

ROUGH DRAFT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS MDL No. 1335
LIABILITY LITIGATION SECTION "L"
New Orleans, Louisiana
Thursday, June 21, 2001
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

(THURSDAY, JUNE 21, 2001)

(STATUS CONFERENCE)

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6 THE COURT: Be seated, please. Good morning, ladies
7 and gentlemen. Let's call the case, please.

8 THE DEPUTY CLERK: Multi-District Litigation 1355,
9 Propulsid Products Liability Litigation.

10 THE COURT: Counsel make the appearance for the record.

11 MR. WRIGHT: Good morning, your Honor my name is Bob
12 Wright, with the permission of court I'll stand in for Russ
13 Herman who is little busy some place else today.

14 MR. IRWIN: Good morning, your Honor, Jim Irwin for
15 defendants.

16 THE COURT: This is our monthly meeting. The parties
17 have given to me a report of the material matters that we are
18 to discuss today. I'd like to go through them, the Master
19 Complaint first.

20 MR. IRWIN: Your Honor, with respect to the Master
21 Complaint and Answer, Item 1 on the joint report and also we
22 would suggest it would be sensible to include that in
23 discussion Item 12 which is the scheduling of presentation of
24 the class certification motion.

25 With respect to those combined topics, I believe

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2 that we are now to the point where the PLC, the Plaintiff's
3 Steering Committee are in the process of completing their
4 preparation of a Master Complaint. I believe we've resolved
5 the general concerns about that.

6 With respect to the presentation of the class
7 certification question, we have furnished to Mr. Herman's
8 office, we did this last week, a proposed schedule for the
9 presentation of the class certification issue to your Honor.
10 The schedule includes class discovery, it includes the
11 preparation, a deadline for preparation of the filing of the
12 Master Complaint to encapsulate all of these classes, the
13 allegations for class certification under medical monitoring
14 and under theories.

15 It provides for a schedule of discovery as I said,
16 also for the presentation and filing of expert reports, if any,
17 expert discovery, a Daubert hearing, if a Daubert hearing is
18 appropriate, and then of course motions, brief and a
19 presentation finally to your Honor in December of the hearing.
20 And which would allow this issue to be submitted to your Honor
21 by the end of the year.

22 We think that the schedule is not an aggressive
23 schedule yet not a conservative schedule, we would like to
24 think it's sort of down the middle of the road. We have
25 presented that to Mr. Herman and he has been tied up in the

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2 tobacco trial and very busy and has not been able to look at
3 that and we understand that fully.

4 We have had discussions about that with their
5 office, and what we would like to do and we think we will be
6 able to, is work out an agreement with respect to the schedule,
7 tune it up. If we cannot work out an agreement with respect to
8 the schedule, we would like to present to your Honor to resolve
9 whatever issues we are unable to resolve at the next hearing in
10 July, which right now is July 19.

11 THE COURT: Let me just talk with you a little bit on
12 that. Let's assume first that you're able to work it out. If
13 you are able to work it out, give me a heads up when you have
14 reached some consensus, and I'd like to meet with liaison
15 counsel in a pretrial conference to go over some of the
16 logistics and get some ideas from you as to how you intend to
17 proceed so I can schedule dates and times.

18 If you can't work it out totally, work out what
19 you can work out and then if you have one or two or however
20 many items in which you cannot reach a consensus, give me each
21 side of them so that I can make the cut on it. And I'll do it
22 that way.

23 How do you plan to proceed, maybe you haven't
24 reached that point yet, with regard to the class certification?
25 Are you looking to have certification by state or how do you

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2 plan it?

3 MR. IRWIN: Judge, I think that Mr. Herman would
4 probably have to answer that question or perhaps Mr. Wright,
5 but we have prepared a chart which we are going to give to
6 Mr. Herman's office with a letter today or tomorrow sort of
7 setting up what we think would need to be the timing for such a
8 motion in order to bring it on for hearing this coming July
9 19th. But the chart describes, I think that there are 19 class
10 actions, putative class actions pending in your Honor's court.

11 Of those 19 class actions there is an array of
12 theories of class certification, a couple are 23(b)(3) personal
13 injury classes, a couple are state wide emanating from the
14 various states.

15 THE COURT: Are there 19 states or less than 19 states?

16 MR. IRWIN: There are less than 19 states.

17 THE COURT: So several of them are seeking class
18 certification at the same time they're competing class
19 certification?

20 MR. IRWIN: Yes, your Honor. There are not 19 states.
21 I don't have the chart in front of me. I would say there are 8
22 to 10 states perhaps.

23 Many, if not all, of the complaints seek
24 certification for various theories of medical monitoring, a
25 consumer seeking injunctive relief, there are several class

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2 actions of a consumer nature, and I think this chart is helpful
3 in that it would provide sort of the landscape of how one would
4 assemble a Master Complaint to capture all of these theories,
5 and then we would address them in discovery and motion and then
6 have presented to you.

7 THE COURT: It just seems to me conceptually, and I
8 don't have it set out in specificity in my mind because I'm
9 just beginning to focus on it conceptually, but it would seem
10 to me that some of the aspects of the case would be specific
11 for each state, there may be a situation where causation, for
12 example, might cut across state lines and maybe perhaps issues
13 of causation may or may not be national. But it would be
14 difficult for me conceptually to see how you can deal
15 nationally with fault with it being so different in each state.

16 MR. IRWIN: I think that would be part of the process
17 of why we would benefit from a Master Complaint and why would
18 then try to sort through these complaints in an orderly way
19 because many of them just seek to certify state classes
20 recognizing the challenges of choice of law.

21 Some, a couple are national classes. Those that
22 are medical monitoring. When you talk about causation,
23 especially in the context of medical monitoring, that is where
24 Daubert might factor into this process because the parties are
25 likely to have genuine disagreements as to whether there is

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1 causation that would require medical monitoring in the future.

2 So Daubert might very well be a solution to some
3 of those aspects of the class certification question. That's
4 why we have factored Daubert into this schedule.
5

6 THE COURT: And on that basis, I am beginning to think
7 in terms of a 706 expert on scientific issues; we've been
8 talking about a 706 expert in the technological aspect of the
9 case, but conceivably this may get to a point where I need some
10 help on the causation standpoint, too.

11 Some courts in matters of this sort have found it
12 helpful to have the parties' experts conduct a tutorial for the
13 judge in which the basic scientific principles can be set
14 forth. I may or may not need that.

15 In addition, it might be helpful to have the
16 experts prepare a bibliography of material that I can use to
17 get up to speed on the basic relevant scientific principles or
18 chemical structure of the product.

19 MR. IRWIN: I know that, Judge, we as lawyers, have
20 required education about things such as EKGs and QT
21 prolongation and what not, and I suspect that there are good
22 teachers that we have access to and that Mr. Herman's side has
23 access to that could provide that to the Court, and that might
24 be something we want to talk about in connection with this
25 class certification schedule.

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2 If, and I had a question for your Honor, if we are
3 able to generally work this schedule out, and I hope we can in
4 the next couple of weeks, would it be appropriate then to come
5 see you before the July conference?

6 THE COURT: I think so. What I see is that if you can
7 work it out, get to me and we'll set up an informal conference,
8 sort of pretrial or prehearing conference and talk about the
9 logistics of it in the conference room just to discuss the
10 logistics and the best way of proceeding and how many days
11 you're going to need and how we're going to proceed and things
12 of that sort. I think that would be the best way of going
13 about it.

14 MR. IRWIN: That's what we'll work towards, your Honor.

15 THE COURT: You also should know that there's a program
16 going on now, somewhat of a pilot program in the federal system
17 whereby lists of potential court appointed experts are made
18 available to the Court. These experts can be used to assist
19 the Court in dealing with technical or scientific evidence.

20 And if I go that route I'll discuss it with you
21 before I do it and give you some idea as to who I'm using and
22 make available whatever material they give me you can see what
23 I'm doing.

24 Okay. Any comments from Plaintiff's side?

25 MR. WRIGHT: Your Honor, we certainly say what the

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2 court is saying, our first meeting of the PSC following this
3 suggested order will be this afternoon and so we hope to get
4 back to court soon.

5 THE COURT: Okay. Item 2, Update.

6 MR. IRWIN: Yes, your Honor. As I think your Honor can
7 see from the report, additional production on schedule was made
8 this month on June 15th bringing the number of pages so far
9 produced to almost 3 million. There is the expectation that we
10 will be producing yet an additional production by the end of
11 the month.

12 You know we have only done the productions once a
13 month, that has been our schedule, but our target has been to
14 conclude the domestic production by the end of June, and as a
15 result we'll be making one more production at the end of this
16 month. I would add, however, that I am told that there are
17 still about 15 boxes of documents left. If my friend
18 Mr. Herman were here I am sure he would say that's the good
19 stuff.

20 But of those 15 boxes of documents I think that
21 we'll have about seven of them done I am told by Mr. Conour by
22 the end of June and we may go a little bit into July to get the
23 last seven boxes done. At which point we are then -- we have
24 already started the process, but I wanted to report to the
25 Court that very soon after that the foreign production will

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2 begin.

3 What the details are of it at this point I don't
4 know. I expect to be able to report them with some
5 particularity to your Honor in July, but I know the process has
6 begun because the desire was not to have a gap between the
7 completion of the domestic production and the initiation of the
8 foreign production, so I think it will begin shortly and I will
9 give your Honor great particulars in July.

10 THE COURT: What's your input on the production of CD
11 ROM rather than hard copies, how is that working just
12 logistically, Mr. Campion, as well as economically?

13 MR. CAMPION: Logistically I think it's working well.
14 We are seeing the plaintiff's attorneys at the various
15 depositions drawing up documents that they have obviously
16 picked up on the scan and using them for whatever purpose they
17 want. We have heard no complaints from anybody about CD
18 production.

19 When we make the CD production in accordance with
20 the MDL production we make the CD production in various states
21 under orders that have been ordered there. In West Virginia
22 Mr. Hill who is, I don't want to say he's poster boy of
23 cooperation but he is about as close as we're going to get.
24 I'll speak. There are no complaints that we're hearing about
25 CD production. And from time to time we make hard copy

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2 production.

3 When Mr. Davis and I recently did the deposition
4 in Belgium, I made a production of some documents there, turned
5 out he didn't have occasion to use them because of time
6 constraints but we do both.

7 THE COURT: How about economics from the standpoint of
8 CD ROM as opposed to hard copy, is there any problem?

9 MR. CAMPION: The economic saving is enormous for us,
10 and I suspect it is for them. We see them using their screens
11 during the deposition as they think they need and they turn out
12 a hard copy from time to time.

13 THE COURT: How about retrieval, are you having any
14 problems, are you developing software, how do you retrieve
15 those documents?

16 MR. CAMPION: There is a directory given with the CD as
17 to how they can pull them down, and we have nobody complaining
18 about that besides from the very first pass so it seems to be
19 working out well.

20 THE COURT: I think it's helpful for the system and the
21 reason I ask you is because I am getting a lot of inquiry
22 throughout the country on this type or mode of production.
23 There's always concern about doing something a little
24 differently than what we've been doing over the years, but it's
25 good to hear that it's both economical and timesaving.

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2 MR. CAMPION: Somebody should write an article about it
3 when it's all over.

4 THE COURT: Are we on electronic service?

5 MR. IRWIN: Yes, your Honor. Let me mention one other
6 thing that I had a note about. With respect to the production
7 and the electronic data which is the last paragraph of II, I
8 wanted to bring to your Honor's attention that we are
9 continuing to have a few logistical problems in the production
10 of the electronic data. I think in large measure because this
11 has not been done before.

12 And there was a conference call yesterday and
13 there are several databases that are close to being producible,
14 but we're still having a couple of problems. I wanted to
15 report that your Honor, Aris G, A-R-I-S-G, Isis, CMF, PMF, and
16 I can't read my handwriting, one other database.

17 MR. DAVIS: CRF.

18 MR. IRWIN: Thank you. CRF are going to be furnished
19 to Mr. Conour in access 2000 format we believe this Friday, and
20 that we believes he will be able to make arrangements to
21 furnish them to the plaintiffs, subject to our abilities to
22 work out cost issues, within three weeks after that. And so I
23 wanted to report to your Honor where we are on that.

24 And then finally with respect to the selection of
25 a special master, under Pretrial Order No. 10, there are very

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2 few people in the country who are equipped to serve in this
3 capacity. We have a name that we've been working on, that
4 particular name right now, that person is also consulting for
5 Mr. Campion's firm in Philadelphia, so additional information
6 about the nature of that, it's not on the same case obviously,
7 your Honor, but the nature of that relationship is being given
8 to Mr. Herman's office and there is another conference call I
9 believe tomorrow on that.

10 We've had trouble getting a special master because
11 there are so few candidates. We had another name earlier I
12 believe and that individual was conflicted out. So we are
13 working on that and that's where we are.

14 THE COURT: Anything on electronic service?

15 MR. IRWIN: Your Honor, we had that issue concerning
16 the security and we have agreed to purchase the security
17 module. I phoned Mr. Amdur at Verilaw yesterday to talk to him
18 about that, and the PSC and the defendants are splitting the
19 cost of that. And so that, I hope, can now go off of our
20 agenda for next time.

21 THE COURT: The next is state liaison counsel.

22 MR. IRWIN: I thought that Mr. Wright was going to
23 speak first of that, and then if your Honor please, Mr. Campion
24 had some comments about that as well.

25 MR. WRIGHT: Your Honor, the suggestion that the

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2 plaintiff's committee has is the Court set a date for us to
3 meet with the state liaison group hoping that that can occur on
4 or about the same date as your next status conference in July.

5 THE COURT: I understand we have a problem with the
6 July date.

7 MR. WRIGHT: Or whenever you set it.

8 THE COURT: Yes, I would like to meet with state
9 liaison counsel and discuss matters with them and also at that
10 time I would like the PLC to be represented.

11 MR. WRIGHT: I think so, too, your Honor. Thank you.

12 THE COURT: Would you get with my staff afterwards and
13 we'll get a date.

14 MR. ARSENAULT: Yes, your Honor.

15 MR. CAMPION: State liaison counsel, one or two points
16 I would like to bring to the court's attention. We have a
17 great many state court cases, but by in large the corporation
18 is very good. Without drawing too much attention to Mr. Hill,
19 the consent orders that he's entering into in West Virginia
20 litigation really are models, and West Virginia and the MDL
21 moving along step by step. Isn't quite that way with New
22 Jersey. I understand that your writ does not extend to New
23 Jersey state court cases, nor do you wish to or should it.

24 On the other hand there is a member of the
25 Plaintiff Steering Committee, David Giacobbe who is the New

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2 Jersey representative. We believe it would be helpful if the
3 PSC would invite him to participate at next month's conference.

4 We have noted one thing which is remarkable about
5 this litigation, when something gets on the agenda it usually
6 gets worked out before the hearing. So if this could go on the
7 agenda, if they could arrange to ask Mr. Giacobbe to attend to
8 discuss matters of, I don't want to say discord but not as much
9 cooperation as possible, perhaps something could be worked out
10 in advance of the July meeting so it would become moot, but we
11 really do believe that that needs to happen.

12 MR. WRIGHT: We're in accordance, your Honor.

13 THE COURT: Tell them that the court would like for
14 them to be there. And if necessary let's have an in chambers
15 meeting.

16 MR. IRWIN: Your Honor, Item 5, would that be the next
17 subject?

18 THE COURT: Yes.

19 MR. IRWIN: The 30(b)(6) deposition of Mr. Dirk Reyn
20 regarding corporate organization of the Belgium operation took
21 place on June 5 in Belgium, and I'm happy to say went very
22 smoothly. And we just wanted to report that to your Honor.

23 THE COURT: How long did it take?

24 MR. CAMPION: Took all day, Judge.

25 THE COURT: Plaintiff's profile forms, how are you

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2 coming with that?

3 MR. IRWIN: Yes, your Honor. If I may have a moment,
4 please, I was going to get my letters and report to you with
5 more specifics about that.

6 I think the joint reports as we have in the past
7 where we are with the number of PPFs that have been received.
8 We received 439, there are 102 that are currently overdue and
9 26 that become due within 30 days.

10 As I believe the Court knows, we have implemented
11 procedures to regularly communicate the status of overdue PPF's
12 to the Plaintiff Liaison Council, we do that every Friday.
13 Plaintiff's Liaison Counsel then sends out notices to the
14 respective plaintiff counsel.

15 When the responses become 30 days overdue -- when
16 I say response, that means we hear nothing back -- we then, the
17 Defense Liaison Counsel send a letter directly to the plaintiff
18 counsel informing them that if we do not hear from them that we
19 will present the matter to the Court for dismissal.

20 At this point, we have prepared two letters and
21 given them to Mr. Herman and Mr. Davis, and of course we have
22 spoken to them about this before we gave them the letters, but
23 the upshot of it is that there are three plaintiffs who have
24 not responded to our separate letters and we will present them
25 for dismissal at the next status conference. We will file a

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2 motion by I believe July 3 was the target date, we will attach
3 the necessary suspecting paperwork. Those are plaintiffs who
4 have not responded, those are personal injury plaintiffs.

5 There are six more consumer plaintiffs who are
6 seeking rescision of sale. We have also asked them to respond,
7 they have not responded. We have sent a separate letter to
8 them, so there will be two motions submitted to your Honor in
9 connection with their failure to comply with the PTL No. 9.

10 THE COURT: And attach documentation showing that you
11 have sent the letters and they have received the letters. They
12 should know and the committee should tell them that I'm going
13 to dismiss the cases if no response is forthcoming.

14 MR. WRIGHT: Yes, your Honor. The only thing we're
15 concerned about is we know the plaintiffs involved and I think
16 they're going to cooperate and make sure they do.

17 MR. IRWIN: Your Honor, Item 7, deposition in state
18 matters have been cross noticed. We have had some discussions
19 about our abilities to furnish in advance to the Plaintiffs
20 Steering Committee or Plaintiff's Liaison Council information
21 that we get about all notices of deposition of Janssen
22 employees.

23 I believe that we have agreed, we are going to
24 agree to furnish them with all of that information. Any time a
25 Janssen employee is noticed at any other state court we will

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2 give them advanced notice. And we had some discussions about
3 that yesterday, we weren't quite sure because my office doesn't
4 know that, so it will be coming from Mr. Champion's office
5 exactly how we work out the details but we have a handshake
6 agreement on that.

7 MR. WRIGHT: Good. And I would add to that your Honor,
8 your Honor, expert witnesses as well.

9 THE COURT: The FDA subpoena.

10 MR. IRWIN: Your Honor, the FDA subpoena is moving
11 along. They initial FDA production was made and then
12 transmitted to, made originally to a representative of I think
13 Mr. Preuss's office who reviewed the information and then it
14 was passed on to the Plaintiff's Liaison Council, yet another
15 follow-up production has been made by the FDA and submitted to
16 Mr. Preuss's office and that is in the process of being
17 reviewed and will be submitted to Mr. Herman's office. My
18 impression is that this is proceeding at an acceptable pace.

19 MR. WRIGHT: Your Honor, although I don't think it's
20 necessary to bring it up. I think we have an additional item
21 in deposition matter. You're going to furnish us with copies
22 of the depositions that have been taken already?

23 MR. IRWIN: That is correct.

24 THE COURT: Service list of attorneys.

25 MR. IRWIN: Yes, your Honor, if I can get my papers I

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2 have something for the Court on that. Your Honor, this is the
3 service list that we have worked hard on, people in Mr. Davis'
4 office and I'll take a little credit for our office, too, and
5 also members of the court's staff and this is an expression of
6 appreciation comes from my office and Mr. Herman's office
7 because they have been very helpful in working with us,
8 especially Ms. Lambert.

9 And what we have here is the first service list,
10 and I'm going to hand it to Mr. Beyer, it is a list of the
11 plaintiffs attorneys and all of the cases, MDL docket numbers
12 and states. We have the defense service list, we also have it
13 in electronic form so it's fully searchable.

14 We do not have the e-mail addresses on this yet.
15 We were shooting to have that, we don't, we hope to have it by
16 next month. We think this is the best service list, but it
17 will always be a work in progress.

18 THE COURT: How about with the state cases, do we have
19 any list of the attorneys in state court that's not in this
20 court?

21 MR. IRWIN: I have a list, your Honor. This may be a
22 later item on the agenda, yes, Item 16, your Honor. This is a
23 list that was prepared by Mr. Preuss's office, and this is a
24 list of active cases by state. And we have agreed to furnish
25 this to Mr. Herman's office and we have an extra copy for your

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1 Honor if your Honor would like one.

2
3 THE COURT: Should that be on our website or not, is
4 that necessary?

5 MR. IRWIN: Judge, I think we probably need to talk
6 about that.

7 THE COURT: Okay. And from the state liaison, if you
8 have access, you can have access to any of this material that
9 you need.

10 MR. HILL: Does it have addresses of lawyers --

11 MR. IRWIN: It does.

12 MR. HILL: -- on the state court cases?

13 MR. IRWIN: It does, I'm going to give you an extra
14 copy.

15 MR. HILL: Thank you.

16 THE COURT: One of the reasons that I appreciate all of
17 you being here is that if you do need material that will help
18 you in your state proceedings, this is where you can get it.

19 As both of you all know, Mr. Hill and
20 Mr. Arsenault, we are endeavoring to work in a way that's
21 helpful to all sides and helpful to the process so that we
22 don't do the same thing twice, we just do it one time. So I do
23 appreciate the input that you have given and also the
24 cooperation that you've given to the case. I think it's
25 helpful.

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2 MR. IRWIN: Your Honor, if I may move to 9 and 10,
3 ongoing studies. We have served discovery on the Plaintiff's
4 Steering Committee and they also on us with respect to ongoing
5 studies. We have furnished some information with respect to
6 ongoing studies. Their responses will be forthcoming.

7 We still have not worked out this protocol with
8 respect to the production of information involving ongoing
9 studies, it's protocol that was used apparently successfully in
10 Phen-Fen, and I expect that we will have this resolved before
11 the July meeting and I do not anticipate any problems on it.

12 THE COURT: Any input from plaintiffs?

13 MR. WRIGHT: We agree with that, your Honor.

14 THE COURT: Third party subpoena.

15 MR. IRWIN: Yes, your Honor. This is a logistical sort
16 of thing. I listed all of the subpoenas, as the court can see,
17 that were furnished by the Plaintiff's Steering Committee.
18 These are largely advertisers to get advertising information.
19 I am told by Mr. Davis that about 12 of the 43 subpoena returns
20 have come in. One return from Creative Marketing is subject to
21 an objection, and Mr. Davis furnished to Mr. Champion and me
22 this morning a letter from Creative Marketing. I have not had
23 an opportunity to look at it, but that may become an issue.

24 This may be with respect to the -- in a larger
25 way, your Honor, we are working on developing a pretrial order

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2 that would provide for the routine handling of third party
3 subpoenas. Because I think it's foreseeable in the next few
4 months that we might see more subpoenas and more documents, and
5 we want to have a uniform procedure for how these documents
6 could be designated as confidential, if they're eligible for
7 such designation, how they might be redacted if they're
8 eligible for redaction.

9 We're working it out on case by case basis with
10 respect to these 43, but this is providing a vehicle for us to
11 work on a pretrial order that we would submit to your Honor to
12 make this uniform. And it was observed yesterday by Mr. Davis,
13 and I think aptly so, that this might be a good area for the
14 State Liaison Committee to get involved in because the
15 subpoenas are going to find their way to a bunch of different
16 states. And also there is a dynamic between producing these
17 documents simultaneously in state and federal proceedings when
18 they are delivered. So we thought it would be a good idea to
19 consider involving the state committee in some way in that
20 process. We haven't finalized that yet.

21 THE COURT: Let's keep a heads up on that from the
22 state committee standpoint, you ought to interface, this is an
23 opportunity to find out and to get some input from the various
24 states. It may be different in the states as to what you need
25 and how you go about it.

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2 MR. ARSENAULT: In connection with that we understand
3 that Judge Corodemus has ordered that certain public relation,
4 advertising documents be produced a month from June 13th, so we
5 may want to coordinate the production of that data which seems
6 to be similar on the subject matter associated with the 43 or
7 so subpoenas.

8 THE COURT: Okay.

9 MR. BECNEL: Daniel Becnel. We had a problem yesterday
10 in our meeting as to how we were going to Bates number these
11 types of documents, because they're coming in from all over and
12 the defendants are not Bates numbering them and if we do one we
13 might have multiple Bates numbers, so that may be something
14 that the Court might issue an order on all third parties that
15 we'll have either a central Bates numbering system and then
16 everybody is on the same page then if Mr. Arsenault gets
17 something from one particular third party return and they Bates
18 numbered them, it's going to be total confusion.

19 THE COURT: I agree with that. That's the key thing
20 because that's the biggest problem that you have in a document
21 intensive case, just nomenclature, numbering, and it gets out
22 of hand. And now is the time to get a handle on it because if
23 you wait too long and you get stacks and stacks and stacks of
24 material without numbering it it will drive you crazy. What
25 can you do about that?

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2 MR. BECNEL: Judge, what I was thinking we would do is
3 if the defendants and our team got together and hired some
4 temps or an agency that would do the Bates numbering that they
5 would all be brought to a central location, whether it's our
6 depository or not, Bates number them, we get a copy, they get a
7 copy, we all know what we're dealing with and that way we would
8 have a system.

9 But, I mean, it could be done as easily outside by
10 an outside vendor if that's cheaper. We were just thinking
11 maybe a Manpower type person could just sit there and do it
12 under the auspices of Penny Herman who is running our document
13 depository in LaPlace.

14 THE COURT: Whatever the easiest way, you all would
15 know but it seems to me to be worthwhile.

16 MR. IRWIN: We agree, Judge. That's part of the
17 pretrial order that I alluded to earlier to try to capture this
18 problem and treat it in a uniform way.

19 THE COURT: Good. Let's get together on that. Meet
20 with the plaintiffs and see what can be worked out and bring in
21 the liaison counsel, too, on that one. We've already talked
22 about 12. Item 13.

23 MR. IRWIN: Yes, your Honor, I have the motion here.
24 This is to address, I think we discussed this last month, the
25 fact that some of the documents are described as sealed

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2 documents. This order would provide for the disclosure of the
3 title and filing party involved in the sealed document. I have
4 the signed motion. May I hand it to Mr. Beyer?

5 THE COURT: Yes. Tolling agreements, particular in
6 Louisiana we have some difficulty with agreements I'm told.

7 MR. IRWIN: We have looked into whether there are
8 creative ways to, how do I say this as an officer of the court,
9 get around the code of civil code with respect to the
10 provisions that proscribe and render null any agreements. I
11 think the authors of the civil code are a lot brighter than we
12 are, and there's no way to get around them I don't believe.
13 And if I can use a double negative.

14 But we have, we want to both the plaintiffs and
15 the defendants want to explore methods in which we can protect
16 Louisiana plaintiffs who want to avoid the process of
17 litigation and we have asked for an opportunity to possibly
18 speak to the Court about filing Louisiana plaintiff's and
19 placing them on an inactive docket, it would not have to go
20 through the PPF process, we would take them up, if we needed to
21 at some point in time. Obviously that would be an imposition
22 on the Court and the Court's offices to accommodate that, but
23 we think in the big picture of the litigation it would be an
24 efficient answer to this question.

25 THE COURT: Okay. Let's meet on that, we'll try to

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2 work out something that's doable.

3 MR. IRWIN: We appreciate that, your Honor.

4 MR. BECNEL: May it please the Court, Daniel Becnel. I
5 have about a thousand of those that I need to file suit on, and
6 Mr. Herman and I have been talking about that but because of
7 our involvement in Tobacco right now, we would like to get this
8 done as quickly as possible only because we want to get them
9 placed here alternatively if we can't work it out then it's
10 going to drive us all nuts trying to file individual or groups
11 of suits.

12 THE COURT: Let's meet on that sometime next week, give
13 my staff a call and we'll have a conference and we'll talk
14 about logistics, I'll bring in the clerk's office and see how
15 we can set up a special docket type situation.

16 MR. IRWIN: We are very anxious to work with the Court
17 on that. Thank you, Judge, we will be available any time next
18 week.

19 THE COURT: Okay.

20 MR. IRWIN: Your Honor, the Item 15 deals with the
21 status of pending requests for production. I believe that
22 those sentences there are rather self-explanatory. We need to
23 add to that narrative the fact that the plaintiffs have served
24 a second Request for Production of Documents on the defendants
25 and that we will be responding to that, I hope, by the end of

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2 next week.

3 And Mr. Davis and I discussed that yesterday. We
4 believe that with respect to those document requests served on
5 the plaintiffs that we have filed and those supplemental one
6 that they have served on us they have filed that whether or not
7 we were able to work all of this out that this is being handled
8 in due course, and if we need to bring it to your attention we
9 will.

10 THE COURT: Are we on track in both of your views from
11 the standpoint of the discovery aspect of the case and movement
12 of the case?

13 MR. IRWIN: Your Honor, with respect to these requests
14 that we have furnished and served on the plaintiffs we believe
15 we are on track. If there are any discovery issues that we
16 felt needed to be brought to your attention, we would do so.
17 At this point we're satisfied.

18 MR. WRIGHT: I think to that extent, yes. What I was
19 concerned about him going into the order that he's going to
20 propose with regard to the further addition to the Court and
21 we're not in accordance with that.

22 THE COURT: Okay. Anything further, any other item
23 that we need to discuss?

24 MR. IRWIN: Your Honor, I think there were a couple of
25 items on the agenda towards the end, if you look at it, New

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2 Matters.

3 THE COURT: Let me ask you all on that. The Internet
4 Deposition, I sent you some information on what I was thinking
5 about putting on the website. Do either one of you have any
6 problems with that?

7 Last time we talked about the Internet Deposition
8 and I thought it would be helpful if we had a link on the
9 court's website to Internet Deposition. I contacted the
10 Internet Depositions provider and they gave us a demonstration.
11 It was my thinking that if we had a link that someone could
12 click on and get to their web page and go from there it would
13 be helpful to the process.

14 MR. IRWIN: Yes, your Honor. We spoke to about this
15 the other day, and from the defendant's standpoint we have no
16 problems with that particular contractor. Our original concern
17 was we wanted to be assured that people who participated in
18 depositions using that technology were properly in attendance,
19 were legitimately able to participate and that their presence
20 would be known to us, in particular, and we're satisfied that
21 those measures and that security could be and was obtainable.

22 The discussion that we had with Mr. Beyer, I
23 believe this week, was a concern expressed by Mr. Herman's
24 office and my office about whether listing this deposition
25 contractor on your Honor's website would in some way being an

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2 exclusive franchise to this deposition contractor, to this
3 deposition provider. An answer that I don't know the answer to
4 and maybe a question more important for the Court than it is
5 for us. Substantively, our security concerns are satisfied.

6 THE COURT: All right. I'll look it over and make some
7 decision on it.

8 MR. BECNEL: Your Honor, Daniel Becnel. Your Honor,
9 we've been using that technology in the Rezulin depositions
10 around the country, but the big issue is cost because when you,
11 and we are using it with the two camera system and a program
12 called E-Transcript Server. The cost is very, very expensive
13 if you log on.

14 And I think, Richard, how much have we been paying
15 an hour?

16 MR. ARSENAULT: It's \$2 a minute with a maximum of four
17 hours, so if the deposition goes ten hours you still don't have
18 to pay any more then four hours, but it's \$2 a minute with that
19 limit.

20 MR. BECNEL: It's quite expensive and with that
21 E-Transcript server program, that person can be shielded from
22 the defendants, has security built into it so he can't -- let's
23 say a guy in Minnesota, Mr. Zimmerman's office wants to give a
24 note to Mr. Arsenault who is taking the deposition in
25 Philadelphia, he can type it and it will pop on his screen.

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2 However, Mr. Irwin's office couldn't see those notes and vice
3 versa.

4 So I'm sure Mr. Irwin's office knows a little bit
5 about Rezulin and he can see how it's being worked out through
6 the MDL in Philadelphia on Rezulin.

7 THE COURT: Okay. I'll keep an eye on it and see.
8 What I was trying to do is to just make it easier for people
9 who wanted to look at the website and get some information on
10 it.

11 But if it can be helpful to the litigants in this
12 case, I want to make it available. I understand there may be
13 some problems.

14 MR. BECNEL: And, Judge, one last thing. You've got to
15 remember those are uncorrected transcripts.

16 THE COURT: Right.

17 MR. BECNEL: So everybody has to know it because
18 there -- if you have a good reporter it's pretty darn good. If
19 the court reporter, especially when you're dealing with
20 technical issues sometimes, doesn't get the stuff quite right
21 so it's kind of a rough transcript.

22 THE COURT: Well, the link, if it is put on the court's
23 website would simply have a link to Internet Deposition web
24 page, you click on the link and that would throw you into the
25 web page of either that Internet Deposition or several internet

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2 deposition suppliers.

3 Okay. Let's see, cross-claims and answers, new
4 matters.

5 MR. IRWIN: Yes, your Honor. A couple of the instances
6 where removed, recent removed cases have been brought into
7 court involving pharmacies that have been sued, and the removal
8 was based on fraudulent joinder. If some of those cases the
9 pharmacies had filed cross-claims even in state court before
10 the cases were removed.

11 And this is in the nature of a request to your
12 Honor for a classification on the record. I think it's fairly
13 clear, but paragraph 7 of Pretrial Order No. 1 provides for a
14 general extension to answer all complaints. The literal
15 reading of paragraph 7 does not say that there is an extension
16 to answer cross-claims.

17 I would assume that the paragraph 7 extension for
18 answering complaints would implicitly apply to cross-claims,
19 and the purpose of putting this on the agenda was to get your
20 Honor's hopeful approval of that.

21 THE COURT: I think so. The reason we didn't include
22 cross-claims is because there were none at the time.

23 MR. IRWIN: That's correct.

24 THE COURT: But I think the purpose is the same,
25 whether it's cross-claims or other claims.

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MR. IRWIN: Thank you, your Honor.

THE COURT: So to the extent we need some clarification in that, I'll look to you all to clarify it; but I'll put that in the record my intent is that it is to extend to cross-claims, too.

MR. IRWIN: And we believe that would satisfy the record, your Honor.

Your Honor, Item 2 is yet again another, in the nature of a heads up, mindful that your Honor likes heads up. I don't think this is a major issue, but in a couple of the state court cases there have been disagreements as to whether the plaintiffs, consumer plaintiffs, plaintiffs seeking rescission of sale from the purchase of their Propulsid, whether they should be called upon to answer the plaintiff profile forms. We have not had that problem here at the federal MDL. I don't expect we will.

Our position is that if a consumer plaintiff feels that they did not get value for the medication, we are entitled to understand what they used the medication for, we are entitled to understand what the medical condition was, and therefore, we believe, that they should answer the PPF. And they are doing so.

And so I bring that to your Honor's attention only because it has been a problem, I don't think of any significant

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2 magnitude in the state courts and not a problem here. But it
3 was merely to report it to your Honor.

4 THE COURT: I think that from the standpoint of the
5 state liaison, you want to get that message out to your people.
6 Anybody who is going to take advantage of the process, any
7 plaintiff who is going to participate in the discovery or
8 participate in the process has to also follow the rules of the
9 game.

10 And so to the extent that I can do something about
11 it, I will do something about it. I want the plaintiffs to
12 participate to the same extent that the defendants participate,
13 to give information. Each side ought to know what the other
14 side's claims or defenses are, so let's make sure everybody
15 knows that.

16 Uniform certificate of service.

17 MR. IRWIN: Yes, your Honor. Now that we have some new
18 parties coming in, some new defendants, and I might add as an
19 aside that it might be appropriate to invite these defendants
20 to our next meeting, some are here today, and it might be
21 appropriate to discuss whether there is a need for a separate
22 and distinct liaison counsel, but the purpose of Item 3 on new
23 matters is to explore providing for a uniform certificate of
24 service because we do have unique, and we believe, very good
25 electronic service capability now. It's really beginning to

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2 work well.

3 But you need to have a uniform certificate of
4 service that says basically I have furnished a copy of this
5 pleading to liaison counsel in hard copy and electronic form
6 and I have also uploaded a copy for E service to Verilaw. I
7 think understandably some of the new parties who are coming in
8 might not understand that process because this is an unusual
9 process and I think a uniform certificate of service could be
10 helpful.

11 Mr. Davis and I were talking about that and we
12 were in the process of working on one and would propose to shit
13 a joint motion to the Court to address that.

14 THE COURT: That's fine. Let's do it and we'll put
15 that in our form section on the website so that people can pull
16 it down and look at it.

17 MR. IRWIN: And finally, your Honor, the July status
18 conference is the need to explore trying to pick a new date
19 because of scheduling issues.

20 THE COURT: What date do we have for it?

21 MR. IRWIN: July 19, your Honor.

22 THE COURT: Before or after the 19th, what's your
23 input?

24 MR. HILL: After.

25 MR. IRWIN: Your Honor, I would think after the 19th

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2 would help give us a little more time to work on this class
3 certification schedule, too.

4 THE COURT: How about the 26th, the following Thursday?

5 MR. BECNEL: Judge, we have the MDL in Chicago that day
6 and I'm arguing and Russ is going to be there also.

7 THE COURT: Some other day that week, would that work
8 that week?

9 MR. BECNEL: The 25th?

10 MR. DAVIS: Can't do it.

11 THE COURT: I'll try to accommodate you.

12 MR. DAVIS: I don't think Russ is available.

13 MR. IRWIN: Mr. Davis does not think Mr. Herman is
14 available on the 25th. Let's do the 27th then.

15 MR. DAVIS: Your Honor, I've spoken to Russ and Russ
16 has given me these dates that are good for him, July 27, August
17 the 3rd, which is the following week and August the 10th,
18 August the 17th, those were the best days for him.

19 THE COURT: How about August the 3rd, will that work?

20 MR. HILL: That's perfect.

21 MR. IRWIN: Yes.

22 MR. DAVIS: Your Honor, I would presume that you would
23 like the entire Plaintiff Steering Committee and state liaison
24 invited to that?

25 THE COURT: Yes.

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MR. WRIGHT: And we'll have our meeting then also.

THE COURT: I can do that.

MR. IRWIN: Yes.

THE COURT: Then I'll meet with the committee after the meeting here, state and the liaisons for plaintiff and defendant.

MR. IRWIN: Your Honor, would it be appropriate for us to ask to meet with you at the end of the day, Mr. Campion, Mr. Preuss and Mr. Irwin?

THE COURT: Sure.

MR. IRWIN: Okay. Thank you.

THE COURT: Anything else before we go?

MR. FOSTER: Yes, your Honor, I would like to speak to the court for a moment.

THE COURT: Would you make your appearance for the record, please, sir.

MR. FOSTER: My name is Frank Foster, I represent Clinic Drugstore of Golden Meadow in Civil Action 1296, civil action 1296 on the docket of the court.

In that case it's only the significant case, your Honor. No more than two, maybe three of the plaintiffs in the case involve my client, and it's the only suit in which we are involved in all of this litigation. And I would like for clarification from the court just which of these orders and

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2 pretrial meetings that the court wants us to be in? I have no
3 idea at this time, since it's a new suit, whether there's any
4 basis in fact or law for our client to be party, if there is,
5 then of course the court should, I presume remand, if there is,
6 at least the court would have jurisdiction, but if not, then
7 the court should remand.

8 And we're getting ready to seek that information
9 now, but I don't think under those circumstances that we would
10 be obliged to furnish everybody who has no interest whatsoever
11 in this particular matter that we've been discussing here today
12 and have been ongoing apparently for a good while.

13 THE COURT: It has and it looks like it may well be.
14 Let me hear from the parties on that. Mr. Champion.

15 MR. CAMPION: Your Honor, it doesn't appear to the
16 defendant Janssen and Johnson & Johnson that these pharmacies
17 have any place in this litigation. Now, how that is done
18 formally or informally seems beside the point.

19 This battle is between the plaintiff and the drug
20 company, that's what it should be. And I think some
21 arrangement should be entered into that the ladies and
22 gentlemen who have been called upon to represent these
23 pharmacies are allowed to step down. I would suggest that we
24 be given until August 3rd to see if we can come to some
25 accomodation, and failing that then the matter would have to

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2 come before you in some motion form.

3 MR. FOSTER: With this court's permission then, we
4 will do nothing forward discovery until after the meeting of
5 August the 3rd.

6 THE COURT: That's fine.

7 MR. FOSTER: Thank you very much.

8 THE COURT: From the plaintiff's standpoint, you should
9 confer with the defendant to see if it can be worked out. If
10 it can't, bring it to me so I can work it out.

11 MR. WRIGHT: Your Honor, we have asked as Y and J to
12 provide us with the indemnity agreements, these are the
13 pharmacy agreements, and I think that should be forthcoming,
14 right?

15 MR. CAMPION: They have made a request for such
16 indemnity agreements. We have only given a couple. We are
17 collecting them.

18 We have some differences of opinion, particularly
19 the state of Texas, as to what some of these things should be
20 so it's a matter in progress. But as to those which we have
21 been given indemnity agreements we will provide them to the
22 other side.

23 THE COURT: This may well be moot, so we'll deal with
24 it, if I need to deal with it I will, but you all meet before
25 the next meeting and see if you can resolve it.

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2 MR. BECNEL: These issues were covered pretty much in
3 Phen-Fen, and, in fact, I was involved in a lot of motion
4 practice dealing with it. In some they were separate, some
5 cases they were kept in, some cases there were indemnity
6 agreements. If you consider all opinions all over the board on
7 that very issue.

8 THE COURT: All right. Anything from the liaison, any
9 problems you all are having, any difficulties, any suggestions
10 that you have.

11 MR. ARSENAULT: There are no real problems. We have
12 been trying to monitor the depositions all over the country,
13 and the one problem is that some of the depositions have just
14 not been hitting our radar screen.

15 The defendants have represented to us yesterday
16 and today that they're going to take steps to make sure we're
17 notified of all depositions. For example, Dr. Spielberg's we
18 learned during the deposition that they had just been deposed
19 10 or 15 days before and an expert Morganworth was deposed this
20 Monday that we were unaware of that we would have liked to have
21 notice of.

22 We are meeting weekly with New Jersey counsel. We
23 do not bring that Morganworth deposition to our attention. We
24 learned about it after the fact. But the defendants assured
25 that they were, and I don't think it's through any fault of

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2 theirs, for all of us to try to get a better idea of what
3 depositions are taking place.

4 THE COURT: Don't we have all of that on the calendar
5 in Verilaw? I thought that was a part of the calendar.

6 MR. IRWIN: Judge, the only thing that we put on the
7 calendar are depositions noticed in the MDL.

8 THE COURT: I see. Why not put on the calendar
9 depositions?

10 MR. IRWIN: That might be a good way.

11 THE COURT: If we put every deposition that's scheduled
12 on the calendar then all you have to do is pull it up and look
13 at it.

14 MR. WRIGHT: That would be wonderful.

15 THE COURT: Is there any adverse feeling about that?

16 MR. IRWIN: I'm not sure, Judge. I think that we
17 obviously have agreed that we're going to give them this
18 information. I don't know offhand, I can't think of a problem
19 but I would like to look into it.

20 THE COURT: It's easier and you put an S by it meaning
21 state court or some such designation so that you know that it's
22 a state court proceeding, but at least everybody would have it.
23 It would be easier from your standpoint rather than describing
24 who you give it to or who you don't give it to.

25 MR. IRWIN: That sounds right to us, Judge. We'll have

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2 to look into it.

3 THE COURT: Talk about it and see if we can handle it.

4 MR. ARSENAULT: Yes, your Honor.

5 THE COURT: If not, get me involved and I'll handle it.

6 MR. IRWIN: I don't think we want to get you involved
7 in this.

8 THE COURT: Okay. Anything else, any other problems
9 that we can deal it? Okay. Folks see you next trip. The
10 court will stand in recess.

11 THE DEPUTY CLERK: All rise.

12 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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16 REPORTER'S CERTIFICATE

17
18 I, Karen A. Ibos, CCR, Official Court Reporter, United
19 States District Court, Eastern District of Louisiana, do hereby
20 certify that the foregoing is a true and correct transcript, to
21 the best of my ability and understanding, from the record of
22 the proceedings in the above-entitled and numbered matter.
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ROUGH DRAFT

Karen A. Ibos, CCR, RPR

Official Court Reporter

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