

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS * Docket 00-MDL-1355-L
LIABILITY LITIGATION *
* New Orleans, Louisiana
*
* September 28, 2001
* * * * *

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Herman, Mathis, Casey,
Kitchens & Gerel
BY: RUSS M. HERMAN, ESQ.
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For the Defendants: Irwin, Fritchie, Urquhart
& Moore
BY: JAMES B. IRWIN, ESQ.
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Also Present: RICHARD J. ARSENAULT, ESQ.
DAWN M. BARRIOS, ESQ.
THOMAS F. CAMPION, ESQ.
BARRY HILL, ESQ.

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PROCEEDINGS

(September 28, 2001)

THE DEPUTY CLERK: Everyone rise.

THE COURT: Be seated, please. Good morning, Ladies and Gentlemen. Call the case, please.

THE DEPUTY CLERK: Civil Action 00-MDL-1355, In Re: Propulsid Products Liability Litigation.

THE COURT: Counsel, make your appearances for the record.

MR. HERMAN: Russ Herman with Herman, Mathis, Casey, Kitchens & Gerel, New Orleans, for the Plaintiffs Legal Committee/Plaintiffs Steering Committee.

MR. IRWIN: Jim Irwin for the defendants. May it please the Court. It would be my pleasure this morning to introduce Your Honor to Tom Campion's colleague and partner, Susan Sharko, from New Jersey. I know you have heard us speak about her before.

THE COURT: I have. Welcome, Ms. Sharko. I look forward to working with you. We are here today in our monthly meeting, and I received an agenda and joint report from the parties. I'll hear from you at this point on the first item, the master complaint.

MR. HERMAN: May it please the Court. Good morning, Your Honor. Noted counsel. The master complaint will be filed next week. The master complaint will pay attention to, of

1 course, Your Honor's concerns regarding regional and
2 geographical issues which are similar as among class action
3 complaints. We are advised there are now 45 class actions
4 filed of which 30, approximately, are in federal court, 15 of
5 which are in state court.

6 THE COURT: Anything from the defendant on that?

7 MR. IRWIN: We have nothing to add to that at this
8 point, Your Honor.

9 THE COURT: Statistically, is that consistent with
10 your records?

11 MR. IRWIN: I am not sure, Your Honor. Mr. Herman
12 and I mentioned that this morning, and the number we have just
13 described -- which came from us -- may not be what I remember
14 the number to be. It was my recollection that we were in the
15 neighborhood of 25 federal class actions.

16 THE COURT: Are we anticipating any more? Is this
17 still a moving target from where you sit?

18 MR. HERMAN: Your Honor, the last word that I
19 received from any lawyer wishing to file or indicating they
20 were going to file a class action was from a law firm in
21 Minnesota. Thus far, as far as I know, there was nothing filed
22 by that firm and I'm not aware of any other class actions.
23 There is a class action in Texas for what I call "economic
24 benefit" only. I had understood that a Minnesota firm was
25 looking at that issue in a different way.

1 MS. BARRIOS: Dawn Barrios. My office is keeping
2 track of the class actions for the Plaintiffs Steering
3 Committee and our last official count was 26. Mr. Hill,
4 however, since our last status conference has filed two more in
5 state court and they are on their way here. Those were for
6 Ohio and Oklahoma. Next week, he will file two additional ones
7 which will make their way here for Wyoming and Kentucky, so
8 that should bring us up to 30.

9 THE COURT: What's your reading on the future? Do
10 you anticipate more, or can you tell?

11 MR. IRWIN: I just can't tell, Your Honor. No one
12 else has notified me of any intent other than Mr. Hill.

13 THE COURT: All right. Thanks. Our second item is
14 the document production.

15 MR. HERMAN: Your Honor, we are receiving document
16 production. We have received eight databases. More are on the
17 way. Plaintiffs and defendants are meeting next week in order
18 to reevaluate whether we need all the databases, and it may be
19 that we can reduce the call on the database production. In
20 terms of other production issues, they are covered elsewhere in
21 the document. At this point I only make reference to -- well,
22 I'll wait until we get to them.

23 MR. IRWIN: Your Honor, I could add that yesterday
24 Mr. Preuss' office shipped ten CDs to the Plaintiffs Steering
25 Committee consisting of approximately 130,000 pages of

1 documents, and this is the beginning of the Belgium production.

2 The domestic production is essentially complete.
3 We are still awaiting the production or delivery of some video
4 tapes that will be delivered I believe by October 22, but I
5 wanted the Court to know that the foreign production is now
6 under way in earnest.

7 THE COURT: How do we look from the foreign
8 production? Is that on line?

9 MR. IRWIN: We believe it is on line to be completed
10 within five to six months, Your Honor. We are going to look at
11 this next week to see what we can do with respect to completing
12 it, but that is our best estimate at this point.

13 THE COURT: With regard to the foreign production,
14 let's keep in mind that I'm anxious to look at a class
15 certification, so that the discovery of material relevant to
16 the class certification issues should be prioritized so we can
17 get those handled as quickly as possible rather than put them
18 on the bottom end.

19 MR. IRWIN: Within the production that will be
20 delivered today to Mr. Herman's office is what we judge to be
21 the most important information that they would be seeking from
22 the foreign production. That will be delivered today, I
23 believe. We are preparing the production with those goals in
24 mind, Your Honor, as we did with the domestic production.

25 THE COURT: From the plaintiffs' standpoint, if

1 there's something relating to class certification, let's make
2 that known as quickly as possible so the defendants can deal
3 with that issue because I do want to have a class certification
4 hearing. Let me hear from liaison on the production. Are you
5 getting the material, access to it? Are you satisfied with
6 what you are getting?

7 MR. ARSENAULT: We sure are, Judge.

8 THE COURT: I do think we all have to be mindful of
9 the fact that I'm trying my best to coordinate this matter from
10 the standpoint of the states to make sure the states have
11 access to these documents, but it's essential that we not have
12 duplication, wasted time and effort, either on your part or any
13 of the other parties' part.

14 MR. HERMAN: I do want to indicate that of the eight
15 databases that we are waiting receipt of, we have received
16 three, and we have been assured by the defendants we will get
17 the other five shortly. Then we will be able to make a
18 decision as to how many other databases we need.

19 THE COURT: How do we stand with electronic
20 production pursuant to Pretrial Order No. 10? One aspect of it
21 was the appointment of an individual to assist the Court in
22 handling any problems that might develop with electronic
23 production.

24 MR. HERMAN: We both looked at it. We don't have any
25 agreement yet on the name to submit.

1 MR. IRWIN: Your Honor, we are not at the point yet
2 of filing motions on this. As we continue to work through the
3 production of these electronic databases, of which we have
4 produced three and are very close to producing the fourth, I
5 believe as these discussions continue we may be able to avoid
6 the necessity of selecting or appointing a special master or
7 asking Your Honor to hear it or refer it to Magistrate Africk.

8 We would, I think, try to give the Court as
9 early a heads-up as possible if we felt these discussions were
10 breaking down. In the meantime, as we continue to talk, I
11 think at least at this juncture we are not anticipating filing
12 a motion any time soon that would require a special master or a
13 magistrate.

14 MR. HERMAN: In terms of the foreign production,
15 since that issue has come up now, I would like to just amplify
16 the Plaintiffs Steering Committee's position. Of course, our
17 point of vantage is often different from those of defendants.
18 Once we get the first foreign production, then we intend to
19 bring to the defendants a sequencing request on foreign
20 production so we can be accelerated. It's in the interest of
21 everyone that that be accelerated so we can meet a
22 certification hearing date.

23 At this point, Your Honor, the plaintiffs and
24 defendants have met and are jointly submitting to Your Honor
25 for Your Honor's consideration a March 22, 2002 hearing date.

1 THE COURT: That's fine. That's what I was, frankly,
2 looking at, the Ides of March, but that's fine. That's a good
3 date.

4 MR. HERMAN: If counsel shows me his back, I promise
5 not to stab him.

6 THE COURT: Beware of the Ides of March. Before we
7 leave the special master, let me say this. I don't need
8 anybody to deal with the law aspect of the issue. What I could
9 use a special master for in this area is to help in the
10 technical aspect of the matter. What I have been seeing and
11 reading in the literature is that the big problem that the
12 Court has to figure out is feasibility and harassment.

13 Oftentimes these matters are technical in
14 nature. That's where I need some assistance, to see whether or
15 not it is feasible, whether or not it is technically able to be
16 done and, if so, how. That's where I think the rub is.

17 MR. HERMAN: Part of the problem is that there are
18 very few real experts in this area. Defendants have an expert
19 or experts that are very competent, so do plaintiffs. It may
20 be at some point the plaintiffs would have no objection to
21 Your Honor meeting, without the lawyers involved, with an
22 expert from either side to get whatever input Your Honor may
23 need. That might be a better solution than taking someone who
24 is a tertiary player in the electronic field. At any rate, I
25 offer that on behalf of the plaintiffs and for the defendants

1 to consider and Your Honor. We have found that in the
2 discussions where we have got both experts together, even
3 though we don't understand always what they are saying, they
4 seem to understand each other. I think that may be a possible
5 solution.

6 THE COURT: If we get to that point, there are a
7 couple of ways of doing it. One way is to set a tutorial
8 hearing where I can ask them questions and deal with the
9 technical aspects. Another approach is to use the resources of
10 the Judicial Administrative Office. They are trying to
11 assemble a database of experts for the purpose of assisting the
12 Court; not testifying, but just assisting the Court with
13 matters of this sort and other matters. I will check into that
14 and see whether or not there's any list compiled of people who
15 could be of help in this area and I will confer with you. The
16 next item is: Verilaw electronic services.

17 MR. HERMAN: Really no outstanding issue. It's
18 working. The additional security measures have been
19 implemented. The defendant and plaintiffs see no reason to
20 continue dealing with the Verilaw issue unless some particular
21 problem comes up.

22 THE COURT: Okay.

23 MR. HERMAN: With regard to state liaison counsel
24 issues, we recently received from the defense a letter written
25 jointly to yourself and Judge Corodemus in New Jersey relating

1 to 38 proposed depositions. From the MDL Plaintiffs Steering
2 Committee perspective, we don't think there's a problem because
3 we haven't had an issue thus far arising from depositions.
4 Depositions have gone forward. We have attended. We have
5 reserved our rights to ask questions that have not been asked
6 during those depositions. If new documents are produced that
7 are not covered in the depositions, we have a right to go back.
8 Thus far, depositions have proceeded in what we believe is a
9 very orderly fashion.

10 We are concerned about one issue, and that is a
11 number of the depositions, as we understand it -- I haven't
12 seen a notice and I haven't been provided with a schedule by
13 either our New Jersey counsel or by defense counsel in the MDL.
14 As I understand it, a number of these depositions scheduled to
15 begin in October, as we understand it, will take place in
16 Belgium. Given the circumstances of foreign travel and recent
17 developments in Belgium as late as last night, we would hope
18 that something can be worked out between the lawyers scheduling
19 those depositions and defense counsel to have the depositions
20 in the U.S. taken first. It certainly would facilitate MDL
21 attendance at those depositions and at foreign depositions.
22 And, indeed, documents are going to be produced very shortly as
23 relates to Belgium. We would like an opportunity just to take
24 a look at them before foreign depositions are scheduled.
25 That's the only comment that I have regarding the state liaison

1 issue.

2 THE COURT: Let me first hear from the defendant on
3 it.

4 MR. CAMPION: If I may speak to that, on further
5 reflection, the defense has concluded it is appropriate to
6 bring before the Court for resolution a possible form of
7 injunction. We are preparing pleadings to be filed no later
8 than October 9. We shall serve all counsel in state and
9 federal cases and ask for a return date that may be addressed
10 later on, but we think the time has come for that matter to
11 come to this Court for resolution.

12 MR. HERMAN: If I may respond to that?

13 THE COURT: Yes.

14 MR. HERMAN: As I understand what counsel has just
15 said, the defendants will move for an injunction of state cases
16 under the All Writs Act.

17 MR. CAMPION: It will address matters of discovery,
18 matters of class certification, and things of that type. The
19 papers are still in the preparation stage.

20 MR. HERMAN: I'm going to ask that the respondents to
21 such motion have at least two weeks to brief and respond to
22 that motion when it's filed.

23 THE COURT: Do you have any problem with that?

24 MR. IRWIN: No, Your Honor. We agree with that.

25 MR. HERMAN: If the defendants would please provide

1 us with the service list of state cases as soon as possible, we
2 would like to give advance notice to all the attorneys with
3 state cases. The PSC will, of course, meet before that motion
4 is even filed in order to designate individuals to respond to
5 such motion and in order to accommodate any oppositions that
6 lawyers who have state cases pending may wish to file, either
7 as direct opposition or as amicus.

8 Mr. Seeger has just indicated to me that two
9 weeks may not be enough time to respond. Irrespective of that
10 issue, we would like to go ahead and notify the state lawyers
11 as soon as possible.

12 THE COURT: This, of course, is a serious matter.
13 You all know there are approximately eight to ten cases that
14 have dealt with similar issues of this sort throughout the
15 country. Let me hear from the state liaison. Any comments on
16 that?

17 MR. ARSENAULT: Richard Arsenault from Alexandria.
18 With regard to the New Jersey depositions, we are in contact
19 with them. We communicate with them on a very regular basis
20 and this is a coordinated basis. Myself and Mr. Davis will be
21 meeting Monday to perhaps visit with the New Jersey attorneys
22 with regard to the deponents that we are interested in moving
23 forward with, as we have done in the past, to try to make this
24 a coordinated, nonduplicative effort.

25 THE COURT: Anything further?

1 MR. IRWIN: With respect to the service list
2 Mr. Herman alluded to, Mr. Campion's office and Mr. Preuss'
3 office are working to get that list to my office. We hope to
4 have a list we're comfortable is accurate within the next
5 couple days. As soon as I have it, I will make sure a copy is
6 delivered.

7 MR. HILL: With respect to opposition to the
8 All Writs Act, I am aware that the New Jersey class
9 certification is scheduled for October 24, the hearing. We are
10 looking at a November class certification hearing date in
11 West Virginia. These two things are probably a good part of
12 the impetus for the injunction the defendants are looking for.
13 Mr. Herman had asked for time for the PSC to respond to that
14 motion. Perhaps we need to address the amount of time would be
15 the same for lawyers from the state cases -- New Jersey and
16 West Virginia, at least -- to file their opposition to it?

17 THE COURT: That may be so, but the problem I'm faced
18 with is the imminence of a certification hearing and a plethora
19 of foreign discovery.

20 MR. HILL: I understand.

21 THE COURT: We either have to stop those
22 certification hearings from going on at this point or we have
23 to get this resolved prior to the certification hearings.

24 MR. HILL: I'm not asking for more time, just that
25 these state lawyers be allowed at least the same amount of time

1 as the PSC is to respond.

2 THE COURT: The difficulty I'm faced with is the
3 imminence of the certification hearings and potential
4 duplicitous discovery. If these proceedings were not imminent,
5 then time would not be of the essence. That's the only problem
6 that I see in it. In any event, I think all interested parties
7 ought to get to work on this issue. There are a couple of law
8 review articles discussing injunctions in MDL cases. There's
9 one law review issue dealing with this whole concept. See *June*
10 *1995 Symposium: National Mass Tort Conference*, Tex. Law
11 *Review*. See also *Civil Practice & Litigation Techniques in*
12 *Fed. & State Courts*, Am. Law Institute - ABA Course of Study,
13 Feb. 28, 2001.

14 MR. HERMAN: Your Honor, the PSC hadn't met on this
15 issue. We haven't taken a position. I believe, based on prior
16 discussions within the PSC, that it's fair to say we will
17 invite those state lawyers who are not part of the MDL to
18 participate, under the Federal Rules, in whatever briefing and
19 arguments that take place. It would be our intention that the
20 Court be properly petitioned to allow those state lawyers, whom
21 I know have strong feelings on this issue, also to participate
22 in oral argument.

23 THE COURT: That's an issue that ought not to create
24 havoc in your ranks. It ought to be isolated, and the people
25 who feel the strongest ought to be given the opportunity to

1 brief and argue it as opposed to those who do not feel as
2 strong or have not as much interest in it. That's the way that
3 this issue ought to be handled.

4 MR. HERMAN: The PSC will do everything it can to
5 facilitate briefing and oral argument by those individuals who
6 feel the strongest about this issue and whose rights they feel
7 must be protected.

8 THE COURT: My reaction to the time for briefing and
9 arguing this issue will really depend upon whether there is an
10 imminent problem with the taking of state depositions and or
11 the state certification hearing dates. If they are right on
12 us, then I'm going to have to move very fast on it. If those
13 are pushed back by agreement of the parties, then we can take
14 our time and study this matter with a little more deliberation
15 and thoroughness.

16 MR. HERMAN: The PSC has no problems with the
17 deposition schedule. We just hope that they will start in the
18 U.S. before they begin in Belgium.

19 THE COURT: Let's proceed to the next item: Patient
20 Profile Form and authorization.

21 MR. IRWIN: Your Honor, the joint report describes
22 the status of the Patient Profile Forms received and those that
23 are overdue. I would add that we have also identified several
24 plaintiffs about whom we will bring a motion under
25 Pretrial Order No. 9 next month, assuming we have not received

1 a PPF in the meantime.

2 I would add to what is in the report the
3 following information. We have received from one set of
4 plaintiffs' counsel a large number of PPFs; 335 to be precise.
5 There are still from this same group of plaintiffs' counsel 171
6 PPFs outstanding. They have been in communication with our
7 office. They have requested extensions. We have agreed to
8 extensions. We have agreed that, with respect to these
9 outstanding 171, that they will furnish to our office those
10 that they can by this coming Monday; and if they cannot furnish
11 others of that 171, they will then prepare dismissals without
12 prejudice.

13 I am informed that there are some of the clients
14 that they are not able to contact. That has been happening to
15 a lesser degree with respect to other plaintiffs in this case,
16 and Your Honor I'm sure has seen some notices of dismissal
17 without prejudice. Those are occurring as a consequence of
18 these kinds of developments.

19 I would add one other thing, and this is
20 something Mr. Davis and I are going to address next week
21 informally before we take it any further before Your Honor.
22 Some of these PPFs that we have received have been delivered to
23 us with unsigned medical authorizations, and that obviously is
24 a significant problem for us. Mr. Davis and I will take that
25 up next week. That's where we are with respect to the PPFs.

1 THE COURT: The subpoena to the FDA.

2 MR. HERMAN: We are awaiting from the defendants the
3 FDA documents. The FDA has now complied by providing Bates
4 numbered documents to the defendants. We have a copy of the
5 cover letter that gives us the Bates number range. The
6 defendants are redacting the documents, providing us with a
7 redaction code. When we get the documents with the redaction
8 code, we will review it. If there's a problem with it, it will
9 first be taken up with the defendants and, if necessary,
10 brought to Your Honor's attention at the next hearing.

11 THE COURT: Anything from the defendants on FDA?

12 MR. IRWIN: Your Honor, I would only add the FDA has
13 delivered everything to defense counsel's offices, Mr. Preuss'
14 offices. They are in the process of completing those
15 redactions and will be delivered, in due course, to
16 Mr. Herman's office. I hope it's not too much longer.

17 THE COURT: Service list on the attorneys?

18 MR. IRWIN: Your Honor, we customarily deliver to
19 Ms. Lambert and to liaison counsel, state liaison counsel, a
20 monthly list updated as best we can each month. Mr. Davis and
21 I feel that we need to go over it one more time. I have one
22 with me, but we think it probably needs to be looked at again.
23 With the Court's permission, we would like to do that and
24 deliver it to everyone next week.

25 THE COURT: Let's get together a list. I'm sure you

1 will in your motion, but let's make sure you do get a list of
2 the attorneys who are handling state court cases, both the ones
3 that double as MDL attorneys and those who do not.

4 MR. IRWIN: We are doing that, Your Honor. We
5 delivered one list to Your Honor about a week or so ago, I
6 think, and I believe we indicated that we had to supplement
7 that list. We are in the process of doing that and that should
8 be completed early next week.

9 THE COURT: Their addresses and bar numbers. I don't
10 know whether you have that in other states, but bar numbers if
11 you do have it.

12 MR. IRWIN: We will work on that, Your Honor.

13 MR. HERMAN: Your Honor, I'm sorry. It just occurred
14 to me that the PSC will undertake to facilitate pro hac vice
15 appearances among those lawyers who have state cases who wish
16 to be present at, or brief, or have oral argument. It also
17 occurs to me that a number of those attorneys would want to
18 appear without waiving the right to maintaining their cases in
19 state court. I believe that's a given under the current law,
20 but I state that for the record.

21 THE COURT: I don't have any problem with that.
22 That's accurate. Nobody is going to waive their rights by
23 appearing here. They can give me some information, some
24 argument that would be helpful to me. All sides ought to give
25 me as much as they can -- information, citations,

1 discussions -- because it's a serious situation. When a
2 federal court is asked to enjoin state proceedings, that has to
3 be taken seriously. I want to hear from everybody on that.

4 I do remind you that the whole purpose of the
5 MDL legislation is to select one court to avoid duplicity,
6 avoid harassment, provide consistency in rulings, and various
7 other things. This is the very basis for the jurisdiction of
8 this Court in these matters. Ongoing studies, subpoena to
9 BevGlen, is the next topic.

10 MR. HERMAN: The subpoena was served. We haven't
11 gotten full production from BevGlen. They indicate that they
12 are too small; they don't have the time. Plaintiffs offered to
13 go there and tag what documents we wanted so they wouldn't have
14 to do it; but they said, no, they won't allow it. It's a
15 serious issue for us because BevGlen was contracted by the
16 defendants in this case to do Propulsid studies, and we think
17 we are entitled to a full production.

18 THE COURT: Have they been subpoenaed?

19 MR. HERMAN: Yes.

20 THE COURT: I understand there may be some privacy
21 issues. I'm sensitive to that, but there are ways of dealing
22 with that question and still produce the material. For
23 example, they certainly can turn the material over to the
24 defendant to look at. But the point is that they have to know
25 that I will enforce subpoenas. You have to tell these parties

1 that, if they do not comply with the Court's subpoenas, they
2 may be in contempt of Court and I'm going to order somebody
3 into Court to explain their actions. Get me the name of the
4 president, as well as the chairman of the board. I want them
5 to know that I'm serious about enforcing the Court's subpoena.

6 MR. HERMAN: Your Honor, we have an issue -- and if
7 BevGlen gets together with the defendants and says, "Okay,
8 we'll produce them to the defendants," we want a certification
9 from BevGlen as to every document they are producing, and we
10 want them to Bates number them. This idea of us getting
11 documents through a party litigant from a third party -- I
12 understand the privacy issues, but unless we can get a
13 certification that makes sense to us, plus a redaction log, we
14 would still have a problem.

15 MR. IRWIN: Your Honor, we think that is fair. When
16 we have been producing documents in other contexts, we have
17 been providing redaction logs. Where requested and where we
18 can assist, we can furnish certifications if the third party is
19 willing to provide them. Here we think a certification would
20 be appropriate, and if the Court were to order it we would
21 certainly embrace that.

22 We think there are privacy issues that need to
23 be protected. We have offered to BevGlen to furnish assistance
24 on behalf of BevGlen by defense counsel. We certainly agree
25 with Mr. Herman there should be an appropriate record of all

1 documents, properly numbered, and a log showing what documents
2 are redacted or removed for whatever reasons, that they are
3 appropriately logged, so that any challenges that should be
4 made can be properly made.

5 THE COURT: Fine. I would want BevGlen to sign off
6 on that so they understand they are certifying it, as well as
7 you are certifying it.

8 MR. IRWIN: We think that is appropriate. We will
9 deliver the message and will endeavor to assist BevGlen in
10 responding to this subpoena in a way that's appropriate and in
11 a way that protects the plaintiffs' rights to properly
12 challenge the response.

13 THE COURT: I don't want to wait to the next meeting
14 for that. Let me know within ten days whether or not they are
15 responding. If they are not, then I expect something to be
16 filed so I can deal with it by the next hearing. At that point
17 or before, I will take some action. Give me the names of the
18 people who are at the top, their names, their addresses, and I
19 will handle it from there.

20 MR. IRWIN: Yes, Your Honor.

21 THE COURT: Next: Third party subpoena duces tecum.

22 MR. HERMAN: We really have part of a similar issue,
23 and that is we just want to make sure that as these third
24 parties produce documents to the defendants for them to redact
25 and then send to us that they are certified and list the Bates

1 numbers of whatever they are producing and that we get
2 redaction logs as they are produced. We understand that the
3 process takes some time. Our concern is that we get a
4 certification from the third party who had custody and control
5 of those documents of exactly what they produced to the
6 defendants, with Bates numbers, and that we get that
7 certification, along with the documents and a redaction log. I
8 understand the defendants have agreed to do that.

9 MR. IRWIN: Your Honor, in the course of assisting in
10 the production of some of these third party subpoenas, we have
11 in every instance produced redaction logs. I believe in most
12 instances the documents have been numbered. I have spoken in
13 the past to Mr. Davis about this issue concerning
14 certifications. I believe that where we can obtain the
15 certification from the third party we will endeavor to do so.
16 I'm not sure in every case we can do that, in which case we may
17 have to come to the Court and say we are not able to get the
18 certification. In some cases, some of these third party
19 subpoenas have been produced and delivered directly to
20 plaintiffs' counsel and directly to us without our involvement
21 or our assistance, and obviously we have no control over that
22 process. I just want to say that, from a general principle, we
23 agree with what Mr. Herman is saying, that this is the way this
24 should work. We are not always able to control it in every
25 instance, and where we are not I think we will have to probably

1 link that to the attention of the Court.

2 THE COURT: I understand the issue. The issue boils
3 down to the documents. They may have a right to get the
4 documents, but there is a legitimate concern about privacy and
5 that's what we have to deal with. The plaintiffs have to have
6 enough comfort to know that they have complete and accurate
7 documents. There's several ways of satisfying production
8 responsibilities and protecting privacy. That can be resolved.

9 MR. HERMAN: Your Honor, I have confidence, as does
10 the entire PSC, in the integrity and professionalism of defense
11 counsel. The problem with the third party subpoenas -- and
12 it's rather awkward for us -- is that when a third party is
13 served with a subpoena to produce documents to us and we don't
14 get them, they go to the defendants, although we have
15 confidence in defense counsel, we don't get a certification
16 from the issuing party they are making a complete production
17 and that they are itemizing whatever it is they are
18 producing --

19 THE COURT: The way to shorten that is when you get
20 the documents, if they are mailed directly to you, at that
21 point make the contact and get the certification. Don't let it
22 just linger because that trail gets cold.

23 MR. HERMAN: Your Honor, with reference to No. 10,
24 the scheduling order, we are going to meet in the early part of
25 next week, Tuesday or Wednesday. We have Mr. Longer of

1 Mr. Levin's office -- I'm sorry. We skipped an issue that I
2 think is important, and if I might go back to No. 8?

3 Mr. Arnold Levin, a member of the Plaintiffs Steering
4 Committee, is going to meet with defense counsel and work on a
5 joint order as to discovery of ongoing studies. That's an
6 issue that's left hanging.

7 THE COURT: All right.

8 MR. HERMAN: Next week, Mr. Fred Longer of
9 Arnold Levin's office, and Mr. Davis are going to work on a
10 scheduling order with the defendants working towards that
11 March 22 certification date.

12 THE COURT: Try to get some dates you all are both
13 comfortable with. If you can't, give me each your preferences,
14 and then I will set dates. It's better for you to do it than
15 me, but I'll do it if you can't do it.

16 MR. HERMAN: Under No. 11, we are working on our
17 responses to defendants' request for production, Set No. 2, and
18 that is another issue that Mr. Longer is coming in to work on
19 next week. We should have those responses shortly.

20 MR. IRWIN: Your Honor, I would add to this
21 paragraph XI that with respect to the couple of interrogatories
22 we sent to plaintiffs' counsel regarding ongoing studies, we
23 held a Rule 37.1 telephone conference. Most of the responses
24 have come in. As of yesterday, there are only 21 remaining
25 outstanding. We have agreed to another extension to October 1,

1 and I am optimistic that these responses will be complete by
2 them. Hopeful, anyway.

3 THE COURT: The next item on the agenda is:
4 Modification of Pretrial Order No. 9.

5 MR. IRWIN: Your Honor, this is really a housekeeping
6 measure. Under a provision of Pretrial Order No. 9, whenever
7 we receive a medical record -- and we have a contractor
8 collecting medical records for us all around the country.
9 Under a provision in Pretrial Order No. 9, we are obliged
10 properly to send a copy of that medical record to each
11 plaintiff counsel, to the plaintiff counsel whose case that is.
12 It has become a real costly and time-consuming process to do
13 this each day we get a piece of paper in. We may be sending
14 six letters over six days to the same plaintiff counsel. So we
15 have negotiated and agreed to an amendment to Pretrial Order
16 No. 9 that that would allow us to do this once a month,
17 basically, and by posting it on Verilaw and noticing
18 plaintiffs' counsel to that effect. So we appreciate the
19 courtesies of opposing counsel in accommodating us because it
20 will save us substantial energy. The motion is prepared and we
21 submit it to Your Honor.

22 THE COURT: Give it to me. That makes sense. I'll
23 sign it.

24 MR. HERMAN: With respect to that, we want to make
25 sure that since there's going to be a posting that the private

1 medical issues of that individual are not accessible to the
2 Verilaw world.

3 THE COURT: I'll assume that would be the case.

4 MR. IRWIN: It's filed under seal, Your Honor, under
5 the Verilaw new security measures.

6 THE COURT: Anything further from anybody? How do we
7 stand with statistics?

8 MR. CAMPION: At the present time we have
9 approximately 2,770 plaintiffs in both the state and federal
10 proceedings. There are approximately 1,600 plaintiffs either
11 in your Court or on their way. The most significant
12 development has been in toll agreements; in part in written
13 toll agreements and in part in the litigation that was brought
14 here. There are now in excess of 13,000 persons under toll
15 agreements of one form or another. No difficulties of any
16 consequence in the form. It is also manifestly clear in excess
17 of 10,000 of these persons and perhaps as much as 12,000 are
18 represented by counsel or before your Court.

19 MR. HERMAN: Before we conclude, I notice a number of
20 lawyers have not signed an appearance, so please do that before
21 you leave.

22 THE COURT: Anything from liaison counsel before I
23 leave? Anything further? All right. I will see you next
24 time. The date for our next meeting is October 25, 9:00.
25 Court will stand in recess.

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THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, the Court was in recess.)

* * * * *

CERTIFICATE

I, Toni Doyle Tusa, CCR, Official Court Reporter,
United States District Court, Eastern District of Louisiana, do
hereby certify that the foregoing is a true and correct
transcript, to the best of my ability and understanding, from
the record of the proceedings in the above-entitled and
numbered matter.

Toni Doyle Tusa
Toni Doyle Tusa, CCR
Official Court Reporter