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P R O C E E D I N G S

MORNING SESSION

(Tuesday, February 20, 2001)

THE COURT: Will counsel make their appearances for the record?

MR. IRWIN: Good afternoon, Your Honor, Jim Irwin for defendant.

MR. HERMAN: May it please the Court, good afternoon, Your Honor, Russ Herman for the plaintiffs in MDL 1355.

THE COURT: Okay, we are here today in connection with a prearranged status conference, at which time we will deal with any motions as well as reports from counsel.

I have received from counsel a joint report number 4 setting forth the agenda for today's meeting. I would like to go over it with counsel, first, the virtual document depository.

MR. HERMAN: We have pursued it and there has been no progress to report, Your Honor. We are still, if I may speak for the defendants as well as the plaintiffs' concern about security problems, I suspect what will happen is the documents will be placed by plaintiffs so that they can be accessed, but not any subjective coding of other materials. We are still looking at the security issue.

THE COURT: All right, I'm aware of the problems that counsel is facing. This document depository is, after all, for

1 your benefit, meaning both sides.

2 I do want to urge you to consider it because I do
3 think that you're going to find that the retrieval of the
4 information is going to become more and more problematic, and
5 the use of methods such as document depositories, assuming you
6 can work out some of the details of it, I think will benefit
7 you in the long run.

8 Let's go to number two, the plaintiffs' profile forms
9 and authorizations.

10 MR. HERMAN: They were agreed to, and I believe it
11 was a 45 day period from January 31st for the plaintiffs to get
12 those in.

13 MR. IRWIN: That is correct. Your Honor entered the
14 order and we believe this item can be taken off the agenda for
15 next month.

16 THE COURT: I put the forms that you gave to me on
17 the website, and hopefully that will help people who want to
18 look them over and deal with them. I don't know whether they
19 can fill them in on the website and e-mail the material in, but
20 if they can, that also will be helpful.

21 MR. IRWIN: I think they can download the forms,
22 Judge, and I think that's a very efficient way for them to get
23 the questionnaires.

24 MR. HERMAN: May I report, Your Honor, that we intend
25 to send out a notice to all of the plaintiffs in the MDL next

1 week reminding them that the forms are due, and giving them the
2 due date.

3 THE COURT: Let's keep "a heads up" on it from the
4 standpoint of the defendants. If you don't have the material,
5 let me know so that I can get that material for you.

6 MR. IRWIN: Yes, Your Honor.

7 THE COURT: Master Complaint.

8 MR. HERMAN: We have formed a committee on the
9 plaintiffs' side to look at two different Master Complaints:
10 One, a Master Complaint relating to what I will call individual
11 claims, including personal injury claims, with various causes
12 of action that have been asserted.

13 We have collected, with Ms. Barrios' good work, all of
14 the complaints that have been filed, and we're now attempting
15 to forge a Master Complaint on the individual cases that would
16 allow lawyers to designate which causes of action they are
17 asserting in their individual claims.

18 The class actions are more problematical. We have now
19 16 class actions that we know about. Again, all of those
20 complaints have been gathered.

21 With all candor to the Court, some of those complaints
22 raise class issues which are not class issues, and it's
23 extremely difficult to, on the one hand, serve all of the
24 lawyers who have filed class actions, and on the other hand, do
25 what we think we ought to do if there is going to be a Master

1 Complaint filed, that it be a Master Complaint that the Court
2 could take cognizance of and that the defendants would be able
3 to answer.

4 We have a committee working on that, and we may
5 propose two separate Master Complaints. Again, we're not
6 certain that the master class complaint really forms a service
7 at this time, but we're going to present something to the Court
8 in March anyway.

9 There will be a report. I anticipate that Steve
10 Murray will be making that report, or Arnold Leveanor
11 (phonetically), or both.

12 THE COURT: All right. Give me an update on the
13 document production.

14 MR. HERMAN: We received as of yesterday -- as of
15 the 15th -- excuse me -- as the defendants have indicated,
16 additional documents, about 240,000 documents, as we have
17 reported, are pages of documents on CD ROM. We reached an
18 agreement as to proposed marketing documents.

19 I understand from the defendants that they are going
20 to attempt to accelerate that. We should have those in hand,
21 one group, no later than March 15th, and the second group no
22 later than the beginning of April.

23 So, we will be addressing in March any document
24 production problems, but as of right now, I think that any
25 problems that we do have, we have been able to work out and

1 negotiate up to this point.

2 I do want to alert the Court in advance, however --
3 and you will hear some of this today -- there will be a
4 dispute as to foreign production, when it will begin, when it
5 is to be produced, what companies need to be produced, et
6 cetera. I don't want to argue the issue, I just want to alert
7 the Court to it.

8 I would say that there's a very strong feeling on the
9 part of plaintiffs that subsidiary and related corporations
10 discovery and other countries should proceed, and proceed
11 quickly. I believe the defendants -- and they will speak
12 more to it -- have a concern that the discovery is too broad,
13 and they have relevancy issues as well that they will bring to
14 the Court's attention.

15 You may want to address that now.

16 MR. IRWIN: Your Honor, with respect to the rolling
17 production of documents as we have described them under Roman
18 IV, I just want to clarify for the record that it was our plan
19 to supplement our document production today. We had talked to
20 Mr. Herman and some of their colleagues in the plaintiffs'
21 discovery committee in an extensive meeting on February 5th,
22 but as we went through, what is our box index -- and I wanted
23 to reference that to Your Honor because we have mentioned it
24 once or twice before -- we have an index of boxes that
25 consist of approximately, I think, 1400 boxes, over a thousand.

1 What we were going to try to do was specify those particular
2 boxes that are responsive to each of the 109 paragraphs of the
3 complaint. Once we tried to do that with pen to paper, it
4 became difficult because some of the paragraphs overlapped and
5 we found that we were often putting down 30, 40, 50 or more --
6 I didn't count up the number -- that we had penciled in on
7 the responses, but it became apparent that it was not going to
8 be all that helpful.

9 So, what we're talking to Mr. Herman's office about
10 and what I mentioned to Mr. Davis this morning is that we're
11 going to go back to the drawing board and work on supplementing
12 our responses by utilizing the objective coding index that we
13 have and that the plaintiffs have, too. That's where we are
14 now in the supplementation, and I wanted to bring that to the
15 attention of Your Honor for the record.

16 With respect to the completion of the document
17 production, we believe that we are shooting and hope to make
18 the end of June for the completion of the domestic document
19 production, and that relevant matters involving the foreign
20 document production will commence probably after that.

21 We do have substantial issues regarding the relevance
22 of foreign document production. We have touched upon them in
23 some informal way during some of our discussions. I can give
24 Your Honor an example. We had a heated debate about the
25 relevance of sales information, let's say, in Italy. I think

1 you can guess where I came down on that debate.

2 There may be other information in the European
3 documents that would be of potential relevance, and that
4 includes adverse events. I believe that information is
5 ordinarily transferred to the United States and produced in the
6 domestic production, and may have already been produced, but
7 I'm not sure about that. I think that's the case, though.

8 But, I do think we have substantial differences of
9 opinion with respect to the foreign production, and the best
10 mechanism to address those may be to employ the officers of the
11 magistrate to do so. But, we're a long way apart on that.

12 THE COURT: Maybe we should slide into the electronic
13 production at this point. Is there some overlap there or do
14 you want to go the way you have set out in the report?

15 MR. HERMAN: There is. Judge, we have reached
16 agreement on some of that. The issue outstanding is the
17 foreign production. As I understand it, the protocols were
18 preservation that we requested and which were to be the subject
19 of an argument, as I understand it, the defendants will agree
20 to those protocols of preservation, but not as they regard
21 foreign electronic documents, electronic discovery. I'm going
22 to have Mr. Segrit (phonetically) address that.

23 If I might, before we get to that, I think it behooves
24 me to give the Court a better picture of foreign discovery.
25 Sysipride (phonetically) or Propulsid were sold under more than

1 30 brand names. It was sold in more than 104 countries. There
2 are 60 plus Janssen, Johnson & Johnson subsidiaries and
3 affiliate corporations. Many of those, according to the
4 journal literature, were involved in Propulsid either in its
5 creation, its sale, its licensing, et cetera. The question of
6 clinical tests, of adverse drug events, of reporting adverse
7 drug events of marketing to children and matters associated
8 with that or, frankly, a serious bone of contention.

9 In addition, Mr. Clousner (phonetically), who was
10 produced at a 30(b)(6) deposition cross-noticed in the MDL
11 recently, seemed to say that the nerve center for Propulsid was
12 in Belgium and Beersay (phonetically) and we anticipate a lot
13 of -- a great deal of discovery there as a result.

14 If we cannot resolve our differences by March, then we
15 are certainly going to have to file motions and then bring it
16 to the Court's attention for either a decision, argument or
17 referral.

18 I can say from the plaintiffs' point of view that
19 issue, we believe, is one of the most critical and fundamental
20 issues in the entire litigation. So, with that in mind, am I
21 correct that as far as preservation protocols, we have agreed
22 except as to form?

23 MR. IRWIN: Yes. I would just like to say one thing.

24 MR. HERMAN: Absolutely. And then we will address
25 the foreign electronic discovery.

1 THE COURT: Okay.

2 MR. IRWIN: I just want to get my notes up here.
3 Judge, I would say something I guess that's maybe a little
4 negative, but I would like to say it in as positive a way as
5 possible, and that is, I looked back at pre-trial order number
6 two where Your Honor said that the Court record is not the
7 repository and should not be the repository for ill chosen
8 words.

9 I also looked at the good words Your Honor said about
10 professionalism among counsel, and I have nothing but the
11 highest remarks to state about professionalism with my
12 colleagues. But, I do believe that there are some ill chosen
13 words in the reply brief on page 10. And the words that I take
14 issue with are the words that say that there is an e-mail
15 destruction program which is the equivalent of a desire to
16 eliminate documents "that are most problematic." I suggest in
17 the most positive way that those are ill chosen words, and we
18 take issue with them with all due respect.

19 THE COURT: Yes, I noted that, and I thought that for
20 the first time I noticed something that had crept into this
21 litigation that I had not seen until now, and I did think that
22 the tone of it, not necessarily the wordage, but I thought the
23 tone of it was a bit excitable and perhaps put down in haste in
24 a knee jerk fashion. And I would hope that upon reflection and
25 calmer time when deadlines are not looming, that matters of

1 that sort would not be presented in the future.

2 Let me share with both of you just some of my thinking
3 on computer records in general. There is no question that the
4 law has gotten to the point long ago where computer records,
5 including records that have been deleted, are documents
6 discoverable under Federal Rule 34. Even the amendments of
7 1970, included language that anticipated the development of
8 technology to at least this point. Therefore, computer records
9 relevant to the claims and defenses should not be destroyed
10 because they may be subject to discovery. I can't focus on
11 them if I don't have them before me or they are not in
12 existence anymore. I don't want spoliation to creep into this
13 litigation and all of the bad inferences that that will bring.
14 For the benefit of both sides I mention that.

15 Although the scope of discovery is broad, the Court
16 may, and no question in my mind, should limit discovery where
17 the burden or expense of the proposed discovery outweighs its
18 advantage or the benefit that is likely to be derived from such
19 discovery.

20 The party requesting discovery, be it plaintiff or
21 defendant, must be as specific as possible as to the nature,
22 the extent, the feasibility and, of course, the relevance of
23 the discovery. The request must be as particular and specific
24 as possible. General requests in this area are, in themselves,
25 burdensome.

1 The Court is aware of the parties' concern with
2 privacy, with privilege, with security, with trade secrets,
3 with competitive concerns and all those type issues, but except
4 in rare instances, I would expect these issues to be dealt with
5 by stipulation or by agreement of counsel. I don't think that
6 those issues are insurmountable and would thwart or excuse
7 discovery in any way, but they have to be dealt with and should
8 be dealt with.

9 Now, if the dispute arises in the discovery aspect and
10 if the dispute gets technical or, at least, the technical
11 components of the dispute preponderate over the legal aspects
12 of the dispute, the Court is going to need some assistance from
13 an expert explaining why discovery is necessary, whether it is
14 necessary, how can it be done, the affect of it being done, the
15 potential problems with it being done, and such things of that
16 nature.

17 I haven't really constructed any protocols in my own
18 mind about the procedures for going about it, but it seems to
19 me that I would be dealing with or looking toward Federal Rule
20 of Evidence 706 in that regard, a 706 expert. Let me go into a
21 little more detail.

22 I could pick the 706 expert by either utilizing the
23 federal data bank sources available to me or I could seek
24 agreement of counsel on a particular person or persons, or I
25 could get counsel for both sides to give me suggestions and

1 pick the individual from those suggested.

2 Once the person is designated, I would anticipate
3 indicating that the individual is a court appointed expert.
4 The court appointed expert would then look to see what is
5 requested, why it's requested, how it can be produced, what the
6 cost of it being produced. What is the economic and social
7 impact of it being produced, and things of that sort. That
8 expert would probably be paid by the party requesting
9 discovery.

10 What's found might well be turned over first to the
11 other side for viewing in order to determine whether or not
12 there is any privilege concern, whether there is any privacy
13 concern, whether there are any other concerns involved. If
14 those concerns present themselves, then some privileged logs
15 can be prepared, and that material segregated out of the
16 regular material and dealt with accordingly.

17 It's a complicated procedure. It's a burdensome
18 procedure. It's a cumbersome procedure. So, it seems to me
19 that before we go down that road, it would be better to see
20 whether or not you can work out some protocol among yourselves.

21 I have looked at a number of cases that have dealt
22 with similar issues of this sort, and there are some procedures
23 developing along the lines which I just mentioned: I may have
24 to tweak it here, have to tweak it there, depending on the
25 facts before the Court on a particular matter. Nevertheless,

1 it's doable, but it's cumbersome and awkward, and probably
2 better done by the parties. But, if you get to the point where
3 you're at an impasse, we ought to carve out as small a segment
4 as that is able to be carved out and give it that burdensome,
5 cumbersome treatment. That's basically what I'm looking at in
6 dealing with some of these issues, because it is not really a
7 discovery issue that's just pregnant with law; it actually
8 involves a lot of technology concerning whether it can be done,
9 how it can be done, what's the cost, and so forth.

10 So, in dealing with those issues I'm going to need
11 some help, and the only way I think I can get it is through an
12 expert. It doesn't do me any good to hear your expert and your
13 expert and make a decision as to who's most credible. I'm
14 going to need a little bit more information than that.

15 So, that's what I'm thinking about as I'm hearing you
16 talk about these issues now.

17 Let's go to electronic service in Verilaw.

18 MR. HERMAN: As far as I know, service is being
19 effectuated through Verilaw, and Verilaw is sending out
20 additional information to all litigants regarding service
21 through e-mail. I have had no complaints. The only thing I
22 have gotten is from one law firm that wanted to be taken off
23 the e-mail list.

24 MR. IRWIN: Can I add something to that, Your Honor?

25 THE COURT: Sure.

1 MR. IRWIN: We're not really quite still up and fully
2 running with Verilaw. Mr. Davis and myself are really on line,
3 and I know Mr. Herman is, too, but I think he gets Mr. Davis to
4 do his computer work for him. But, we still have a couple of
5 small technical things to work out with Verilaw before we get
6 on line, and Mr. Davis and I promised each other that we're
7 going to finish it and get it done.

8 THE COURT: Okay. And I would like them to at least
9 touch base with my staff. We have a link on it, but I don't
10 know whether our link is fully up and going.

11 MR. IRWIN: I think Your Honor and your staff would
12 need a user ID and a password.

13 THE COURT: Yes, okay.

14 MR. HERMAN: I might say in that connection we have
15 agreed with the New Jersey group that they will be able to
16 access pleadings that go out through Verilaw in the MDL and
17 that we will be able to access pleadings in the state court
18 proceeding.

19 THE COURT: I see that we have some state liaison
20 counsel present. I appreciate your presence and also your
21 interest in the litigation. If there is any issue that you
22 want to be heard on as we're going through this that you feel
23 is important from your viewpoint, give us an opportunity to
24 hear from you.

25 MR. HERMAN: Your Honor, as our joint submission

1 indicates, state liaison counsel have been active. They have
2 attended your court hearings and several state liaison counsel
3 have attended the depositions recently in New Jersey.

4 THE COURT: It seems to me that we're in a situation
5 where we ought not to have to ring the bell twice or do things
6 twice, so, this is an opportunity, I think, for all of us to at
7 least piggyback and learn from the other, and utilize the
8 resources that each has available to them. That's what I'm
9 trying to do in this particular litigation. I want to welcome
10 you all and have you participate as much as you feel you need
11 to participate in it. I think the system will profit. I think
12 the litigants on both sides will profit. From the defendants'
13 vantage point, they won't have to do things two and three and
14 four times. From your vantage point, you won't have to do them
15 two or three times. It just seems that that's the best way of
16 going about it for the system as well as the litigants.

17 So, I am urging you to continue doing it.

18 Cross Notice, somebody has taken depositions?

19 MR. HERMAN: The depositions were Cross Noticed and
20 were taken.

21 THE COURT: How did those go? Any particular
22 problems logistically?

23 MR. HERMAN: I don't believe there was really a
24 problem. There were no calls to the magistrate or to you, and
25 the depositions proceeded on time.

1 We have agreed the week of March 5th to go forward
2 with organization depositions, and, of course, we will be
3 notifying through liaison counsel, once Mr. Irwin and I have
4 got agreement on dates, that they may attend. I assume the
5 defendants are going to Cross Notice, which we would have no
6 objection to, but, I'll leave that to the defendants.

7 As I understand it, they will attempt to produce two
8 individuals who will deal with organizational structure and
9 individual identity, and we should have additional documents
10 before those depositions related to those issues.

11 With regard to electronic document production as
12 distinguished from preservation, I think Your Honor has given
13 us a road map that we can follow. We have a consultant in
14 court to the plaintiffs. I would just like to briefly
15 introduce Barbara Frederiksen who has been working with us.

16 MS. FREDERIKSEN: How do you do, Your Honor.

17 THE COURT: Hello.

18 MR. HERMAN: We will begin looking at the road map
19 that you have given us and meet and see if we can come up with
20 something.

21 With regard to the briefing material, sometimes when
22 the knee jerks, the brain doesn't work, but I'm sure that the
23 Court and learned counsel opposite that certainly there is no
24 intention to throw any barbs whatsoever at defense counsel.

25 I think that, however, with respect to March, the

1 March hearing, I just don't see us being able to work out the
2 issues of foreign discovery although we will meet and confer on
3 that before any papers are filed.

4 MR. IRWIN: Your Honor, may I respond briefly?

5 THE COURT: Sure.

6 MR. IRWIN: And we got the electronic discovery
7 protocol around the first of the month, and then on February
8 7th, Mr. Conour, who is here at the defense counsel table, who
9 is very informed about these issues, he came to New Orleans
10 along with our expert who is from Dallas, and we met in Mr.
11 Herman's office along with Ms. Frederiksen and Mr. Buchanan,
12 and we started to go through paragraph by paragraph the
13 protocol, and I think as respect preservation, domestically we
14 are largely in agreement. There may be a couple of little
15 things that have to be fine tuned, but that working session
16 made a lot of progress there.

17 We identified that there are enough areas where there
18 were technical challenges that it was necessary for our experts
19 to talk directly to some people at Janssen and Johnson &
20 Johnson. They're doing that this week.

21 We, then, are resuming our meetings in Dallas next
22 week with the lawyers involved, the informed lawyers involved,
23 and the experts again.

24 So, I think the process is trying to work. Although I
25 was a little concerned about breakdown in communications, I

1 sense and I am encouraged that the process will continue to
2 work.

3 THE COURT: Fine. Let's look at 30(b)(6) depositions
4 regarding corporate organization. I think you may have touched
5 on some of that.

6 MR. HERMAN: We met this morning on those issues.
7 Those depositions will go forward the week of March 5th two
8 days that week, and the defendants or Endeavoring will produce
9 at least one person responsive, and Endeavoring will produce
10 two. I have no reason to think that they will not go forward.

11 THE COURT: How about status or response objections
12 to documents request to defendants?

13 MR. HERMAN: Well, we have reached an agreement on
14 that this morning. As Mr. Irwin indicated, the defendants
15 found the task daunting to cross reference boxes to responses.
16 The more difficult way would have been an assistance by the
17 plaintiffs that it be done by Bates numbers which we felt
18 really would just incur too much -- it would be too
19 problematic. However, we have discussed the objective coding
20 reference to the responses, and I am informed that that can be
21 done by March 9th, which is acceptable to us, which means that
22 we should be able to work this problem out before the next
23 meeting in March.

24 MR. IRWIN: That is correct, Your Honor.

25 THE COURT: All right. Is there anything further on

1 the agenda, anything that anybody wants to cover that I haven't
2 covered, anything from liaison counsel?

3 MR. IRWIN: A scheduling matter that we talked about
4 before, because we have some of our colleagues on the defense
5 side, and I think maybe -- I'm not sure -- from the
6 plaintiff's side, come in from California, if it were possible
7 for us to have our conference in the morning and then we could
8 get our folks home at night, so, if the Court schedule could
9 meet it --

10 THE COURT: We'll work it out.

11 MR. IRWIN: -- for the morning.

12 THE COURT: I'll work it out.

13 MR. HERMAN: Your Honor, I have one more matter, but
14 may I speak with counsel for one second?

15 THE COURT: Yes. Let's do logistics first. When is
16 the next meeting?

17 MR. IRWIN: It's March 15th.

18 MS. LAMBERT (DEPUTY CLERK): We have it scheduled for
19 two, Judge.

20 THE COURT: What about a Friday meeting? Is that a
21 possible for you all, Friday morning?

22 MR. IRWIN: Friday, the 16th, Your Honor?

23 THE COURT: Would that be all right?

24 MR. IRWIN: That would be Friday the 16th?

25 THE COURT: Right.

1 MR. IRWIN: It's not okay with me. I'm on a seminar
2 panel that morning that I cannot get out of. And then Russ is
3 on it; we're on the same panel.

4 THE COURT: All right, let's do it on the morning of
5 Thursday the 15th. What's a convenient time, 9:00 o'clock? Do
6 you all want to do it earlier than that?

7 MR. IRWIN: 9:00 o'clock, please, Your Honor.

8 MR. HERMAN: That's going to be on the 13th?

9 THE COURT: The 15th.

10 MR. HERMAN: With regard to production preservation
11 of electronic material, with domestic only, we should have that
12 resolved following this, and we're in a position to submit a
13 joint order to Your Honor either later this afternoon or
14 tomorrow.

15 There are three issues. The confidentiality language
16 varies slightly from what was ordered, and we have no objection
17 to it the way it is. I just wanted to state that for the
18 record.

19 MR. IRWIN: Thank you. It's merely what's on the
20 legend, Judge. What our computer is printing on the documents
21 for being confidential doesn't read word for word for what's in
22 our order, so, we would like to submit a joint order to Your
23 Honor just to clear that up.

24 THE COURT: You will have to amend it. Let's do that
25 so we're in sync with the orders.

1 MR. HERMAN: Secondly, with regard to motions and
2 hearings that relate to documents which are stamped
3 confidential, we really do not know what procedure Your Honor
4 prefers. Sometimes we have submitted that separately to the
5 clerk's office. Sometimes it comes to Your Honor's law clerk,
6 or Your Honor might want to get it directly, but we do want to
7 follow the way that you wish that to be handled.

8 THE COURT: Let me talk with the clerk's office and
9 we'll get some uniform way, and then I'll be in touch with you
10 so everybody is on the same page. I want to see whether they
11 have some things that I don't know about, but we will work out
12 something and give it to you.

13 MR. HERMAN: Lastly, Your Honor, we have the CPA who
14 has been compiling information on time and expenses. The
15 defendants do not object to us speaking with you outside of
16 their presence regarding that issue.

17 We have one small matter to talk about as to exactly
18 what you would like done, and that is, the CPA is here in court
19 as our consultant.

20 THE COURT: Okay. We'll meet in the conference room
21 then, if you want. Is this a long conference or can we do it
22 at the bench here now?

23 MR. HERMAN: We can probably do it from the bench.

24 We still had outstanding the question of preservation
25 of international electronic data which is not resolved.

1 THE COURT: Let me hear from the defendants on that.
2 What's your position on the preservation? I'm not talking
3 about the presentation or the discoverability of it, but just
4 the preservation of it.

5 MR. IRWIN: Believe me, Your Honor, I need notes on
6 this. We believe that we have the technology in Europe to
7 preserve e-mails. We're optimistic about that is the word I
8 have in my notes, and we're working on that. We should be able
9 to consult with our opponents about those measures, but I have
10 reason to believe that we should be optimistic about e-mails.

11 Such things as, of course, data bases, adverse event
12 data bases, which I will submit would be that which is
13 potentially relevant, and I have serious reservations about the
14 relevance of other documents, and we'll argue about that later.
15 Those data bases are, of course, and we're not going to lose
16 information from those data bases.

17 One of the issues that needs to be developed, not only
18 in the context of the foreign preservation and production, but
19 local as well, and it is something that we were talking about
20 on February 7th and it's something we will continue to talk
21 about, and that is the development of search terms that we can
22 agree on hopefully that would be most likely to be utilized
23 officially to identify this electronic data. So, search terms
24 are at issue.

25 There is information in Beersey that is, I believe,

1 that Belgium headquarters of the operation, and at this point
2 our impression is that the Beersey system does not conveniently
3 allow monthly backups. Why, I couldn't explain to you, but I'm
4 advised that our experts are talking about this. There are
5 technological issues with regards to backups of certain
6 equipment at Beersey. Our position is that other European
7 venues, sales and marketing information and wherever would not
8 be relevant, and we really haven't go to that point yet. But,
9 I think that this answers your question, we are optimistic
10 about e-mails. We have technological challenges with respect
11 to backup tapes in Beersey which our experts are talking about.

12 THE COURT: Let me say this. I'm not sure that any
13 of this material is discoverable. I'm not sure any of it is
14 relevant or irrelevant for that matter, but I don't see that as
15 being the issue before me. The issue that I think that both of
16 you ought to be conscious of is that it is important to do
17 everything possible to preserve this information. In fact, if
18 it's not preserved, it's going to lead to more severe problems,
19 because I can see spoliation problems developing, and with
20 spoliation, there is not only some penalties involved, but some
21 adverse inferences drawn, some presumptions the parties have to
22 live with, and also some potential of not being able to utilize
23 that information in the event it turns and it is helpful.

24 So, the fact that it is preserved doesn't mean that
25 it's admissible. It may well not be admissible. I think

1 relevancy is a hurdle that has to be crossed before information
2 is discoverable, and sometimes even if it's discoverable, it
3 may not be admissible at trial.

4 So, I'm not concerned at this point with either
5 relevancy or I'm not concerned with admissibility, and I'm not
6 even concerned with discoverability, but I am concerned with
7 preservation.

8 Both of you should tell your clients to preserve
9 information. If it is, or had been destroyed, I'm going to be
10 concerned about that, and I will take appropriate action; and I
11 don't think it is going to be to either of your advantage,
12 either the plaintiffs or the defendants, whoever destroys the
13 material. So, to the extent that they need to be encouraged, you
14 should disclose to your clients the Court's feeling on the
15 issue.

16 I don't want documents destroyed or data bases washed
17 out or material erased on the basis that someone feels that it
18 is not relevant. It has got to be preserved so that it can be
19 looked at by me, and only by me. I'm not going to get to the
20 point of relevancy if I don't have it before me. If it is
21 destroyed and I find that it was available and shouldn't have
22 been destroyed, then it seems to me that some adverse inference
23 may be drawn in addition to some other appropriate actions
24 taken.

25 So, let's not have them destroyed. It doesn't mean

1 that I'm going to admit them; it doesn't mean that it's
2 relevant; it doesn't mean that it's discoverable, even, but I
3 don't want them destroyed.

4 MR. IRWIN: Well, Your Honor, we're mindful of those
5 words, and one of the things that we will be talking about --
6 and I'll move away from the podium and let my more learned
7 colleague address that -- is that we will talking about this
8 imbalance. If we feel we can't be comfortable with the
9 situation, we may then come to court and ask Your Honor for
10 relief.

11 THE COURT: Sure.

12 MR. CONOUR: Your Honor, Kenneth Conour from Preuss
13 Shanager. Just to be clear on this issue, and I have heard you
14 and I take heart to what you said. I do want you to
15 understand, as plaintiffs have pointed out, we're talking about
16 marketing and sales throughout more than 140 countries
17 involving dozens of companies. Each of these companies
18 implement their own backup procedures, have different
19 procedures available to them. Some of the technology might be
20 compatible with what plaintiffs can use here; some of it may
21 not be. But, to implement a protocol cookie cutter style and
22 put it upon the more than 60 companies or what have you, it
23 can't be done, so, it's going to take substantial undertaking
24 for us to communicate further with these companies and see what
25 can be done and what can't be done. I do believe that we will

1 be back discussing with you in more detail because we're not
2 prepared for this today in more detail what the burdens are.

3 THE COURT: All right. And just keep in mind, too,
4 that there are several issues that are raised which we have
5 touched on. The other, as you say, is expense, and the expense
6 situation may well be relevant, an expense may have to be borne
7 by the people requesting discovery. Maybe it's divided. Maybe
8 it's just your burden, I don't know. But, those are issues
9 that can also be dealt with. I can hear that, but that's
10 another issue.

11 MR. CONOUR: As long as you do understand that issue,
12 that's fine.

13 THE COURT: I do understand.

14 Is there anything further, folks?

15 MR. CAMPION: Your Honor, I have been informing the
16 Court at the various hearings --

17 THE COURT: Do you want to just make your appearance
18 for the record?

19 MR. CAMPION: Yes. That's Thomas Campion. I have
20 been informing the Court of the statistical information.

21 THE COURT: Yes.

22 MR. CAMPION: The numbers go up, they don't go down.
23 At the present time Your Honor is presiding over cases brought
24 from 18 separate states and the commonwealth of Puerto Rico.
25 You still have 78 percent of all the plaintiffs who have

1 brought actions against Johnson & Johnson and Janssen, and you
2 still have far more than half the cases.

3 So, the center of gravity remains this building in
4 this room.

5 THE COURT: How many do you anticipate? What are you
6 looking at now?

7 MR. CAMPION: We do not have a sound estimate, Your
8 Honor. It will obviously exceed a thousand. That's all we can
9 say.

10 MR. HERMAN: Your Honor, I strongly believe that
11 we're going to be held in excess of several thousand.

12 THE COURT: Are we past the cutoff dates?

13 MR. HERMAN: No. There are a number of
14 jurisdictions. For example, I'll just throw one out. Missouri
15 has got five years for discovery. New Jersey is two years
16 withdrawal of drug effectively late June or early July of last
17 year.

18 And there are other issues: Claims of minors, for
19 example. But, between now and the end of June, Your Honor, I
20 think you're going to see an accelerated filing. I know that's
21 true.

22 THE COURT: Let's just keep me advised so at least
23 we'll know where it's at.

24 Anything further by anybody?

25 Counsel?

1 MR. BECNEL: Judge, Daniel Becnel. I was just
2 wondering, what is the Court's preference into these filings?
3 What we have done in some cases in the past is if it involves
4 the same judge, the same jurisdiction, we have bundled some of
5 the cases. That was done in Norplant (phonetically); it was
6 done in other cases. And then some judges don't like them
7 bundled. They want each one filed for statistical purposes.

8 All I'm looking for is some guidance. If I have 20
9 cases from the Eastern District and I put them all together and
10 have one filing fee, knowing that each one of them will be
11 separate and different and will be discovered separate and
12 different, I'm wondering if the Court has any direction?

13 THE COURT: What's our position with the clerk's
14 office? Do you know? Do you have a feeling?

15 MS. LAMBERT (DEPUTY CLERK): No, Judge.

16 THE COURT: I don't have any personal problem with
17 bundling them together to save money. I don't have any problem
18 with that if the defendants don't have any problem with it.
19 Statistically, I don't want to be driven by statistics on that.

20 MR. BECNEL: In phen phen here, all of my cases were
21 basically bundled, and then kicked out, and then they will be
22 coming back either individually tried or tried in flights if
23 not settled. But, some judges don't want them bundled.

24 THE COURT: I don't have any problem with it. I
25 think that's really a lawyer's call, each of the lawyers from

1 defendants or plaintiffs. I don't know, for example, if you
2 have created any problems with splitting some of them up from
3 that particular case number. For example, what if some of them
4 are settled and some of them are disposed of and others were
5 not. I just really don't know. But, it's something that,
6 either way, I'm comfortable with. If it's a question of
7 logistics for the clerk's office, you may have to deal with
8 them, but from my standpoint, I don't have any problem either
9 way.

10 MR. BECNEL: We're just trying to save some court
11 costs is why I brought the question up.

12 THE COURT: I understand.

13 MR. HERMAN: Your Honor, with your position, I would
14 like Mr. Davis to step up.

15 THE COURT: Sure.

16 (Off-the-record discussion held at the bench.)

17 THE COURT: Okay, folks, let me have your attention
18 before I leave. I talked with counsel for the plaintiffs on
19 the question of cost and keeping account of costs, and I've
20 worked out with them certain guidelines, and I'm going to be
21 insistent that they follow the guidelines. So, from their
22 standpoint when they contact other counsel, it's not that
23 they're trying to nit pick, it's really me trying to nit pick.
24 So, if anybody gets any criticism, it's really me and not
25 anybody else.

1 I want everybody to be conscious of the fact that
2 there are certain guidelines for recording expenses and costs
3 that the Court has to insist on. I'm going to be insistent on
4 those guidelines.

5 Is there anything else from anybody? Liaison counsel,
6 are there any problems that you all are having?

7 UNIDENTIFIED ATTORNEY: No, Your Honor.

8 THE COURT: The court will stand in recess.
9

REPORTER'S CERTIFICATE

I, O.J. Robert, Jr., Official Court Reporter, for the
United States District Court for the Eastern District of
Louisiana, appointed pursuant to the provisions of Title 28,
United States Code, Section 753, do hereby certify that the
foregoing is a full, true and correct transcript of proceedings
had in the within-entitled and numbered cause on the date
herein before set forth and I do further certify that the
foregoing transcript has been prepared by me or under my
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O. J. ROBERT, JR.
Official Court Reporter
United States District Court
Eastern District of Louisiana