

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

IN RE: : MDL 1355 "S"
:
PROPULSID PRODUCT LIABILITY : New Orleans, Louisiana
LITIGATION : Friday, August 3, 2001
: 9:00 a.m.

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

APPEARANCES:

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Also Present:

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APPEARANCES: (Continued)

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Mike Papantonio
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Also Present:

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P R O C E E D I N G S

MORNING SESSION

(Friday, August 3, 2001)

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

MR. IRWIN: Good morning, Your Honor. James B. Irwin for the defense.

THE COURT: Is Mr. Herman here for the plaintiffs?

MR. DAVIS: Your Honor, I believe Mr. Herman stepped outside. He'll be here in just a second.

THE COURT: Okay, we're here today for our monthly meeting. I received a joint report from plaintiffs and defendants, liaison counsel. I will hear from them at this time.

MR. HERMAN: May it please the Court, good morning, Your Honor, Russ Herman for plaintiffs and Propulsid 1355.

Your Honor, with regard to item number 1, the master complaint, our next meeting with the Court is now scheduled for September 28th, and at that time, or by that time the master complaint will be filed.

We have advised the Court that there are additional class actions which have either been filed last week or will be filed the coming week. That should bring the total of

1 class actions filed in federal court, where they have been
2 MDL'd or not to 26. The class actions consist of economic
3 loss, medical monitoring, recoupment in one form or another
4 in personal injury. The master complaint will combine both
5 individual personal injury claims with whatever has been
6 asserted in the class action.

7 THE COURT: How about the answers to the
8 complaint; how do you propose to deal with that, and when do
9 you propose to do that?

10 MR. IRWIN: Mr. Irwin?

11 Your Honor, the schedule we had submitted to Your
12 Honor in connection with the motions for the entry of a
13 scheduling order for a class certification suggested, I
14 think, three weeks, and they have already furnished us with a
15 draft of the master complaint, and assuming that the final
16 version of the master complaint does not vary substantially
17 from the draft, then that time frame will be sufficient for
18 us.

19 THE COURT: Okay, let's get ready for it so that
20 you can be prepared to answer it. If you can do it in less
21 than three weeks, that will speed the process along.

22 MR. HERMAN: And we will, in advance of filing,
23 furnish the defense counsel with a final draft so they can
24 get started on it and begin communicating in order to make
25 sure that due process is complied with.

1 The individual firms who have filed class action
2 complaints, indicating to them that whatever they have
3 claimed in their own cases, have been incorporated by
4 reference in the master complaint.

5 There is a question of the timing of class
6 certification which is scheduled later on in this hearing,
7 and with Your Honor's permission, I'll just go to the update
8 on rolling production. At this juncture, the defendants have
9 produced approximately 3.4 million pages of documents. We
10 have yet to begin to receive the foreign discovery. However,
11 we are advised that there are five data bases of electronic
12 discovery. The defendants are reserving their rights in
13 terms of cost allocation in the event that we can't work them
14 out, and the first electronic production we understand is
15 available now.

16 And I will turn this issue over to Mr. Irwin for
17 comment.

18 THE COURT: Does anybody have any idea as to how
19 many CD-ROMS we're dealing with at this point?

20 MR. IRWIN: Yes, Your Honor. I think it is 340
21 that we have produced already. Is that correct?

22 MR. BECNEL: 324.

23 MR. IRWIN: 324. I was surprised to see the
24 number yesterday, Judge. It's in excess of 300 CD-ROMS.

25 THE COURT: That's a lot better than three million

1 pages.

2 MR. IRWIN: It's still a lot of CDs.

3 THE COURT: It is.

4 MR. IRWIN: Mr. Herman is correct, Your Honor,
5 with respect to the documents that have been produced so far.
6 And the CMF data base, which is the Call Center data base
7 referred in the joint report, is ready to be produced, and we
8 are going to produce it probably next week.

9 We have submitted to the plaintiffs' steering
10 committee a cost bill for the production of that particular
11 data base. I think we have reported that to the Court.

12 We are going to try to work out an arrangement for
13 the sharing of that cost. If we cannot work out an
14 arrangement with respect to the sharing of that cost in light
15 of some of the current jurisprudence on the subject of cost
16 sharing and cost shifting with respect to electronic
17 production -- and I'm reminded of the letter that you very
18 courteously afforded to Mr. Herman and to me on January 19th
19 of 2001 of this year, and one of the law review articles
20 attached was the Washington and Lee law review article
21 regarding allocating discovery costs in the computer age,
22 deciding who should bear the cost of discovery of
23 electronically stored data. If we're not able to reach an
24 agreement to our mutual satisfaction with respect to the
25 sharing of that expense, then we would submit it to Your

1 Honor or to Magistrate Africk for the determination. We do
2 not want to delay the delivery of the data bases, and, thus,
3 with the understanding that that issue is reserved to be
4 resolved by Your Honor or Magistrate Africk, then we would
5 propose to deliver four more data bases -- and they are
6 described in the report -- by Labor Day.

7 THE COURT: That's my view of it. I would like
8 you to not stop collecting the material. Collect the
9 material. If we're dealing with costs, that's a resolvable
10 matter. One way or the other, if you all can't agree on it,
11 I'll resolve it, but that's able to be resolved. Let's not
12 stop everything from going forward because of a concern about
13 costs. So, I will handle the costs if you all can't handle
14 the costs and agree about costs among yourselves.

15 But, in any event, let's not just stop everything
16 until the cost is resolved. It will be resolved one way or
17 the other. Either you all do it or I will do it. That will
18 be resolved. So, let's go forward with collecting the data.

19 Nobody's interests are going to be thwarted or hurt
20 by your doing it. That doesn't mean that you're assuming the
21 costs by the plaintiffs receiving it. That doesn't mean the
22 plaintiffs are agreeing not to bear the costs. So, let's
23 move forward with it.

24 MR. IRWIN: That was our concern, and, Judge, we
25 appreciate your comments in that regard.

1 The other issue involving electronic production had
2 to do with an onsite inspection of the computer data base to
3 facilitate the ability to understand it.

4 And in connection with some of the meet and confer
5 sessions that have occurred between informed counsel on the
6 subject, which does not include me, it was decided that sort
7 of educational training session would be necessary or helpful
8 to understand how they manipulate the data, and a request was
9 made to perform that inspection onsite.

10 We would prefer not to have an inspection performed
11 onsite on our company premises for obvious reasons, so,
12 therefore, we are making arrangements or attempting to make
13 arrangements that the inspection be performed offsite. It
14 will probably be somewhere nearby in New Jersey. We have
15 discussed that with liaison counsel and understand that that
16 will be a satisfactory solution to our objection in that
17 regard.

18 THE COURT: Okay. The bottom line is the
19 production of the documents; the bottom line is the material
20 and not where they are produced. If plaintiffs receive
21 material and are validly concerned about their accuracy or
22 something of that sort, I will hear those issues and will
23 deal with it.

24 MR. HERMAN: Your Honor, I'm prepared to, but I
25 won't burden the Court with arguing why the plaintiffs don't

1 believe they should bear this cost. We'll defer that to
2 another time.

3 There is an aspect of it. I'm just alerting the
4 Court as Your Honor has directed. When I first started
5 practicing, they had me collecting for Universal Furniture
6 Company, and I nearly went broke because people would come in
7 and I would start writing checks out of my own pocket. I'm
8 not going to have a lot of success collecting from Texas or
9 New Jersey. A portion of these costs, if someone or Your
10 Honor or Magistrate should order us to pay costs, which we
11 deny or do, I certainly don't want to be the collection agent
12 for the costs vis-a-vis of the litigation.

13 The next issue is electronic service with Verilaw.
14 Verilaw is upgrading right now, and the security measures
15 that were requested are in progress.

16 MR. IRWIN: Your Honor, I think I can provide the
17 Court with a little particularization on that.

18 Right now on Verilaw, there are 160, approximately,
19 registered users. A letter will be sent to those 160 users
20 next week informing that if they want to have the technical
21 ability to see and download documents that are filed under
22 seal, they will have to purchase a \$30 certificate that will
23 be then programmed into their computer. This will be up and
24 running, predicted to be up and running by August 24th.

25 MR. HERMAN: Your Honor, with regard to state

1 liaison counsel, I understand that it's the Court's intention
2 immediately following this hearing to meet with state liaison
3 counsel on behalf of plaintiffs' legal committee. We don't
4 see any necessity for us to attend that conference unless
5 Your Honor feels in some way that it may be helpful, but we
6 will be available in the event that some issue comes up that
7 you would like to discuss with us.

8 THE COURT: I think it would be helpful if the
9 plaintiff liaison counsel were there to at least be kept
10 advised of any concerns expressed by state counsel.

11 I understand that Mr. David Jacoby is with us
12 today?

13 MR. CAMPION: That's correct, Your Honor. It is
14 my privilege to introduce Mr. Jacoby to you. He and I have
15 begun a dialogue on some of the matters that were raised on
16 the last issue. It's a work in progress. It is not
17 complete, and I hope that we will have something positive to
18 report at the next meeting.

19 THE COURT: Mr. Jacoby, I welcome you to this
20 litigation. I look forward to working with you. The state
21 liaison counsel will play an important part in resolving this
22 matter, and I hope you will actively participate and will
23 assist in every way that you can.

24 MR. JACOBY: I certainly will, Your Honor. Thank
25 you.

1 THE COURT: Thank you.

2 MR. HERMAN: On behalf of the plaintiffs
3 welcome your participation, and should you need an
4 motion, I'll be happy to sponsor you.

5 MR. JACOBY: Thank you.

6 MR. HERMAN: The subpoena to the FDA is
7 schedule, Your Honor. In the event that the FDA is
8 unable to meet the schedule they have advised us of
9 immediately call that to the attention of defense of
10 the Court.

11 THE COURT: I have been contacted by the
12 received their assurance that they're going to do as
13 possible to get the material to you with dispatch.
14 me advised if any problems occur.

15 MR. HERMAN: We are receiving six to two
16 transfer orders a day. We are revising the counsel
17 we are able to track additional counsel whose cases
18 transferred into the MDL, and we're available, we are
19 e-mail addresses and we're in the process of compiling
20 counsels' list as I speak.

21 MR. IRWIN: Your Honor, I believe we speak
22 number five, Patient Profile Forms.

23 Your Honor, as to the current status of the
24 Profile Forms, as reported in item 5 of the joint report
25 had received 421 Patient Profile Forms. 68 are current

1 overdue and 49 will become due in the next 30 days. As we
2 have reported to the Court in the past, as these became
3 overdue, we anticipated that there might be a development
4 requiring that we file motions, and we have done that, and
5 with the Court's permission, I would like to take those
6 motions up at this moment.

7 Your Honor, I think that we have made a record with
8 respect to the processing of the Patient Profile Forms in
9 this case. The general background is clearly a matter of
10 record, and is contained in our motions.

11 I'll just summarize it very briefly here. Our
12 procedure has been to send letters once a week to the
13 plaintiffs' liaison counsel reporting to the plaintiffs'
14 liaison counsel the cases in which there were Patient Profile
15 Forms overdue. Plaintiffs' liaison counsel has in the past
16 reported to this Court that each week they would, in turn,
17 direct those notices to the respective plaintiff counsel.

18 We would then follow up, once the PPF's became 30
19 days overdue. We would write directly to those individual
20 plaintiff attorneys saying directly to them "Your Patient
21 Profile Forms is overdue. If it is not received by such and
22 such a date, we will seek the appropriate relief from the
23 Court."

24 In many instances the profile forms were returned
25 and the matter was resolved. In several it has not. In the

1 past we have reported these developments to Your Honor. On
2 May 17th of this year, Your Honor said "I don't want to willy
3 nilly dismiss cases, but I think it is appropriate to dismiss
4 a case in which nothing is forthcoming after diligent
5 request. If people don't cooperate, I'm ready to dismiss
6 their case."

7 When the matter was discussed again on June 21,
8 Your Honor said "They should know, and the committee should
9 tell them that I'm going to dismiss the case if no response
10 is forthcoming."

11 We have cited to Your Honor, I believe, the law
12 that's relevant to this. Obviously it is important that a
13 moving party make a substantial record to support a dismissal
14 for discovery violations under Rule 37.

15 The district courts and the courts of appeal look
16 very careful at those dismissals, as they should, and we
17 believe we have provided the Court with more than an ample
18 record. The National Hockey Case, a Supreme Court case that
19 we cited, said that sanction of dismissal in cases is "not
20 merely to penalize those whose conduct might be deemed to
21 warrant such sanction."

22 And I think the next comment is important here,
23 Judge, because of the large case that we're faced with
24 managing here. And the Court goes on to say "But to deter
25 those who might be tempted to such conduct in the absence of

1 such a deterrent, we are all here working laboriously to
2 process this case."

3 So, not only does this dismissal, not only is it
4 supported by the failure to be responsive to repeated and
5 reasonable requests, it is also supported as a deterrent to
6 promote the continued processing of this case.

7 THE COURT: Is there anybody here who has any
8 opposition to this dismissal; anybody speak in opposition to
9 it?

10 MR. BECNEL: Your Honor, this is a referral case
11 that we have from an attorney. We have sent private
12 investigators. We have sent to our referral lawyer probably
13 15 letters. We have made numerous telephone calls. We have
14 sent certified letters, and I can't get any response.

15 THE COURT: I'll construe the comment to be a
16 response in opposition to the dismissal. I have heard the
17 opposition. I understand the motion.

18 Anything further?

19 MR. HERMAN: Your Honor, I would like to make a
20 brief comment in opposition to dismissal for the record, and
21 a very short procedural argument.

22 It is true that we have been advised timely by
23 defense counsel. It's true that we have attempted to comport
24 with our responsibility in following up these issues.
25 Nevertheless, it seems to me that none of these claims should

1 be dismissed with prejudice. People move, and they move very
2 frequently in this country, and it's sometimes very difficult
3 to locate them. It doesn't mean the Court's docket should be
4 burdened, but at the same time I do not believe this warrants
5 dismissal with prejudice.

6 Secondly, Your Honor, there have been procedural
7 objections in the past to having dismissals without a formal
8 rule to show cause. I raise that as comment rather than as
9 argument. My main concern is that the dismissals not be with
10 prejudice, and I don't think that dismissals with prejudice
11 are warranted.

12 THE COURT: Let me hear from the defendant.

13 MR. IRWIN: Your Honor, I would very much ask the
14 Court to dismiss these cases with prejudice, and I would like
15 to continue for a few more minutes with respect to the record
16 on that subject, if I may.

17 THE COURT: All right.

18 MR. IRWIN: Responding to Mr. Becnel's comments
19 concerning Mable Charles, which is case number 00-282, I
20 would only add in response to his comments that we wrote 12
21 letters to the plaintiffs' legal committee beginning on March
22 30th and going through July 13th, and we wrote five letters
23 to Mr. Becnel and his office beginning on May 7th and going
24 to July 13th. That's 17 letters to which we received no
25 response.

1 With respect to the Lucius Hinkle motion --

2 MR. HERMAN: Excuse me.

3 MR. IRWIN: Yes.

4 MR. HERMAN: May it please the Court, I consider a
5 dismissal one of the most serious issues that a Court can
6 entertain. There is no concern here that the plaintiffs'
7 legal committee or Mr. Becnel hasn't attempted to reach this
8 client. My concern is with the consumer out there who may
9 have moved or may have suffered a death in the family or some
10 untoward event. This is not a situation where someone
11 refuses to comply, it's a situation where efforts have been
12 made to contact and find the plaintiff and they haven't been
13 successful.

14 I just feel that in accord with the duties I have
15 as liaison counsel to extend, not only to lawyers that have
16 brought cases in the MDL, but to the clients directly to
17 oppose a dismissal with prejudice in this case and in similar
18 cases.

19 THE COURT: I understand the issues. I have them
20 before me. I feel that we do have to move on with this case.
21 I'm satisfied that all efforts of all counsel have been
22 extensive; they have tried to contact the litigants; the
23 litigants have not responded. I understand that people may
24 move. I understand that people may be sick or people may
25 have individuals who are sick, but they have a responsibility

1 if that occurs to alert someone, to alert some counsel. 17
2 letters, 12 letters, 5 letters to someone else, everybody
3 trying to reach individuals, we're spending too much time
4 with plaintiffs who don't want to proceed with their case.
5 It's not fair to the plaintiffs who are interested in
6 proceeding with their case. We have to get on with matters
7 at hand.

8 I'm going to dismiss the cases with prejudice.
9 Give me a list of those individuals who have not responded to
10 the numerous requests and I will enter a judgment dismissing
11 their claims with prejudice.

12 MR. IRWIN: Your Honor, I would like to add one
13 other thing with respect to Lucius Hinkle case. I think I
14 had reported this to the Court earlier, but we are
15 withdrawing the motion with respect to Lucius Hinkle. I'm
16 adding to the record Exhibit QQ, which is a letter dated July
17 31, 2001 to Mr. Todd Cocker (phonetically), counsel for
18 Lucius Hinkle. He explained that Mr. Hinkle was admitted to
19 the hospital for congestive heart failure on June 22, 2001,
20 that he was readmitted again on July 18, 2001. Having
21 received that letter and those communications, we have
22 withdrawn the motion. I would only state for the record that
23 this information could have and should have been presented to
24 us before we were required to file motion. Nonetheless, we
25 are withdrawing it.

1 THE COURT: Lucius Hinkle's motion has been
2 withdrawn. Charlar Brewer has been withdrawn, and Angelique
3 Mallery has been withdrawn.

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

5 THE COURT: With those exceptions, all the ones
6 that you have listed in item number five, the Plaintiff
7 Profile Form and Authorization are still delinquent?

8 MR. IRWIN: Yes, Your Honor. Mable Charles,
9 number 0282, and the 15 Lorio plaintiffs, and that's 01-0315,
10 we will submit a proposed judgment identifying each one of
11 those plaintiffs with respect to the proper eastern docket
12 number.

13 THE COURT: All right, let's go on to number 8 on
14 the report, Ongoing Studies.

15 MR. HERMAN: Your Honor, I have one question
16 concerning the dismissals. What is the Court's position on
17 how the judgement on motions to dismiss with prejudice will
18 be served?

19 THE COURT: Let me hear any suggestion from either
20 one of you. We will post it on the website first and we will
21 also serve it on the attorneys who presented the case
22 initially.

23 MR. IRWIN: We will have no information on these
24 plaintiffs, Your Honor. We have no address, so, the only
25 thing we could do would be able to post it on the website.

1 THE COURT: Well, that also raises an issue of
2 whether or not it is a final judgment. I may have to issue a
3 54(b) judgment.

4 MR. IRWIN: Your Honor, frankly, it's not
5 something that we had discussed or I had thought about yet.
6 I think we'll have to think it over and maybe get back to
7 Your Honor.

8 THE COURT: I'll hear from both of you at another
9 time on the proper form of dismissal.

10 Next, Subpoenas/Ongoing Studies.

11 MR. IRWIN: Your Honor, may I report one other
12 thing about PPF's that are in the joint report?

13 THE COURT: Yes.

14 MR. IRWIN: I wanted to bring this to the Court's
15 attention. We had discussed it with liaison counsel. We are
16 seeing a pattern of deficiencies in some of the reports, and
17 we're going to try to resolve this. I wanted to report to
18 the Court that, for example, one of the patterns that we are
19 seeing is that instead of answering a question about your
20 health condition or how do you feel or how were you, we're
21 being told to see the medical records. I think that's a
22 question of judgment, and in some cases that's probably a
23 fair answer, but we're finding in some responses that it's
24 not a fair answer.

25 THE COURT: Well, you'll have to figure out a way

1 of allowing the plaintiff to answer the question without
2 being concerned that he or she will be prejudiced if
3 something turns up later and is connected to the drug. There
4 hedging their answers by incorporating or adopting the
5 doctors' reports. You've got to deal with that problem. It
6 is always a problem at the early stages of litigation and it
7 just has to be dealt with. This is the way plaintiffs
8 respond so that they are not prejudiced later on. On the
9 other hand, you need some reasonable expression from the
10 plaintiffs as to the nature and extent of their claims.
11 You've got to understand their problem, and they have to
12 understand your need. If this cannot be achieved after
13 conference between counsel let me know at a later date and I
14 will resolve this issue.

15 MR. IRWIN: And we merely wanted to bring it to
16 your attention. We intend to work with plaintiffs' liaison
17 counsel who have offered their services and helping to
18 resolve this.

19 THE COURT: The objective is to obtain something
20 that can provide you with essential information and allow
21 them to amend their answer if it becomes necessary in light
22 of added knowledge or change in circumstance. Try to deal
23 with it. If it cannot be worked out among yourselves, I
24 understand the problem and I'll resolve it.

25 MR. IRWIN: Thank you, Your Honor.

1 MR. HERMAN: With reference to number 8, BevGlen
2 Medical System has been served with a subpoena regarding an
3 ongoing study, and we're negotiating a proposed order for the
4 Court, and have been in those negotiations for about the last
5 ten days, and I think we will reach some resolution on that.

6 There is, however, a continuing issue of the
7 production and the extent of production on an ongoing study
8 which we also have to resolve. That is the general issue.

9 In addition to that, we were served, the
10 plaintiffs' legal committee was served with interrogatories
11 as to whether there were ongoing studies on the plaintiffs'
12 side. We answered that. We don't know of any. We're not
13 participating in any at the present time.

14 And then we were requested to answer every lawyer
15 who has a case that may have been transferred here, which we
16 object. We don't think that's our role, our job, to conduct
17 a survey every time an issue comes up. We have answered that
18 honestly. We understand we have a continuing duty under the
19 federal rules, and in the event an ongoing study is conducted
20 that we either learn about or we participate in in some way
21 that we have to timely and reasonably supplement our answers.

22 So, those are the various controversies I'm aware
23 of regarding ongoing studies.

24 MR. IRWIN: Your Honor, with respect to the
25 subpoena that was issued to BevGlen Medical Systems, there

1 was a conference call on August 1 with Mr. Davis, myself and
2 counsel for BevGlen with respect to making a return on a
3 subpoena. There will be another conference call on August
4 16th following up on that conference call.

5 In the meantime, a number of the documents that
6 were subject to the subpoena have already been produced by
7 the defendants, and yesterday or the day before yesterday I
8 forwarded to Mr. Davis a 15-page list of exhibits that
9 already had been produced. So, they have a good deal of the
10 information.

11 So, I agree with Mr. Herman, that that is under
12 discussion. I expect it will be resolved.

13 With respect to the ongoing study issue, I think we
14 have reported to the Court before that we have circulated
15 between each of us a proposed pre-trial order that would
16 provide for how the production of ongoing studies is handled.
17 This was an order that was confected in Fen-Phen, and it
18 attempts to address the scientific concerns of preserving the
19 integrity of scientific data before the study is completed.
20 And it may well be, although I'm not sure, that the subpoena
21 to BevGlen addresses that sensitive question, which we will
22 either have to work out among ourselves or deliver to the
23 Court for resolution.

24 With respect to the interrogatories or the request
25 for production that Mr. Herman referred to that was served on

1 the plaintiffs' legal committee, we did get their responses.
2 He informed us that the plaintiffs' steering committee,
3 rather, was not in a position to answer for all of the other
4 plaintiff counsel, therefore, we are scheduling a Rule 37.1
5 conference call to see if we can resolve that, and we will
6 report to the Court about that in due course.

7 THE COURT: All right.

8 MR. HERMAN: A number of third party subpoenas
9 have been issued, and those subpoenas are being negotiated
10 with counsel for the various entities from whom documents
11 have been subpoenaed. The subpoenas were not served in a
12 formal sense as required by the federal rules in some
13 instances, but nevertheless, counsel for various entities
14 have indicated -- we have indicated that we will -- this
15 is to get the ball rolling. If you want us to serve them
16 formally, we will, but we expect most of those to be
17 resolved.

18 THE COURT: I think that's the best way of doing
19 it. Let's see the ones that you can solve. If not, then we
20 will go forward with it.

21 Let's skip the next item: the Scheduling Order.
22 We'll save that for last, and we will go to the Tolling
23 Agreement.

24 MR. HERMAN: First of all, I would like to say to
25 the Court and on the record that the Clerk of Court, Loretta

1 White, and Mr. Denny Descant (phonetically) have been
2 absolutely terrific in the way they have handled this issue,
3 as they handle all issues, but they have been particularly
4 cooperative. They have gone far beyond just what their
5 office requires, as they usually do and as I have known them
6 to do. They facilitate lawyers rather than impeding them.

7 The defendants have waived no rights insofar as the
8 master complaint filed to interrupt the Louisiana
9 prescriptive issue which we brought before the Court. An
10 amended complaint adding new names has been filed.
11 Defendants have advised that they would like the John Doe
12 appellations redacted. We have agreed to do that. We have
13 indicated that current Louisiana law gives no efficacy
14 whatsoever to a John Doe nomenclature in a lawsuit, but since
15 it is of concern to the defendants, we will eliminate and
16 redact all John Doe references.

17 These matters are governed by pre-trial order
18 number 9.

19 THE COURT: Fine. First, I do appreciate you
20 mentioning the Clerk's office. We have a great Clerk's
21 office, and they do an excellent job. Those sorts of things
22 start from the top, and you have got the two people at the
23 top who are responsible for setting the tone. They do a
24 great job, and I appreciate your mentioning that.

25 With regard to John Doe's, as you know, the Fifth

1 Circuit as well as the district courts have addressed this.
2 It is something that you used to see in the "old days" in
3 malpractice suits in this community. It is not unusual for
4 lawyers to file against Dr. John Doe or lawyer John Doe, or
5 whoever, and later amend to insert the actual name. It was
6 originally of restricted use, but it was expanded later on to
7 name people who were not known at the time suit was filed in
8 an attempt to interrupt prescriptions. The courts have
9 spoken on that. It is not, cannot be used to interrupt
10 prescription. The Taylor versus City of Winfield case,
11 Western District of Louisiana, 191 F.3rd 511 thoroughly
12 discusses the whole concept, and, of course, the Fifth
13 Circuit has spoken on it in Jacobson versus Osborne, which is
14 one of the seminal cases on this issue.

15 So, let's remove the John Doe's. It has no value
16 whatsoever. So, I'll assume that they will be removed.

17 Let's move on to the next one.

18 MR. HERMAN: The Narcissipride (phonetically)
19 production issue we had discussed this morning again before
20 we came to court. The defense is going to provide us with an
21 agreement that they entered into before the request was made.
22 And then we will again meet and confer in an attempt to
23 resolve this issue before bringing it to the Court.

24 We also make reference under paragraph 7 to the
25 ongoing study issue which I previously addressed and which

1 Mr. Irwin previously addressed to the Court. In terms of the
2 request for production of documents at number 2, plaintiffs
3 are formulating those responses and they should come forward
4 fairly soon.

5 We met on those yesterday.

6 THE COURT: Is there anything from the defendants
7 on any of those items?

8 MR. IRWIN: We agree with those remarks, Your
9 Honor.

10 THE COURT: All right. Does that leave us with
11 the motion to enter a Scheduling Order?

12 MR. HERMAN: Yes, it does, Your Honor.

13 THE COURT: Okay. Let me hear from the defendants
14 on that issue since it is your motion.

15 MR. IRWIN: Thank you, Judge. We think there are
16 three issues. The first is the Daubert question. The second
17 is fact discovery of the plaintiffs, and third is do we have
18 a fixed hearing date or an unfixed hearing date.

19 I would describe the three issues as interesting,
20 easy and important. I'll take up the first one, Daubert
21 interesting, because I think it is a legal issue that we
22 lawyers and this Court relish dealing with new legal issues,
23 and I think this is one of them. The reason it is a new
24 legal issue is because it is a reflection of modern class
25 action litigation and a recognition by the courts at the

1 discretion of the judge should afford the judge an
2 opportunity to look at scientific questions in the context of
3 class certification.

4 But, in the purest sense as we know, Daubert, the
5 whole Daubert test and all of the criteria are not
6 traditionally featured in class certification.

7 As Judge Gleason said in the Visa/Mastercharge
8 case, which we reported to Your Honor, and, of course, our
9 opponents addressed it as well, he pointed out that
10 traditionally Rule 702 and Daubert deals with the gatekeeping
11 role of the Court on scientific evidence that might assist
12 the trier of fact, and as he pointed out, "The standard for
13 admitting expert scientific testimony in a federal trial."

14 So, clearly, Daubert's legacy is in the context of
15 pre-trial proceedings and whether a trier of fact should hear
16 a Daubert question.

17 But, all the courts have recognized that there may
18 be a role for Daubert in the class certification process when
19 it is appropriate. We are suggesting here that it is
20 appropriate. It makes good common sense. It's a good case
21 management device, and it's part of our obligation to bring
22 production and constructive ideas to the Court, we believe
23 that this case and the processing of this class certification
24 question would be enhanced by featuring a Daubert type
25 vehicle in preparing the class certification hearing.

1 Now, that does not mean that the Court should go
2 through a full blown Daubert analysis. That does not mean
3 that the Court should weigh competing expert testimonies.
4 That does not mean that the Court should determine whose
5 expert has more qualifications or more tickets. I'm not sure
6 it even means going through every single step of the Daubert
7 analysis. I don't think it does, but I do think it means
8 this. I think it means that a court such as this that is
9 facing a challenging class certification motion has within
10 its arsenal the ability to determine whether there is valid
11 expert testimony that is legally admissible -- let me just
12 use the phraseology "legal admissible" -- to support a
13 class certification. I think that's what Judge Gleason
14 described in Master Charge which was a case involving a tying
15 agreement where it was alleged that a debit card was being
16 tied to the credit card and the plaintiffs claimed through
17 their expert that but for the tying agreement, the debit card
18 would have been cheaper. The defendants challenged that
19 testimony saying that it was speculative, saying that the
20 expert can't really say that the debit card would have been
21 cheaper if it hadn't been tied to the credit card because
22 there are too many transactions out there, there are too many
23 circumstances, there are too many retain establishments, and
24 it can't be set as a valid matter of scientific lore or
25 opinion coming from an anti-trust expert.

1 The Court said notwithstanding these distinctions,
2 it will look at this. It will not look at it from the
3 standpoint of going through the entire Daubert analysis, but
4 it will look and see whether this opinion should support a
5 class certification. And I believe this is a fair standard
6 for Your Honor to consider here.

7 THE COURT: But, doesn't that go to the substance
8 of the issue?

9 MR. IRWIN: If it does go to the substance of the
10 issue, then it's gone too far, and it shouldn't go to the
11 substance of the issue. It should not be like the Eisen
12 (phonetically) case where the Judge shifted the cost of
13 notice concluding that the plaintiffs had a 90 percent chance
14 of winning.

15 If Your Honor thinks that there is a 90 percent
16 chance that the defendants are going to prevail on the
17 question of medical monitoring and that there is a 90 percent
18 chance that medical monitoring is not scientifically
19 supported, then this is not the sort of determination on the
20 merits that should be made with respect to class
21 certification.

22 THE COURT: How do you feel if it's clear that it
23 is 100 percent one way or the other?

24 MR. IRWIN: If it's 100 percent one way or the
25 other, I guess I would have to say that that's the

1 opportunity that Your Honor should take advantage of before
2 Your Honor, to borrow a phrase I heard before, "Launches the
3 hounds of Rule 23," which is sort of what Judge Gleason said
4 here, he wasn't going to invoke Rule 23 in a case of
5 approximately 4 million members on the basis of an expert
6 opinion so far that it is inadmissible as a matter of law.

7 So, before you "launch the hounds Rule 23," it's
8 fair for you to look at, in some way, whether there is a
9 scientific basis to support the proposition that someone who
10 has taken Propulsid and is now Propulsid has sustained some
11 lingering disease that will require medical monitoring.

12 THE COURT: Isn't that the whole issue in the
13 case? I mean, we're talking certification as to what's the
14 -- what would I do at the end of the case, then, or at the
15 trial of the case?

16 MR. IRWIN: At the trial of the case --

17 THE COURT: Suppose I found one way or the other
18 and we go to the trial of the case. Didn't I already find
19 it?

20 MR. IRWIN: Yes. If you find that there is no
21 admissible evidence whatsoever to support the proposition
22 that there is a need for medical monitoring, then you have
23 decided that, Judge; I agree that you have decided that.
24 But, we would not suggest this argument to you in order to
25 wave in the wind and waste time. There are no scientific

1 studies out there anywhere that suggests that there is any
2 lingering injury; there is none. It is going to take some
3 creative science to do it.

4 Now, we make it to September, October, November and
5 you may say "No, this is getting too far into the merits;
6 it's beginning to feel too much like Daubert 702 before we go
7 to trial," in which case you can hit the eject button and say
8 we're not going to do this."

9 But, I think, and we respectfully submit that the
10 issue is clear enough in this case that you may want to take
11 the opportunity, the advantage of managing this class action
12 and recognizing that why would be launch a class action on a
13 scientific basis for which there is no legally admissible
14 scientific basis. Why would we do it?

15 And this is why I think the question is
16 interesting. I'm suggesting merely that the Court should
17 avail itself of that opportunity before it invokes this giant
18 proceeding, and it should try to work it into, constructed
19 into this order. It can always deconstruct it later, and
20 we're suggesting you ought to try to construct it into it.

21 Now, it may be appropriate for me to sit down.

22 THE COURT: All right, let me hear from Mr. Herman
23 on that issue.

24 Your opponent draws the distinctions between the
25 substance in the sense that these individuals -- he has

1 mentioned monitoring, so, I'll go forward with that one. He
2 draws a distinction between the finding that these
3 individuals do not need monitoring, and the situation in
4 which no one needs monitoring. He argues that there is no
5 problem. Thus no monitoring is necessary.

6 It's not that there is a problem and these people
7 don't have it. He says there is no problem, therefore, a
8 decision ought to be made initially on this issue; and it's
9 not substance because you're dealing with whether or not
10 there is a problem, not whether or not these individuals have
11 a problem.

12 Do you see any distinction there?

13 MR. HERMAN: I don't understand it. It sounds
14 like substance to me. I don't know whether it's a billy goat
15 with a saddle we're calling a cow or what it is. I know that
16 defendants want to argue Rule 23. They want a master
17 complaint. They want an answer in a Rule 23 mode, but then
18 they want to avoid the U.S. Supreme Court ruling in Eisen
19 that class certification is procedural.

20 Since Lexicon (phonetically), it poses even more
21 substantive problems because presumably the cases are going
22 to go back whether they're certified or not to another court
23 unless the Congress changes something or the court changes.

24 We have a situation with an 800 case study
25 somewhere we just learned about that we haven't read, and in

1 order to do a retrospective study on the issues, we have to
2 get the studies, our experts and do a study, and that is a
3 substantive issue. And I don't accept at face value the
4 defendants' bald statement that there is no need for medical
5 monitoring. Indeed, the law is different. The substantive
6 law is different in Louisiana. There's a medical monitoring
7 class. You have to have a symptom. That's all you have to
8 have.

9 I think there is abundant information that there's
10 a prolonged QT caused by Propulsid with a cardiac insult, at
11 the very least. I think this drug was sold off label to
12 minors when they weren't supposed to be, and they knew it
13 wasn't supposed to be, and we've got infant deaths here.
14 Those are substantive issues. To say that there is no need
15 for monitoring children that were on Propulsid, I don't know.
16 That's a substantive issue, but that's for a judge and jury
17 to determine on the merits. It is not a class cert issue.
18 What the defendants are tempted to do is to file a motion to
19 dismiss under the guise of a Daubert hearing and eliminate
20 all the causes of action before the substance gets to Your
21 Honor.

22 I fully understand the need for a date certain to
23 have a class cert here, but we also have needs, too, and our
24 needs are to get discovery, to hire experts to do the studies
25 that have to be done, and we're not going to be prepared to

1 have Daubert hearings in connection with cert hearings.

2 I know this, that Rule 23 wasn't created as humpty
3 dumpty, that the MDL manual wasn't created as a humpty
4 dumpty, but to turn this on its head is sort of a twiddle-
5 dee, twiddle-dum situation where humpty dumpty is put on a
6 wall, falls off, and we will never put the pieces together.
7 And that's just not fair.

8 I don't think the Supreme Court ruling in Eisen was
9 overruled by the Fifth Circuit in Costano. I don't even
10 think the issues were the same. I was in that case. And I'm
11 still stuck to that tar baby.

12 But, at 34 Fd.3rd 744, it's clear that Eisen is
13 still the law, that class cert is a procedural issue, that we
14 need adequate time to deal with substance, and that we won't
15 get it if we're sort of in graf (phonetically).

16 Lastly, you have an incomplete Daubert hearing
17 where you don't follow the prescription set forth in Daubert.
18 I mean, I just don't understand this.

19 To get up, with all due respect to learned counsel
20 opposite to indicate "Well, we want a Daubert hearing but
21 it's not going to be substantive but is going to determine
22 100 percent of the issue in the case, but we're not going to
23 follow Daubert prescriptions, and Your Honor, it's not
24 necessary for you to really have a Daubert hearing," it just
25 makes no sense to me, and I respectfully say to the Court

1 that Rule 23 class certification is meant to be procedural
2 and not deal with the substantive issue.

3 MR. IRWIN: May I respond very briefly on this
4 interesting question, Your Honor?

5 THE COURT: Sure.

6 MR. IRWIN: They have a legal burden here. In
7 many respects, lawsuits are the allocations of a burdens, and
8 one of the things that they are suggesting to the Court is
9 that the Court should certify a class for medical monitoring.
10 They have to sustain that burden by supporting it with proof,
11 legally sufficient proof to demonstrate to the Court that
12 there is a need for medical monitoring.

13 If they don't support their burden and satisfy the
14 Court that there is a need for medical monitoring if there is
15 a problem, then the Court should not certify a class only
16 later to then address and find out whether there was a need.

17 THE COURT: I have the issue.

18 Let's go to the next issue, or is that the only one
19 that needs resolution? I got the report from you all and it
20 seems that the factual issues there was some agreement on.

21 MR. IRWIN: I think that there are some
22 agreements, yes, Your Honor. I'm not sure I'm answering your
23 question. I'm afraid maybe I'm not.

24 I think the main issues are whether we should be
25 permitted to take plaintiff depositions, and the third issue

1 is it's whether we would have a fixed hearing date or an
2 open-ended hearing date.

3 I think there are some other smaller issues about
4 how many page numbers there should be allocated to each side.
5 I remember that issue, and I wasn't going to argue that issue
6 today.

7 THE COURT: With regard to the Daubert issue, I
8 made some notes. I would like to get my thoughts together on
9 this.

10 Let's take a ten-minute break at this time, and
11 I'll come back and we'll deal with it.

12 MR. HERMAN: Your Honor, may it please the Court?
13 I have just one matter I want to call to the Court's
14 attention.

15 THE COURT: Sure.

16 MR. HERMAN: As Your Honor has directed us before,
17 we think the issue is going to come up. I think there is an
18 issue on plaintiff, the ability or right to take plaintiff
19 depositions in terms of a master complaint. A master
20 complaint is going to designate class representative. I
21 think there's going to be a contest as to whether the deps
22 are going to be limited to the class reps in the master
23 complaint, or the original class reps that were in the 26, 27
24 cases that have been transferred here.

25 THE COURT: Yes. How many are we dealing with?

1 MR. IRWIN: We definitely did want to argue this
2 point if Your Honor would hear us, but so far there are 71
3 class reps in 24 class actions over 11 states. Now, we would
4 not propose to take all 71 plaintiffs, but we would propose
5 to take a representative sample, not plaintiffs who are
6 cherry picked from the 71. I would estimate that a
7 representative sample would approximately be a quarter to a
8 third of the 71 plaintiffs.

9 Obviously, we would want to take a plaintiff from
10 every state for sure. And we would not want to be limited to
11 who we would want to choose to depose. We think it's very
12 important to allow us to have an opportunity to determine
13 which ones of these plaintiffs we want to depose and not have
14 it determined for us.

15 They have all been described in the class action
16 complaints as punitive class action representatives.

17 THE COURT: I would like to also talk about that
18 and see whether or not there is an resolution, any room for
19 negotiation on that. If not, then I will deal with it.

20 We will stand in recess for ten minutes.

21 (Short recess.)

22 MR. IRWIN: Your Honor, may I report something to
23 the Court?

24 THE COURT: Sure.

25 MR. IRWIN: Mr. Herman and I spoke during break

1 with respect to the number of plaintiffs that we think would
2 be a fair number to depose. I have made a proposal to Mr.
3 Herman. He's going to talk with his committee, and if we
4 cannot work it out, we will write a letter to Your Honor in
5 short order and ask Your Honor to decide.

6 THE COURT: Okay. The issue before the Court is a
7 question the role of Daubert in class actions.

8 Class actions, as we know, are an exception to the
9 usual rule that litigation is to be conducted by and on
10 behalf of the litigants involved in the proceedings. The
11 class action device is designed for cases in which factual
12 issues are common to the class as a whole, and which turn on
13 questions of law applicable in the same manner to each member
14 of the class.

15 In federal courts, for a class to be certified, the
16 requirements of Rule 23 of the Federal Rules of Civil
17 Procedure must be met. The rule in general requires
18 numerosity, commonality, typicality, adequacy in
19 representation, predominance on common issues, and
20 superiority of other available means.

21 The party, of course, who brings the class action
22 has the burden of establishing the prerequisites of Rule 23.

23 The cases are clear that the Court can certify
24 classes only if the Court is satisfied after an analysis that
25 the requisites of Rule 23 have, indeed, been met.

1 In the early days of class actions, it was usual
2 or certainly not unusual for the determination of
3 certification to be made solely on the pleadings.

4 Indeed, that was the way, the accepted way of
5 dealing with certification. But, as class actions grew in
6 numbers and complexity and the courts became more experienced
7 in handling them, the procedure changed. Now the typical
8 analytical method of resolving certification is to go beyond
9 the pleadings and convene a contradictory hearing, including
10 presentation of either or both testimony and documents.

11 The defendants proposed that a hearing should take
12 place and that the Court should entertain Daubert issues in
13 connection with the class certification hearing.

14 The plaintiffs object to the introduction of
15 Daubert issues at this stage arguing, in essence, that this
16 will result in a mini trial on the merits, which is
17 inappropriate and premature at this point in the litigation.

18 The latest expression of the Fifth Circuit, to me,
19 seems to favor a hearing on the class certification issue.
20 It seems to recognize that in some instances a class
21 certification can be made solely on the pleadings. But in
22 most instances, something other than the pleadings should be
23 considered.

24 The Fifth Circuit in the Costano case states "Going
25 beyond the pleadings is necessary as a court must understand

1 the claims, defenses, relevant facts and applicable
2 substantive law in order to make a meaningful determination
3 on the certification issues." See 84 F.3d at 744.

4 But, when this is done, that is to say, when a
5 hearing is conducted, the hearing on class certification may
6 not become an inquiry into the merits of the case.

7 The Eisen versus Carlisle case, 417, U.S. 156,
8 makes that clear. In fact, in Miller versus Mackey, the
9 Fifth Circuit held that a district court could not deny
10 certification based on its belief that the plaintiff could
11 not prevail on the merits of the case. See 452 F.2d at 427.

12 Notwithstanding these impediments, courts have held
13 that there is a role for a Daubert hearing at the class
14 certification phase: In Re: Visa Check case, 192 FRD 68..

15 Also, there is an article dealing with this issue
16 at 15, Number 4, Federal Litigator, page 86, April 2000
17 issue. But, although there is a role for a Daubert at the
18 cert stage, it's a very limited role.

19 The issue at the cert stage is not whether the
20 plaintiffs have stated a cause of action or will prevail on
21 the merits of the cause of action, but, rather, whether the
22 requirements of Rule 23 are met: namely whether there is
23 numerosity, commonality, typicality, adequacy in
24 representation, predominance of common issues, superiority
25 over other available methods. Let me turn to these

1 requisites.

2 You shouldn't waste a lot of time on numerosity in
3 this case. That appears to be present.

4 Commonality may be of interest.

5 Typicality may be of interest.

6 Adequacy in representation, don't waste time on
7 that. That's present.

8 The big issues with regard to the role of Daubert
9 at the certification state are: predominance of a common
10 issue and superiority over other available methods.

11 The Visa check case captures it this way. "A court
12 considering a class classification motion must look somewhere
13 between the pleadings and the fruit of discovery. Enough
14 must be laid bare to let the judge survey the factual scene
15 on a kind of sketchy relief map, leaving for later view the
16 myriad of details that cover the terrain." Visa at 79.

17 With regard to the focus on predominance and
18 superiority, it seems to me that the key issue is whether or
19 not the issues of the injury, in fact, proximate cause,
20 reliance, affirmative defenses, compensatory damages are so
21 overwhelmingly replete with individual circumstances that
22 they outweigh predominance or superiority.

23 Further in this regard, particularly with regard to
24 superiority, it seems to me attention or thought should be
25 given by all sides to whether or not there are any problems

1 in presenting the trial on the merits of any class action.
2 Also, whether or not it is feasible to try class actions by
3 state or by region or issue.

4 So, I will allow Daubert issues to be presented at
5 a certification hearing, but in a limited way.

6 I give you these comments in the hope that it will
7 give you some guidance in your future pursuit in this matter.

8 Do we have any other issues at this point?

9 MR. IRWIN: Your Honor, with respect to the motion
10 for the entry of the class certification order, we did have
11 an issue with respect to a fixed hearing date as opposed to
12 a --

13 THE COURT: Yes, I have had an opportunity to meet
14 with counsel for both sides, both liaison counsel earlier
15 today, and it's my feeling which I expressed to them that we
16 ought to have a fixed date, but having said that, I'm not
17 keyed into the February date.

18 I suggest to counsel that they get together on it
19 and see whether a date can be set. If not, then I will set
20 dates either before or after February.

21 But, when I set a certification date, I expect each
22 side to be ready. That means that both sides must cooperate
23 in the discovery process so we can expeditiously complete
24 this aspect of the case.

25 So, while a date certain will be set, I expect that

1 the discovery will be forthcoming in sufficient time to allow
2 for presentation by each side.

3 I want the defendants to have the discovery that
4 they need, and I want the plaintiffs to have the discovery
5 that they need in advance of the hearing date.

6 MR. HERMAN: May it please the Court, on behalf of
7 the plaintiffs' legal committee, I just want to reiterate for
8 the record what we have indicated previously. The defendants
9 tell us that they will not have the overseas discovery
10 available for us until next year. After the depositions were
11 taken in Belgium, we're certain that's where the mother lode
12 of the information is.

13 We still are awaiting electronic discovery. We
14 have just received substantial documents from American
15 discovery. I'm well aware that you don't have to have every
16 document and every scrap of paper and everything reviewed,
17 but the critical documents in the case, we haven't seen yet,
18 and we are willing to sit down and discuss a cert date that's
19 reasonable, but we see way we can meet a February date. I
20 just state that for the record.

21 THE COURT: All right. This is something that I
22 look to you all for input on, at least from the standpoint of
23 the first try. Both of you can pick a better date than I can
24 pick because you know your case, you know your requirements,
25 you know your needs, you know what you're able to do.

1 Counsel ought to be aware that if I set a date, I'm
2 going to expect the essential discovery to be completed
3 before the date. So, both sides pick a date with that idea
4 in mind

5 Mr. Campion, do you have something?

6 MR. CAMPION: Yes. The issue of pharmacies was
7 raised last time. The issue is still under discussion.

8 THE COURT: Okay. What I'm going to do is to
9 instruct you to get together and review the proposed
10 Scheduling Order and select dates. If you cannot agree on
11 reasonable dates, let me know, and then I'll pick the dates
12 and resolve it.

13 Okay, ladies and gentlemen, that will complete our
14 meeting now.

15 I will start meeting with the parties. I do want
16 to meet with the defense counsel, and then I would like to
17 meet with the state liaison counsel, and dependent upon the
18 time, we'll begin meeting with plaintiff's steering committee
19 or I'll resume meeting with the plaintiffs' committee later
20 on today.

21 MR. IRWIN: Excuse me, Your Honor. I was reminded
22 of one housekeeping matter. Each month we deliver to the
23 Court the most current service list, and I have two copies
24 for the Court to deliver, and that is the work product of my
25 office and Mr. Herman's office.

1 And this month's list also has our best effort at
2 delivering the e-mail addresses. I think each month,
3 hopefully, will get better. It's pretty darn accurate now,
4 we think.

5 We also have a list for the state liaison committee
6 which I will give to Mr. Arsenault, and there is the
7 electronic version list also.

8 THE COURT: With regard to the state liaison
9 committee, I'll be meeting with you folks in a short time,
10 but is there anything you want to bring up while everybody is
11 here in open court please do so now, any problems that you're
12 having that everybody ought to know about?

13 MR. ARSENAULT: No, Your Honor.

14 THE COURT: All right, the Court will stand in
15 recess.

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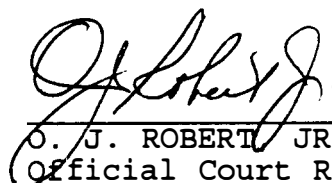
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REPORTER'S CERTIFICATE

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 direction.



O. J. ROBERT JR.
Official Court Reporter
United States District Court
Eastern District of Louisiana