COURT: What motion?

6 MR. HERMAN: On the virtual depository.

7 MR. BUCHANAN: The electronic discovery.

8 MR. DAVIS: How do you want to do that so we can get a  
9 date and get it on the calendar?

10 MR. IRWIN: I think what we need to do first is  
11 identify what electronic discovery you want. I mean, if you  
12 want every single thing that we've ever done to produce, then I  
13 guess you say that. If you're going to be a little more  
14 circumspect and say we can show a reasonable basis for the  
15 entry of a court order that we have electronic discovery on  
16 this type of information, then maybe we'll agree to it, maybe  
17 we won't. But I would think the latter would be a more  
18 constructive way to approach this.

19 THE COURT: I suggest you do go about it the latter way  
20 and take it a step at a time. I'm not saying you take ten  
21 years to get to the bottom of it. But we ought to go, if we're  
22 going to do the A, B, C, you ought to start with the A's first  
23 and do it that way.

24 MR. HERMAN: We have everybody available on the 6th,  
25 7th and 8.

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MR. BUCHANAN: I'm not available on the 6th.

MR. HERMAN: You'll be here the 7th and 8th. We need to set aside three or four hours on the afternoon of the 7th to deal with these electronic discovery issues.

THE COURT: Do you want to decide where you want it?

MR. DAVIS: I think it's going to take sometime with the vendor to go through the issues, we may very well need more than two hours.

MR. BUCHANAN: My experience, I've had demos from every one of them in my office, it takes a good two and a half hours with each one, so it's a full day process. Maybe if counsel is going through the same process, you know, on the defense side it won't take two and a half hours because they will be seeing the things, although I don't get a sense they've gone down that road yet.

MR. IRWIN: I haven't. Ken Conour has done some of that. But I haven't spoken to him and to you guys enough to know that I felt this was going to be, it would require us several days to do this.

MR. DAVIS: Maybe if we split it between the 7th and 8th, the afternoon and the morning if necessary.

THE COURT: Where are you going to have it, in your office, your office, the court, where?

MR. BUCHANAN: Let's decide. And I would like to talk

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2 to you after about your capabilities, if we can host it here it  
3 would give the perimeter of the court on it and provide space  
4 for everybody to come in and see it.

5 THE COURT: If it would help, we will make it available  
6 to you. I'm not saying we have to have it here. I'm saying if  
7 the vendor is interested in displaying it in the courtroom it  
8 will be made available.

9 MR. DAVIS: So I'm clear, we're going to do it the 7th  
10 and 8th, are those the dates?

11 MR. IRWIN: Yes, 7th and 8th.

12 MR. DAVIS: And then do we want to try to get together  
13 beforehand?

14 MR. IRWIN: We do, yes.

15 MR. BECNEL: I notice that on my orders that I've been  
16 getting that they have some sort of a program that y'all are  
17 having now going on in Judge Vance's going on different days.  
18 Will that conflict with anything, because I've been reading  
19 about it.

20 MS. SOULE: No. The whole shebang equipment is only in  
21 Judge Vance's courtroom and also several of other judges, not  
22 Judge Fallon's, but we have presentation equipment like an  
23 ELMO, projectors and the screen in there, that can be used for  
24 some sort of demo.

25 MR. BECNEL: I was wondering if this was not in

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2 conflict, because they have it all set up and I think y'all are  
3 doing that for two weeks?

4 MS. SOULE: Two months. But, no, we have equipment for  
5 this courtroom independent of that equipment, so that shouldn't  
6 be a problem at all.

7 MR. DAVIS: We will talk to the vendor and let the  
8 court know as to timing that's best for them on those dates.

9 THE COURT: Before we leave today talk with Patty and  
10 see whether or not we can host it if you want us to host and  
11 we'll host it for you. I want to show you all our website  
12 before we leave.

13 MR. BUCHANAN: Great.

14 THE COURT: Why don't you come in.

15 (WHEREUPON, THE STATUS CONFERENCE WAS CONCLUDED.)

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17 \* \* \* \* \*

18  
19 REPORTER'S CERTIFICATE

20  
21 I, Karen A. Ibos, CCR, Official Court Reporter, United  
22 States District Court, Eastern District of Louisiana, do hereby  
23 certify that the foregoing is a true and correct transcript, to  
24 the best of my ability and understanding, from the record of  
25 the proceedings in the above-entitled and numbered matter.

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Karen A. Ibos, CCR, RPR

Official Court Reporter