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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

IN RE: PROPULSID PRODUCTS MDL No. 1335
LIABILITY LITIGATION SECTION "L"
New Orleans, Louisiana
Wednesday, December 20, 2000
9:00 a.m.

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

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P R O C E E D I N G S

(WEDNESDAY, DECEMBER 20, 2000)

(STATUS CONFERENCE)

THE COURT: Be seated, please. We have a couple of issues today. One is the report of liaison counsel and then the motion of defendants regarding documents to be used in depositions. Let's talk first about the liaison counsel's report, any problems we're having and get over that and then I'll give you a minute to think about what you're going to say, and I would like oral argument from both sides on the defendant's motion.

I have before me Joint Report No. 2 from plaintiff and defendant liaison counsel. First with regard to the electronic service web site let me hear from either party.

MR. HERMAN: May it please the court. Good morning, your Honor. And learned counsel. Russ Herman of Herman, Herman, Katz and Cotlar, and Herman, Middleton of New Orleans.

Verilaw is set. Recently, however, they sent us a contract and the cost that they originally represented to us varied in two respects, but we expect to have those issues worked out to everyone's satisfaction and there is also an issue as to whether they can serve by fax as well as e-mail. We expect to have that issue worked out. So Verilaw should be

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up and running by January 3rd. It would handle all of the service requirements of the court and we also intend on every document they serve to have them notice, whoever is receiving documents, that the Court's web site is such and such.

THE COURT: How do the defendants intend to use that? What do you plan to do with the servicing?

MR. IRWIN: Good morning, your Honor. Jim Irwin for the defendants. We plan on using it the exact same way. Although it does not, the functionality of it does not alleviate some of our service issues because, basically, there are only a handful of us that we need to effect service on. But we're going to find it very easy to upload our documents each time we serve something and then the service will follow from that. So we're satisfied with it and we're looking forward to the January 3rd start-up date.

THE COURT: That's good. That is fine.

MR. HERMAN: One other report to make to the Court, and that is the Verilaw information forms have been returned to us. Thirty-eight have been returned out of 126. And we had yesterday and again today reminders going out. We expect full compliance with the Court's order by January 3rd.

THE COURT: I put in the order that if we don't get compliance, I am going to have to be dismissing cases, so let's make sure that everybody understands that.

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MR. HERMAN: Up to now I have been conveying that very gently, but beginning today we will convey that in stronger terms. I don't think we would like to see any of the cases dismissed, nor would the attorneys that have filed.

The other issue is that there are a number of cases that are now being transferred in the last -- since we met last, and those folks, many of them I don't think are up to speed with the prior order.

THE COURT: We ought to sort those out so if I do have to act, these latter cases will not be in the mix if they have just come aboard and don't have the information.

MR. HERMAN: Yes, your Honor. Would your Honor like me to proceed with the other issues?

THE COURT: Right.

MR. HERMAN: With regard to the master complaint and master answer, we have conferred with that. We're going to try to meet the January 31st date. We hope it won't have to be extended. It will depend, I think, on the frequency of the cases that we get transferred between now and then, because we're going to need, depending upon the nature of the other filings, we'll need to include some allegations in the master complaint.

In terms of initial disclosures, we have now received this week from defense counsel on CD ROM approximately

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290,000 to 300,000 pages of materials with the general index, and we're now reviewing those for technical quality. We have conferred with the defendants. And if we have any problems, we're certain that it will be remedied in short order.

Now that the defendants have made their first production in conformity with Pretrial Order No. 1, we have asked that they accept service, and they have, on our initial Request for Production of Documents. We are discussing sequencing and we hope to come to a mutual agreement. We have a mutual agreement on some of those issues.

THE COURT: Does the defendant have anything to add on this?

MR. IRWIN: Yes, Judge. Thank you. We are working on document sequencing. One of the things that we furnished to our colleagues across the aisle is an index of the boxes that we have identified. That index shows the boxes that have been produced and those consist of the 290 to 300,000 documents that were produced this week for the IND and NDA. This index also shows documents that have been reviewed by box already by categories, such things as drug safety, the review is now ongoing; regulatory affairs, the review has been completed. And it also identifies what review has yet taken place.

We think that this document will be very helpful in further discussions with plaintiff counsel about staging the

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2 production and the ruling out of production of documents. We
3 have accepted service of the Request for Production of
4 Documents that was given to us earlier. That helped us talk
5 with the other side about sequencing and they have now served
6 us with the production. We have accepted service.

7 I meant to mention to Russ this morning, but I
8 forgot to, that we would like to have until January 31 to make
9 any objections to that.

10 THE COURT: Any problem with that?

11 MR. HERMAN: May it please the Court, we don't have a
12 problem with waiting until January 31st for objections, but we
13 would like production to continue between now and January 31st,
14 the defendants reserving without losing any of the objections
15 that they may raise. So that as documents are reviewed by the
16 defendants, they're produced serially.

17 THE COURT: Do you have any problem with that approach?

18 MR. IRWIN: No, your Honor. I've just consulted with
19 my colleague Mr. Preuss, who is supervising the document
20 production, and that is what we plan on doing.

21 THE COURT: Let's do it that way. Put that one in the
22 record and let it reflect it.

23 MR. HERMAN: The document production protocol, your
24 Honor has set December 28th, I believe, for our next motions.
25 We have a very strong difference of opinion as to electronic

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production. We do not believe it's resolvable.

Learned counsel opposite has asked for additional briefing time and motion time on that issue. We're amenable to it, your Honor, with the understanding that the plaintiffs will not be prejudiced by any loss of electronic information during that time, nor will we be prejudiced because the defendants have placed some of the electronic information on the CD ROM.

We intend to produce at a hearing, with your Honor's permission, the individual whom we have retained who we believe is the leading expert in the federal system on electronic production to explain in a more lucid way than counsel can of why it is needed. So we accept counsel's request that that matter can be postponed so they can have additional briefing time, but ask that in terms of status quo issues we not be prejudiced in the additional period.

THE COURT: How much time do you need?

MR. IRWIN: Your Honor, we appreciate that and we agree that their position should not be prejudiced by virtue of any delay attended with what we think would be a benefit to the entire process. And if I could address that for a second.

They have asked for production of documents electronically in Native format. A new term that we also chuckle about because, I think, that is new to many of us. But our position has been, and we have talked about this with

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Mr. Herman and Mr. Davis yesterday, that the process will benefit, if the parties can address in some meaningful way the categories of documents that they feel would be of value if they were produced electronically.

And I don't want to argue the merits of it at this point, but our position is that since we're producing hard copy versions of the documents, what needs to be done, there needs to be an analysis of what is the value of the electronic version of the same document and what is the burden associated with producing that electronic version. And we don't think it can be done in a vacuum. We don't think the briefing process would be of much value to the Court if we were just to present it to your Honor wholesale.

Depositions are taking place in New Jersey, and we will talk about that in a little while, they start on January 23. And those depositions will include questions about the defendant's computer system, questions about its preservation of documents, questions about what kind of information is maintained electronically, and much of the record that is developed during those depositions would be the record that we would brief to your Honor about the very issues that your Honor would have to decide; namely, balance, balancing on the one hand the value of the electronic information versus the burden of producing it.

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So we think that the briefing should be delayed to accommodate the development of that record. And we think that there could be a basis for us to agree on some of these materials to be produced. And that the plaintiffs should file the first motion, and we should be given a reasonable opportunity to respond to it.

THE COURT: What are we talking about realistically from the standpoint of time wise? What's realistic?

MR. IRWIN: I think if the depositions are completed by the end of January, that the motion should be filed in early February, I would suggest.

THE COURT: How do the plaintiffs feel about that?

MR. HERMAN: I want to thank learned counsel for not arguing the merits. Your Honor, we will not agree on this issue. This issue is at an impasse. We will file our motion post haste and then your Honor may, taking into light counsel's need for time, set it at a time that is reasonable. But we do not want to delay filing. We will address the issue of burden. We will address the other issues that counsel raised in his non-merits discussion.

THE COURT: Okay. I will give everybody an opportunity to brief it and discuss it with me, or argue it or present any material or any evidence, if there be any evidence. But I do want to get on with this, so I understand the problems. I

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2 understand you need time to brief. But we have got to get over
3 this before we get on to something else.

4 MR. IRWIN: Judge, I would only like to add that I
5 think this is a particular issue that would benefit from oral
6 argument. I will be the first to admit that I am not the best
7 person to argue this particular motion on the merits of the
8 electronics. I think there are other people on our side that
9 might be able to answer those questions best.

10 THE COURT: I agree with that.

11 MR. HERMAN: Your Honor, in that regard, we should be
12 able to file this motion by mid January to give plenty of time.
13 Secondly, if we agree that it does need oral argument and
14 briefing, that we do intend, with your Honor's permission, to
15 offer some expert testimony about this issue.

16 THE COURT: With regard to testimony, let's make sure
17 you know what the testimony is so that if you have any, I'll
18 hear it at the same time.

19 MR. HERMAN: I can advance that now. We have retained
20 Ms. Feldman who has written the premier articles on electronic
21 servicing. We have provided learned counsel opposite, as well
22 as Jonathan, with a copy of the presentations that were made.
23 And we would intend to produce, with the Court's permission,
24 this expert's testimony on the need and type of electronic
25 production.

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THE COURT: You take a look at that. If you need anybody, let's let counsel know so we're all on the same page.

MR. IRWIN: We will talk about it, Judge.

THE COURT: Okay.

MR. HERMAN: With respect to plaintiff's fact sheet, we have met and conferred through committee and directly and I believe that we are very close to presenting something to your Honor today in terms of a fact sheet. I need to have Mr. Placitella and Mr. Murray review it, and we will confer today and let counsel know and let your Honor know by close of business today that we have or do not have an agreement. But I suspect we will have an agreement.

MR. IRWIN: Your Honor, may I respond, please.

THE COURT: Yes, sir.

MR. IRWIN: Your Honor, we had been talking about the fact sheet. They have made some progress in New Jersey and actually have entered an order on a fact sheet. We had been working with them as well for the same reason, that it is helpful to have one if they are generally the same. So we have given Mr. Herman the New Jersey version, which is very close to, I think, what we have been talking about, and we hope that that is resolved soon. While all discovery is being discussed in our direction, we're very anxious, obviously, to see things get going the other way, too.

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2 THE COURT: I think we ought to focus on that because
3 that, to me, seems to be another preliminary matter that we
4 ought to get over.

5 MR. IRWIN: Yes, sir.

6 THE COURT: State liaison counsel, I saw the
7 suggestions. I don't have any problem with them. With regard
8 to one of them, Mr. Dumas, you were going to talk with him and
9 find out what his position was. I didn't see his name listed.

10 MR. HERMAN: I have not had an opportunity to meet with
11 him. I feel certain that Mr. Dumas would accept on this
12 committee, and if I may, myself being often in error but never
13 in doubt, suggest that his name should be added at this time in
14 order to save having another order issued. And I will confirm
15 it with Walter today.

16 THE COURT: And I will contact Judge Corodemus and
17 talk with her about the designation of a New Jersey liaison
18 counsel.

19 MR. HERMAN: There is also another name and that is the
20 liaison counsel for West Virginia, Barry Hill, and Mr. Hill is
21 with us this morning from West Virginia. Barry, would you
22 stand up.

23 Judge Fallon, Barry Hill is a past president of
24 the West Virginia trial lawyers and has agreed to serve as the
25 West Virginia liaison as well as undertake other

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responsibilities.

THE COURT: Fine. Mr. Hill, I am glad to have you aboard. This is a critical part of the case, in my view. You can stand so I can see you, sir.

MR. HILL: Yes, sir.

THE COURT: It's a critical part of the case, because it seems to me that we ought to all be on the same page with the state court proceedings as well as the federal court proceedings. I want you to feel that you have access to the record here and access to the court.

I want you to participate to the extent you feel you need to participate, to take advantage of any of the discovery or any of the work progress going on. Hopefully, it will be of some help to you folks over there.

If there is any input you want to make, let's keep that in mind and make the input and I will listen to you. And I invite you to do so.

MR. HILL: Thank you.

THE COURT: Thank you.

MR. HERMAN: Your Honor, lead counsel for the defense would like to address this issue.

MR. CAMPION: Good morning, Judge. Tom Campion from New Jersey. Your Honor will be provided with a copy of the orders that Judge Corodemus entered. Actually, they were

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signed by another judge in her absence, but they are her orders.

And a study of those orders will find no inconsistencies with anything that you have done to date, that I know of. We have proposed to the Plaintiffs Steering Committee and given to them for their consideration a document that we would now like to discuss with the Court. It flows from our concern about state cases, I don't want to say running amuck, but going their own way. We have suggested the following proposal to them and obviously will have no merit but for your approval.

We suggest an arrangement of the following type, that we be directed, though we will do it voluntarily, to provide to the court and Plaintiffs Steering Committee a complete list of all state court cases with the relevant information about people, phone numbers and the same. That once that is provided, that the Plaintiffs Steering Committee shall have the option, if it so chooses, to approach those attorneys for the plaintiff and request them to participate in the discovery as it is being conducted here.

Failing to obtain approval of that type within a very short period of time, the defendants, Janssen, Johnson & Johnson, will assume the burden of making applications in all of those cases for judicial approval of some sort of

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arrangement for cooperation of the individual state cases with proceedings which are being directed by your Honor.

We're mindful of the state-federal concerns, and state judges have their own thoughts about things, but it would be a request.

In that connection, if this proposal meets with the approval of the Plaintiffs Steering Committee and your Honor, we would also suggest that the Plaintiffs Steering Committee and defense liaison counsel prepare a document for your Honor's consideration which would be then attached to an application that would be made for cooperation on discovery. My colleagues to the right have the matter under consideration, and I hope that they will soon have an answer and that we can present something to you for your consideration.

THE COURT: Plaintiffs have any response to that?

MR. HERMAN: Yes, your Honor. We would rather be responded to as the colleagues are on the left.

THE COURT: It depends how you're looking at them.

MR. HERMAN: Your Honor knows where we stand on these issues. We have conferred about it. We're trying to grapple with language that we believe is appropriate and that we can present to -- that as it's presented to the judiciary in the federal system as well as the state systems that it not be offensive to the judiciary nor to the lawyers, and it's not a

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very easy -- it's very difficult to walk that line, but we will resolve it before the end of the year.

THE COURT: I understand. I think we're all on the same page. It seems to me that it's to the advantage of everyone, both the state court litigants and the federal court litigants and the federal court, as well as all of the state courts, to see if we can profit from each other's experience and not have to re-invent wheels and redo things and do them in a different way, whatever. I know everybody has their own way of doing something, but if we can pull together on this one, it seems to me it would be the right thing to do for the litigants, for the process.

So I understand the delicacy of it. And I am sure that counsel on both sides are mindful of that.

MR. HERMAN: I also have a recommendation on this issue. And that is if Judge Corodemus is so disposed to appoint someone to liaison with this group, before we would agree to anything on the plaintiffs' side we would certainly like liaison counsel input on it. It doesn't do much --

I am concerned that if we, if the MDL sign off on it with defense counsel and we don't get liaison counsel input, then we're going to be met with, even if it's a great document, some suspicion. Put it that way.

But we can get that done by the first of the year,

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I am certain, your Honor. We will have a meeting on -- I say by the first of the year, certainly by the 15th. We have a meeting scheduled in New Orleans on January 12th.

Mr. Papantonio of our committee is called. We expect to have all liaison counsel to meet with us at that time.

I know that counsel would like, counsel opposite would like an agreement that we can submit to the Court before that time. I will try to move up the agenda on that. Perhaps we could have the liaison committee meet before the end of the year, and if we can do that I am sure we could come up with a document. This is not going to be an issue in contest.

THE COURT: If all state liaison counsel are coming to New Orleans, give consideration to at least bringing them to court. I would like a word with them.

MR. HERMAN: Yes, your Honor. Our next meeting date is when, January --

THE COURT: 18th.

MR. HERMAN: And that's when the depositions, I believe, are scheduled. The depositions of New Jersey are a week later. So the 18th we will invite liaison counsel to come to New Orleans. We will indicate that your Honor would like to address the liaison issues.

The expense and time reports, your Honor has extended to January 31st without opposition. Frankly, the

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reason for that is that we have had so much organization duties in terms of the various technology and our committee appointments from the PSC will only be going out today, we want to give those folks an opportunity to submit their time records as well.

THE COURT: We have extended that to the 31st.

MR. HERMAN: Your Honor, I believe --

THE COURT: You have something on the stipulation? Where are we with that 803(6)?

MR. HERMAN: Well, the defendants basically have agreed to an authenticity stipulation, but not a business record admissibility stipulation. It's better the defense counsel speak for themselves on this issue.

MR. IRWIN: Thank you, Mr. Herman. Judge, we think the best way to try to deal with this is to do so as we roll out these productions.

THE COURT: I can see that. A 901 objection is one which you can globally deal with. And 803(6) is somewhat fact specific. I've got that. I understand that.

MR. IRWIN: We plan on having a meeting to address the 803(6) possible stipulation with respect to the IND and DNA.

THE COURT: Okay.

MR. HERMAN: May it please the court, from the plaintiffs' side, as serial production continues and as those

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documents are reviewed, we intend to meet and confer periodically with defense counsel in an attempt to get a stipulation of business record in lieu of filing requests for admissions for each and every document.

THE COURT: I think you're going to find that you're going to be able to group them and there will be some groupings that both sides are comfortable with. There may be some groupings that you are not comfortable with and there may be some gray areas. That's the way these things usually shake out. It will be up to focus on the ones that you can stipulate to by groupings.

And I know it takes awhile to get comfort in this area. You don't want to stipulate because it may bleed over into something else, but you will be able to get a grouping early on, hopefully.

Talk to me about the virtual document depository. As I read, the defendants have some difficulty or conceive of some difficulty with it. Do you want to speak to that?

MR. IRWIN: Judge, there were basically three things that I wanted to address on behalf of the defendants to your Honor about this issue. One of them has to do with costs, the second has to do with security and the third has to do with the value with respect to state-federal coordination.

On the subject of costs. We have produced the first

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300,000 documents in electronic form. Mutilative imaging, which is a phrase that I can throw around, but we have also produced or we will produce, I believe by tomorrow, a complete index of all of these exhibits. And the index is global. It is expansive. It includes the name, the date, the type of document, the subject matter of the document, the Bates range, whether the document is an attachment. All of that information was developed by us at tremendous expense, as I am sure the court is aware.

We feel that when we provide this information, as we have and we will continue to do, that we are carrying our fair share of the cost associated with the establishment of the virtual document depository. It is a tremendous expense to us. And we think that that is fair.

The numbers that we have seen, I think your Honor was here during parts of the presentations on December 7th and December 8th, show that there will be a monthly charge for the handling of hosting, I guess, of the virtual document depository. We think that that monthly charge should be paid by the Plaintiffs Steering Committee, the plaintiffs who use the virtual document depository.

We feel that we probably will not be using the virtual document depository, which gets me to the second issue and that is to do with security. We are not satisfied that the

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present technology will provide sufficient security to either side with respect to subjective coding.

The people who sat here on my team, who know what they're talking about, tell me that they were not comfortable that the proposals that were made would truly shield the work product that either side might generate in doing subjective coding. One thing that was said to me, which I can relate, is that the systems were on the same server and were not on separate servers and there are ways to penetrate either system, all being on the same server.

There are other issues associated with security having to do with the inadvertent disclosure of documents and having to do with the inadvertent or uncontrolled access, but security is a great concern to us when it relates to subjectively identifying and coding the documents.

Point No. 3 is a very important point to all of us here and to my colleagues on the left as well. And that is state-federal coordination and we're not convinced that this will promote state-federal coordination. We have said before that we hoped it would.

But if there are going to be charges, expense charges, access charges for use of this depository, then we wonder whether it will promote state-federal coordination because we're going to be basically obliged to present the same

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information primarily in the same format to plaintiff counsel in state litigations as well.

And so one would wonder since the information is so usable, so user friendly, it's already in electronic and imaged form and since we will be providing a terrific index, there will be little incentive for state litigants to use a virtual document depository under those circumstances.

And furthermore, if they have to pay, there will be maybe a disincentive. So we're concerned about whether it will really promote that. We still think that it is generally a constructive idea, but the more we have worked with it and in light of our recent production and what we intend to produce in the future, we think that it is best that it be in the province of the plaintiffs.

THE COURT: I understand your comments. Let me speak on a couple of them.

First, with regard to costs. I think cost is always relative. We think in terms of specific amounts, but the truth of the matter is amounts are relative and so it depends upon how much is expended totally. I think that relativity is significant to cost.

No. 2, cost-benefit analysis; that's something that has to be, I think, considered by you because it's a question of whether you pay voluntarily or pay by court order

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or if the matter is ultimately resolved amicably have it factored into the overall sum.

So look at costs a little more closely because it seems to me that one way or the other you might be paying it, and if that's true, you might as well get some benefit out of it.

No. 3, security, with security, I understand your concern. That's a legitimate point and you just have to be comfortable with it. And if you're not comfortable, then I understand your situation. You've got a responsibility to your clients and I appreciate that. But it seems to me security can be accomplished technologically.

No. 4, state-federal coordination. I think that's an area in which it would be more meaningful to you perhaps, or to the defendants than to the plaintiffs, because I do foresee there may be more of an opportunity in the state cases resulting in a cost benefit to the defendants. And I don't foresee the state people being gauged. I wouldn't expect their costs to be so prohibitive that it would be prohibitive for them, or even cheaper for them, to get it from you a second time than it would be for them to get it the first time. So that, I think, is something that the more we move into it, the more it should become manageable and attractive.

Security is the one thing that I can't give you

JUDGE'S COPY

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2 comfort on. The costs and the state and federal coordination,
3 I think I have some input on that that you have to take into
4 consideration, because if I can make it work for the states, I
5 am going to try to do so. It seems to me to be advantageous to
6 the states. It seems to me to be advantageous to you. I don't
7 think it makes any sense at all for you have to produce four
8 million documents twice, or three times or four times. That
9 doesn't make any sense to me.

10 So it's both economically feasible and consistent
11 with common sense; so it seems to me to be advantageous to at
12 least look at it that way.

13 But I would like to go forward with this, and if
14 you don't want to get on board now, I respect that, I
15 understand, particularly with regard to security, but I do want
16 to go forward with it, if the plaintiffs are interested in it.
17 If they buy it at this point, then they will have total access
18 to it. I want to hear from the plaintiffs.

19 MR. HERMAN: As your Honor is aware, I have as much
20 technical knowledge, cutting through the technology to me is
21 like trying to get through a bowl of Jello with a buoy knife.
22 I am much better at the latter than the former.

23 I want to say that we're going to make a
24 conscience effort, a conscientious effort to institute a
25 virtual depository of some sort. Of the four presenters, we

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2 believe that two were superior. We believe that the security
3 problems can be worked out. One of the ways to work them out,
4 we believe, is with certain guarantees that the vendor will
5 have to make for our purposes.

6 We have also since we received learned counsel's
7 demurrer to the virtual depository explored an alternative in
8 the HMO MDL pending in Florida before Judge Marino. The
9 plaintiffs in that case, and there are a number of plaintiff
10 groups, have established, more or less, or are establishing
11 more or less a virtual depository for plaintiffs only in which
12 objective evidence, as well as subjective matter, can be
13 accessed. And we're looking at the security system there, so
14 we are proceeding.

15 THE COURT: It just seems to me, folks, and I know that
16 this is a cutting edge situation and a lot of us are not
17 comfortable with a lot of the issues that the technicians and
18 technical people are discussing with us, but it seems to me
19 this is the right way to go. We have all been there in the
20 litigation arena and know that when you go into depositions and
21 have crates and crates of hard copy, depositions are
22 interminable.

23 A deposition that I can read in two hours, will
24 take you four days to take. Going through documents, passing
25 them around, or looking at them a first or second or third

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time, all of the things that all of us have dealt with. It seems to me that this new technology makes it easier and more accessible and more manageable, more efficient, and we're missing the opportunity if we don't go into this and take a look at it. It just seems to me that's where this type of litigation is going, so I suggest you get on board.

MR. HERMAN: Your Honor, I would be remiss if I did not address now the third issue regarding the depository. As a representative of the Plaintiffs Committee in this case and some 70 or 80 lawyers at law firms who have agreed to participate in the MDL discovery and trial issues, we have made every effort to provide our work product thus far with the state attorneys. I am not going to indicate what the response has been coming the other way. Hopefully, a door has been opened and we will see some movement.

The question of depository is not a problem in terms of liaison with objective evidence. If what the virtual depository does is give access to lawyers across this country to documents that are produced that they can access and then evaluate themselves, I believe, a reasonable cost and access can be worked out.

However, there is an old saying in Texas, "darn the mule who doesn't pull." And it's not fair for the lawyers that carry the work load on the plaintiffs' side and pull the

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load to have their subjective work product exposed to lawyers that are not contributing.

THE COURT: I don't have any problem with that. That makes sense to me.

MR. HERMAN: So we will proceed. And with your Honor's understanding, we're able to do this and we have every intention of trying to do it. We will separate our workload from the objective documents.

THE COURT: The way I see it, at least at this time, what I think the state court can benefit from, the people can benefit from is just access to the documents themselves. In other words, if we have in this litigation hard copies stored in New Orleans and they want to see hard copies stored in New Orleans, everybody is going to have to fly to New Orleans, get either copies of those hard copies and whatever it is. It just seems to me that if they have access to it, it will negate travel and alleviate the necessity for the defendants to reproduce the same documents that they already have access to.

MR. HERMAN: One other issue that I want to address about the taking of depositions. The legal profession is moving at a much slower rate than the technology offers. The technology is changing as fast as we can buy it. The evidence management, which is probably the most sophisticated electronic video and CD ROM access for use during depositions locally, the

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cost compared to using hard copy is about triple.

And so while I deeply respect your Honor's view as to where we're going, and hopefully we can move, it is much more expensive today to take depositions. We have recently, Mr. Murray and I have been involved in perhaps 200 depositions. The access and use of CD ROMs during depositions, in those depositions cost us three to four times. Fortunately, we had a big load of lawyers to carry the cost. I did want to point that out.

THE COURT: I understand. Anything else on any of the reports that liaison counsel have?

Let's go through the agenda. Virtual depository, we talked about that. Document production protocol, plaintiff fact sheet, master complaint, 803(6) problems, document production sequencing. Do we need anything else on that or have we exhausted that?

MR. HERMAN: Your Honor, we don't have anything.

THE COURT: Electronic Verilaw, electronic service, confidentiality order. I thought I signed that, didn't I?

MR. IRWIN: Your work is never done, Judge, when we don't attach everything that should be attached. And what we did not attach was the agreement that the individuals are supposed to execute to agree to be bound by the confidentiality order. It was just a clerical oversight. We have prepared a

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consent motion to attach it and it will be filed today.

THE COURT: Okay. The state liaison committee.

MR. IRWIN: Excuse me, your Honor. There was one other thing I was asked to bring to the Court's attention. With respect to the document production protocol that your Honor alluded to a little bit earlier on the agenda, we have worked out the agreement about the formatting of the electronic imaging and also the indexing of the documents that I alluded to a little bit earlier, date, type, Bates number, what have you.

And that will be memorialized in a joint motion which we are filing today or tomorrow. So all of the formatting and indexing issues will be presented to your Honor for what we hope will be the issuance of an order commemorating that agreement.

THE COURT: I have been trying to put my orders on the web site, so I appreciate you all cooperating and giving them in the format that I can do it more easily.

While I am on that, anybody has any suggestions about what I should or could do more on the web site? Anything helping you, anything that would help you more?

MR. DAVIS: Your Honor, I have a question. When we submit these motions and orders, I've gotten conflicting word. Do you want them by e-mail, do you want a disc?

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THE COURT: I can do it either way. If you give them to me in e-mail, that's sufficient for us to move them. If not, the disc is satisfactory, too.

MR. HERMAN: May it please the Court, we can relieve defense counsel and plaintiff counsel, I don't think it's necessary anymore to provide five copies of everything plus a disc. I haven't discussed that with Jim, but I will today, and perhaps get back to you on that.

THE COURT: Sure.

MR. IRWIN: May it please the Court, that is Item 1 on the new business, and we had previously submitted to your Honor an order which, I think, the Court signed, and we are now only responsible for submitting one copy and a disc to one another. We would now like to ask your Honor for permission just to submit to each other, instead of a disc, just use e-mail. We have done that comfortably between our offices.

THE COURT: Anybody have any problem with that?

MR. DAVIS: No problem.

THE COURT: Just for purposes of the record, get me something so that I can authorize that. Let's make sure we do that.

MR. IRWIN: We will submit a joint motion, your Honor.

THE COURT: New Jersey, Texas depositions.

MR. HERMAN: I spoke with New Jersey counsel, Mr. Mike

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2 Coren, who, as I understand it from him, is the secretary for
3 the state lawyers of New Jersey in their endeavors. Advised
4 him that we would cooperate, advised defense counsel, and we
5 have sent two representatives from the MDL to these depositions
6 with the provision that they would not be depositions in
7 substance, they would only be MIS depositions.

8 And secondly, we were not indicating in any way
9 that the MDL's lawyers' rights to go forward with merits
10 discovery should in any way be deterred or hampered by
11 cooperating on this initial set of depositions. We want to
12 show our good faith. And again, in attempting to assist the
13 liaison and cooperation situation without sacrificing the
14 intellectual and professional right to do the type of discovery
15 that we think needs to be done. So we will be attending, your
16 Honor.

17 THE COURT: Fine. There are several liaison counsel in
18 the court. Any comments on this issue? This affects you in
19 some way, shape or form? Anything you want to add? Anything
20 from defendant on this particular point?

21 MR. IRWIN: No, thank you, your Honor.

22 THE COURT: Anything else other than the deposition
23 disclosures? Anything anybody would like to raise, any issue?
24 Okay. Let me hear from you on deposition disclosures, please.

25 MR. IRWIN: Your Honor, I am assuming you want to hear

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from us first since we're the mover.

THE COURT: Yes, you're the moving party.

MR. IRWIN: I was not going to go over the arguments that we made in our motion.

THE COURT: No, I've read the briefs.

MR. IRWIN: What I was going to do, other than to offer to answer any questions, was to try to respond to some of the arguments that were made by the plaintiffs in response to our motion.

THE COURT: Let me hear from the plaintiffs first and then I will give you an opportunity to respond.

MR. HERMAN: May it please the Court. We appreciate the opportunity for oral argument because we believe this issue is serious. We believe that it is a one-way issue, that the defendants have a one-way road to travel and that if they're successful in this the playing field is not going to be evenly balanced. The reason for that is that in a products case, and particularly a drug products case, the materials that are presented in discovery and then selected by plaintiffs and then reviewed by plaintiffs which form the subject of not only who they will depose but what questions they will ask, is work product intensive and it only advantages the defendants.

The plaintiffs have no -- the plaintiffs who are suffering from a cardiac disease will already have produced the

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hospital records and medical records. There is nothing for the defendants to produce in ten days before a deposition.

In addition to work product, and we have briefed that issue, I, on behalf of the PSC, urge your Honor that spontaneity during a deposition and the search for truth is paramount in "discovery." Learned counsel opposite are extremely successful, professional and ethical lawyers and professional, successful, ethical defense lawyers review documents with witnesses before depositions, particularly their corporate clients. They talk about the types of questions that could be asked. And if I might use an indelicate phrase, "wood shedding" is an acceptable practice but it doesn't --

THE COURT: On both sides.

MR. HERMAN: Yes, absolutely. It does not, however -- however, the problem is compounded when you provide counsel opposite with your work product and your thinking. Lawyers are supposed to act with integrity, and this group of plaintiff lawyers will, your Honor, inside this courtroom and outside of this courtroom. What is our recourse, to do what is done in most cases, to load up the opposition with 7,000 documents and only question 100 in order to product your work product?

Learned counsel opposite cites cases where such an order was entered. And in those cases many times the lawyers didn't oppose it and many times it was thought to be

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"expedient" let's get on with discovery. Expediency, your Honor, is not justice. For every case in which this has been done, I can name four cases in which it was not done.

BRIGHTFIELD, Ferry-Frosta, Continental Grain, IMC Explosion, Gaylord, Combustion, federal and state cases, all within Louisiana and the Fifth Circuit and I could go on and on.

So having talked about work product and spontaneity go to Hall v. Clifton. Hall v. Clifton is a Pennsylvania case your Honor is familiar with, and the whole idea of Hall v. Clifton is to assure that there is no interference with a search for truth during a deposition. To the extent that a plaintiff lawyer is not allowed to confer during the deposition with the plaintiff who is being interrogated except on a matter of privilege.

And the same holds true for the defense. Well, how does that have any meaning if for ten days the plaintiffs' work product and mental impressions have been discussed ad nauseam with a team of experienced, well-meaning and ethical lawyers vis-a-vis the witnesses that are going to be deposed.

Last, your Honor, as I see it, the only argument that the other side has raised is depositions will be conducted in a more expedient fashion. Well, I don't understand that argument. We have got a stipulation that depositions are going to last two days, except for good cause shown. Now, that's in

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1 the record. I mean, it's there. Plaintiffs abuse it or
2 defendants abuse it, that can be called to your Honor's
3 attention. If we need more time for legitimate reasons, either
4 side, we get more time.
5

6 But two days in terms of a corporate
7 representative -- excuse me, because 30(b)(6) is different and
8 I don't want to overspeak. But in terms of someone handling
9 research and development at a management level is a short
10 period of time. I don't know where this whole idea of
11 justifying intrusion in the trial lawyer's intelligence, both
12 sides, has come from in the name of expediency. It is not a
13 valid argument.

14 And the fact that depositions in some cases may
15 even take longer because of the ten day rule. If I pick the
16 documents or Mr. Papantonio or Mr. Gauthier and we go to a
17 deposition and we're not getting the answers we need because
18 the witness is so prepared on those documents that we can't
19 really dig into the thinking behind the documents, the
20 subjective reasoning, then where are we without filing
21 additional motions asking for extensions, et cetera.

22 So in conclusion, your Honor, there are three
23 issues here. On the plaintiffs' side, it's our work product.
24 They shouldn't be allowed in advance to know what our work
25 product is.

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Secondly, spontaneity and search for the truth comes down heavily on our side.

And the third matter is the only issue that the defendants raise here is expediency, which is a test-tube concept. There is no validation, there is no way to measure it. And the fact that it may have been done in some other cases is not sufficient to warrant an intrusion into work product or to destroy the spontaneity of the witness's response. Thank you, your Honor.

THE COURT: Any response?

MR. IRWIN: Yes. Thank you, Judge. I think the first thing that we would point out is that the cases that the plaintiffs have cited are not MDL cases. They are cases involving individual lawsuits where the issue of case management and complex litigation was not the same challenge that it is here. All of the cases that we have cited come either from that direct -- have that legacy or are described in the manual for complex litigation. We think that is an important distinction. And when we're talking about 2,000, 3,000, maybe as many as what we have heard 15,000 plaintiffs, I don't know how many depositions of defendants, efficiency does become a factor and that is why the cases that we have cited to your Honor have chosen this type of process.

The two cases that really address the issue are

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1 the San Juan-DuPont case and the Sport case, which is the Third
2 Circuit case. The Sport case involved, of course not an MDL,
3 it was a single case, and in that case the defense attorney was
4 preparing the client for deposition and had reviewed a binder
5 of documents with the client prior to the deposition. The
6 plaintiff then took the defendant's deposition and then asked
7 for disclosure of the binder of exhibits that the defense
8 attorney had used to prepare his client for the deposition.
9 The defense attorney said, no, that is work product.
10

11 And the Court of Appeal agreed in the Sport case
12 and said, two to three, said that that is work product and it
13 was the mental impressions of the defense attorney preparing
14 his client for a deposition.

15 The DuPont case, the San Juan case very carefully
16 analyzed that and distinguished that in an MDL setting in an
17 opinion written by Judge Sellya. I think it's important to
18 note that Judge Sellya is one of the most recent appointees to
19 the MDL panel. So I think he has obvious credentials when it
20 comes to complex litigation.

21 Judge Sellya pointed out that in the Sport
22 circumstances what was occurring between the lawyer and the
23 lawyer's client was never going to come to light, was the
24 phrase that was used in the DuPont case. Whatever documents
25 the lawyer elected to show to his or her client during

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preparing, preparation of that client to be deposed was never intended to come to light in the case.

On the other hand, the documents that are going to be presented to a deposed witness in the case by the deposing counsel are going to come to light. They're going to come to light at the deposition. And all this case management order does is require that they be produced earlier. And why? For efficiency reasons.

And does it invade the attorney work product? The Court of Appeals of the First Circuit said, no, it does not invade mental impression, work product. It may, it may be ordinary work product. But the courts commonly require disclosure of ordinary work product. We are required to do that when we exchange witness lists and exhibit lists. We're required to do that when we respond to intention interrogatories and we are served with intention interrogatories that ask us to identify what are the exhibits that you maintain support your claim or your affirmative defense. We're required to do that.

THE COURT: You also get work product during the deposition.

MR. IRWIN: You get it during the deposition when the questions are asked. You get the impressions from the attorney who is asking the questions about where he or she is coming

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from.

So the courts have said in these MDL settings that it's not attorney work product. And also, Judge, this does level the playing field. It may not feel level right now because the first slate of depositions is often the depositions of the defendant and the burden of producing these documents and identifying them ten days before is felt by the plaintiffs early in the deposition phase of the case. That was an argument that was made and observed and rejected in DuPont.

However, our time will come when the playing field will feel unlevel to us and level to them and it will come when we take the depositions of the plaintiff's experts. Often a very fruitful thing for the defendants to do in a litigation involving scientific questions endowed with daze, but the plaintiffs will feel the flame, feel greatly leveled out when we're obliged to produce to the plaintiffs the exhibits which we intend to use to depose their experts ten days before. So the playing field will level eventually in this case.

THE COURT: How do you deal with his argument that a response, and we all focus or function in the real world, is that the response to the plaintiffs is that let me give them 2,000 documents because we may cover this in good faith and they may feel that way or potentially they over estimate because they don't want to be caught short, if they don't list

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2 them, they won't be able to get into them. So instead of
3 giving him five documents which they feel this witness can
4 speak on, they have to broaden it to include 5,000 documents.
5 How do you deal with that?

6 MR. IRWIN: I think it's a matter of judgment. I think
7 that it's a fair expectation that they would be over-inclusive
8 given the time constraints and given the pressures that we're
9 all going to feel in getting these depositions done and we all
10 get to the road and start flying in airplanes. I think it's a
11 fair expectation that they will be over inclusive and that we
12 will be, too, when our time comes. I think we will just have
13 to exercise judgment.

14 If we get 5,000 documents before a two-day
15 deposition and 1,000 are reviewed, then that may be okay. If
16 we get 25,000, then we will have to exercise our judgment about
17 whether we want to bring that to the Court. I don't think we
18 want to bring petty discovery issues to the Court. If they
19 rose to something beyond petty, then we would do it.

20 That would be my response to that problem. I
21 think we will see it. I expect it will not be a major problem.
22 I think we will see some of it.

23 THE COURT: I understand both sides. I have made some
24 notes from you all. I would like to rule on this. Let me
25 sketch up something. Give me ten minutes and I will be back.

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Court will stand in recess for ten minutes.

THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, A RECESS WAS TAKEN.)

THE COURT: Be seated, please. I have before me the defendants' motion requiring disclosure of documents ten days prior to depositions. The defendant moves for an order requiring ten days advanced disclosure of documents which deposing counsel plans to question the deponent about during a deposition.

The defendant supports this motion on the grounds of order and efficiency. Defendant also points to a number of cases in which such a procedure has been used successfully, as well as comments in the manual for complex litigation which seems to support the concept.

Plaintiff, on the other hand, objects to the advanced disclosures on the grounds that it results in deposition answers that are, at best, not spontaneous and at worse are rehearsed or perhaps counsel inspired.

Further, the plaintiffs suggest that advanced disclosures reveal the deposing attorney's thinking and strategy which they feel is work product.

The matter is addressed to the Court's discretionary duty to reasonably control the mode as well as the order of interrogating witnesses set forth in the Federal

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Rules of Civil Procedure Rule 16 and in the Federal Rules of Evidence Rule 611. Rule 611 provides as follows, 611(a): "The Court shall exercise reasonable control over the mode and order of interrogating witnesses in preparing evidence so as, (1) to make the interrogation and presentation effective for the ascertainment of the truth; and, (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment."

There is often some tension between subdivision (1) and (2) of 611(a). Such tension exists in the present case. And this Court must consider the advantages and disadvantages of each based on the facts and circumstances of this particular case.

In the "best of all possible worlds," advanced disclosure would promote order and efficiency, objectives to be encouraged in all types of litigation, but particularly multi-district litigation. In the real world, however, one must question the premise that advanced disclosure of documents actually promotes these laudable goals. In an attempt to achieve some spontaneity, as well as purity of witness response, and also, at the same time retain some flexibility in the preparation interrogation, deposing counsel tend to dramatically overestimate the number of documents that they may use. This practice is usually justified, or at least

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articulated or explained by an expressed concern that if the documents are not listed they may not be able to be used during the deposition.

In any event, advanced disclosure usually precipitates such a plethora of documents that any theoretical advantage becomes meaningless in the practical application.

Furthermore, there is something to be said for spontaneity and purity of a witness's response. This, after all, is the foundation or the stylobate upon which our search for truth actually rests.

Efficiency is important, efficiency is alluring. After all, history has taught us that there is a certain amount of comfort in having the trains run on time. But the courts must be careful not to seek efficiency without regard to consequences. The theoretical advantage of prior disclosure are outweighed in this case by the practical realities and potentially perilous consequences of endangering unfettered and untutored testimony. More over, following the traditional practice in this particular case should not cause any undue hardship to the defendant since the documents at issue will be largely those produced by the defendant, who probably created them or at least assembled them and had access or possession of them for some period of time.

Considering all of the ramifications of this

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motion and considering the facts and circumstances applicable to this particular case, I don't feel that the motion is sufficient to deviate from the time honored practice of producing or using documents at the time they are tendered to the witness.

So for all of these reasons, I am going to deny the motion. Thank you, folks. Court stands adjourned.

MR. IRWIN: Thank you, Judge.

MR. HERMAN: Thank you.

THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

I, Arlene Movahed, 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.

Arlene Movahed

Official Court Reporter