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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS \* Docket 00-MDL-1355-L  
LIABILITY LITIGATION \*  
\* New Orleans, Louisiana  
\*  
\* October 25, 2001, 9:00 a.m.  
\* \* \* \* \*

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

APPEARANCES:

For the Plaintiffs: Herman, Mathis, Casey,  
Kitchens & Gerel  
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For the Defendants: Irwin Fritchie Urquhart  
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Also Present: DAWN M. BARRIOS, ESQ.  
THOMAS F. CAMPION, ESQ.  
BARRY HILL, ESQ.  
JOHN H. KIM, ESQ.

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PROCEEDINGS

(October 25, 2001)

THE DEPUTY CLERK: Everyone rise.

THE COURT: Be seated, please.

THE DEPUTY CLERK: MDL 1355, In Re: Propulsid Products Liability Litigation.

MR. HERMAN: May it please the Court. Good morning. Your Honor, Russ Herman for the Plaintiffs Steering Committee with Herman, Mathis, Casey, Kitchens & Gerel.

MR. IRWIN: Jim Irwin for the defendants. Good morning, Your Honor.

THE COURT: This is our monthly meeting. I have before me Joint Report No. 11 of Plaintiffs' and Defendants' Liaison Counsel. The first matter on that report is: "Master Complaint/Answer."

MR. HERMAN: Your Honor, the Master Complaint has been filed. The defendants will have their answers, as I'm advised, within two weeks. We have a tentative schedule leading up to the proposed certification date, and it should be signed off by both sides in short order and presented to Your Honor.

THE COURT: After the answers are filed and you get together on the dates, plug into that an early status conference with the Court so I can discuss matters with you. I'm interested in how we approach the question of the class

1 action: Whether we deal with one national class action with  
2 subparts; whether we deal with several class actions, meaning  
3 majority, minority, Louisiana, is the way it usually goes, or  
4 other states, so to speak, and subparts; or whether we have  
5 separate class actions per state; or any other combination. At  
6 the outset, I would like your input and discussion at a status  
7 conference on the scope of the class action.

8 MR. IRWIN: Yes, Your Honor. The November 5 date  
9 that appears in the joint report as the deadline for filing the  
10 Master Answer is the date that we have agreed upon in the class  
11 certification scheduling order that Mr. Herman just alluded to.  
12 That order, the one we would propose to submit to Your Honor,  
13 is about finished. We will be in touch with your offices to  
14 try to plug into that order an agreeable date for a planning  
15 conference before the March 22 class certification hearing.

16 THE COURT: Anything more on the Master Complaint  
17 issue? Next is: "Update of Rolling Document Production and  
18 Electronic Document Production."

19 MR. IRWIN: Your Honor, the recent production  
20 consists of approximately 160,000 pages on CD-ROM. These are  
21 Beerse Belgium documents. The production also includes a  
22 cleanup of about one and a half boxes of domestic documents,  
23 which we believe completes the domestic hard copy production.  
24 There are still logistical issues concerning the delivery of  
25 the electronic databases. I'll try to report to the Court as

1 best I can about that.

2 I won't hold it against anybody in this  
3 courtroom if they smile when I say this, but there are issues  
4 involving orphan data. It is my understanding that orphan  
5 data, as it relates to these databases, is data that our  
6 computer people are having difficulty connecting to the  
7 Propulsid product. It my be data that might relate to other  
8 products, in which case it should not be disclosed. That  
9 creates a bit of a logistical problem.

10 I understand our people are looking at new  
11 consultants to possibly sort through this matter involving  
12 orphan data. I think the Court knows and I know Mr. Herman's  
13 people and Mr. Buchanan know this is new for all of us and I  
14 think this is an issue we have not expected. I think that very  
15 soon Mr. Buchanan and Mr. Conour will be talking more about  
16 this orphan data issue, but I want to report that to the Court.  
17 I mentioned it briefly to Mr. Davis the other day.

18 There are also, with respect to the completion  
19 of the domestic production, some videotapes we are going to  
20 deliver. Actually, 133 of them are in my office now, and I  
21 need to get them over to Mr. Herman's office. The cost is not  
22 insubstantial. There are another 350 of them we have  
23 confidentiality issues with, and I discussed that briefly with  
24 Mr. Davis the other day. It's something we need to talk about.  
25 I don't want the tale to wag the dog, but there are expense

1 issues involved with the vast number of videotapes. Those  
2 videotapes, 133 will be delivered hopefully today or tomorrow  
3 to their office.

4 Finally, back to this issue involving the  
5 electronic production, this data I referred to, I think there's  
6 a question about identifying it for purposes of redaction. I  
7 don't know where that stands right now. I do think that is  
8 going to have to be discussed by Mr. Buchanan and Mr. Conour.

9 MR. HERMAN: Your Honor, we don't intend to pay for  
10 any videotapes. This company made more than \$2 billion with  
11 this drug, and whatever videos they produced we'll be happy to  
12 copy them at our expense in my law office. We can do that very  
13 quickly, at a cost of about \$3 a tape, assigning a paralegal to  
14 do it. I just want to make that for the record.

15 In terms of outstanding document issues, we  
16 believe they will be resolved in short order. One is the  
17 insurance policy issues they have been making an additional  
18 search for. Yesterday I heard during oral argument in  
19 New Jersey that there are missing some materials from a  
20 conference of experts with Janssen that occurred in 1998. We  
21 don't have the privilege logs yet or the redaction logs, but I  
22 understand we will be getting those in short order.

23 THE COURT: Let's have those issues resolved one way  
24 or another by the next conference; and if they are not, bring  
25 them to me so I can resolve them. On those issues, I'm

1 interested in state liaison's input. Are you getting access to  
2 the material you need? Anything on any of this material that  
3 is giving you any difficulty?

4 MR. HILL: Barry Hill from West Virginia. Judge, we  
5 have had a cooperative agreement with the defense as far as  
6 West Virginia is concerned. Essentially, with the exception of  
7 maybe four or five single cases, all the cases in West Virginia  
8 are in a single case with a single group of lawyers. They have  
9 produced almost simultaneously with producing for the MDL the  
10 information. We have had no discovery disputes. We have not  
11 been in front of the judge in the West Virginia case a single  
12 time yet in that litigation, so no problems.

13 THE COURT: I'm looking for input from the state  
14 liaison. If you need any material you feel you are not getting  
15 or you need more access to it, this is the reason you are  
16 participating in conferences. Keep an eye on that from the  
17 standpoint of the states. If any state has any problems, they  
18 should alert one of you so you can bring it up in these  
19 conferences. The next item is: "State Liaison Counsel."

20 MR. HERMAN: Mr. Arsenault is in trial. He was going  
21 to address this issue. He called me early this morning.  
22 Yesterday Ms. Barrios, on behalf of the state liaison, was  
23 present at the New Jersey cert. hearing. Mr. Seeger was there  
24 both in the liaison capacity and the MDL capacity. We have had  
25 a number of meetings with the state liaison, particularly in

1 connection with the upcoming motions, and we met in our offices  
2 with representatives of Pennsylvania, West Virginia,  
3 New Jersey, Tennessee, and Texas recently and discussed any  
4 issues outstanding regarding the free exchange of discovery  
5 materials. As far as I know, there's no problem in that  
6 regard.

7 THE COURT: Anything else from any of the states?

8 MS. BARRIOS: Dawn Barrios. I would like to report  
9 we have had a terrific response from all the state attorneys.  
10 We have notified them, obviously, of the injunction pending.  
11 We have been coordinating with them to get them pro hac vice  
12 status here and everybody seems to be on board and working with  
13 Mr. Herman's office.

14 THE COURT: Thank you. The next item is: "Patient  
15 Profile Form."

16 MR. IRWIN: Your Honor, this can be broken down into  
17 two categories, I believe. The first motion deals with several  
18 plaintiffs, Alix, Ansardi, Banks, Batiste, Boudreaux -- excuse  
19 me, Your Honor. I've got the wrong names. The first motion  
20 deals with Absheir, Ford, Leitz, and Rodriguez. These are  
21 plaintiffs represented by Mr. Diaz. We have filed a motion to  
22 dismiss their cases on the grounds that they have not complied  
23 with this Court's Pretrial Order No. 9. They have not  
24 responded to numerous letters from us and from plaintiffs'  
25 liaison counsel. They have not filed any PPF's. We ask they

1 be dismissed with prejudice. No opposition memorandums have  
2 been filed. We ask you treat them the same way as the Lorio  
3 plaintiffs were treated in August.

4 THE COURT: Anybody here? Hearing none, I'll grant  
5 the motion.

6 MR. HERMAN: Your Honor --

7 THE COURT: Liaison counsel objects and, in the  
8 alternative, takes the position if it does have to be done, it  
9 should be done without prejudice. I grant the defendants'  
10 motion to dismiss with prejudice as to those claims.

11 MR. IRWIN: Your Honor, I have brought a judgment  
12 this morning which I will hand up to Your Honor's clerk. I  
13 have a copy here from Mr. Herman. This judgment is exactly the  
14 same form we submitted to Your Honor in connection with the  
15 Lorio plaintiffs.

16 MR. HERMAN: Thank you.

17 MR. IRWIN: Your Honor has not signed that judgment.  
18 I think we had mentioned at an earlier conference that what we  
19 would do is when this issue involving PPF's reaches perhaps a  
20 stabilization point, we would then approach Your Honor with a  
21 motion for an entry of a 54(b) judgment, which would be a  
22 comfortable and sensible way to grant these things up for  
23 purposes of appeal. We are submitting this judgment to  
24 Your Honor as a matter of form at this moment.

25 Next, Your Honor, there are similar motions with



1 respect to a number of plaintiffs represented by Bart and  
2 Gallagher, and I think this motion can be subdivided into three  
3 categories. There is a response involving a Mrs. Manasco, who  
4 is stated to be an elderly person and who was confused,  
5 according to the response papers, with respect to the timing to  
6 file her PPF. We have spoken to plaintiff counsel and are  
7 prepared to accept the late filing; provided, however, that the  
8 plaintiff counsel furnish to us appropriate evidentiary  
9 documentation that would satisfy a reasonable fact finder that  
10 these delays were appropriate.

11 THE COURT: I'll reserve ruling on that until next  
12 time. Talk to me about the hurricane.

13 MR. IRWIN: We are a little troubled by that in the  
14 sense there are seven responses with respect to these  
15 particular individuals --

16 THE COURT: I have Chapman, Vernon, McGowan, Gill,  
17 Starkey, Duet, Frederick.

18 MR. IRWIN: Yes, Your Honor. We have a little bit  
19 different concern with respect to those seven individuals  
20 because the responses indicate that on September 21 each one of  
21 these seven individuals reported to counsel for plaintiff that  
22 they had not been aware of their obligation, or something like  
23 that, that there was a problem attendant with Tropical Storm  
24 Allison, that there was yet another report simultaneously with  
25 these seven individuals on October 21. So we are troubled by

1 the coincidences of those dates. However, we were told that  
2 the PPF's would be furnished to us yet, and we received two of  
3 them yesterday. We have not received the remaining five.

4           So what we would like to do, putting aside a  
5 moment our concerns for the factual basis for these  
6 explanations, we would like to defer this motion. We want to  
7 investigate the factual basis for these allegations and will  
8 reserve our rights, if the Court permits us, to reurge the  
9 motion.

10           THE COURT: I'll reserve ruling on that until next  
11 time. Report to me by the next meeting on both Mrs. Manasco  
12 and those seven remaining.

13           MR. IRWIN: Finally, Your Honor, I think most  
14 importantly with the remaining plaintiffs, we have attached to  
15 the joint report that we submitted to Your Honor and also to  
16 the memorandum we filed in opposition to the motion to withdraw  
17 a chart of all of these plaintiffs and also with the plaintiffs  
18 who are subject to the motion to withdraw. I know the Court  
19 has read this material. I am not going to stand up here and  
20 make a speech about MDL's and all the notices these plaintiffs  
21 have had not only from us but from their own counsel, from the  
22 Gallagher firm, that attached letters that indicated they wrote  
23 each one of these individuals and said to each one, "Your case  
24 will be dismissed."

25           I will only add this comment, Your Honor. When

1 we argued to Your Honor in August about why it is appropriate  
2 to dismiss claimants like this in an MDL setting where we all  
3 have the obligation to process a large number of cases and why  
4 they should not now be able to walk away from this case and why  
5 they should be dismissed with prejudice, Your Honor said on  
6 August 3, and I think it's especially appropriate here:

7 "I understand that people may move. I  
8 understand that people may be sick or people may have  
9 individuals who are sick, but they have a responsibility, if  
10 that occurs, to alert someone, to alert some counsel.  
11 Seventeen letters, twelve letters, five letters to someone  
12 else, everybody trying to reach individuals, we are spending  
13 too much time with plaintiffs who don't want to proceed with  
14 their case. It's not fair to the plaintiffs who are interested  
15 in proceeding with their case. We have to get on with matters  
16 at hand. I am going to dismiss with prejudice."

17 Your Honor, we think that same standard should  
18 apply here, and we ask that these individuals be dismissed with  
19 prejudice.

20 THE COURT: I have two motions in that regard. You  
21 can come forward, sir. On each of those cases I have a motion  
22 from the defendant to dismiss with prejudice, opposed by the  
23 liaison counsel for the same reasons that I mentioned,  
24 sub silentio opposition to each one of them, taking the  
25 position they should not be dismissed; and if they are

1 dismissed, they should be dismissed without prejudice. I  
2 understand that.

3 In addition to that motion, I have a motion by  
4 plaintiff counsel who seeks to withdraw from each of those  
5 cases, indicating he has done his best to contact the people,  
6 but he has not been able to do so. They have moved or whatever  
7 and have not kept in touch with him. I have read the material  
8 that you have submitted. Would you like to supplement it?

9 MR. KIM: My name is John Kim. We don't dispute  
10 anything Mr. Irwin has said. Certainly this Court should have  
11 the capability and must have the capability, in an MDL setting,  
12 to control its docket. What we are concerned about is while  
13 not disputing the Court's right to dismiss these cases with  
14 prejudice because of noncompliance -- and we are just as  
15 frustrated as the Court is -- it is our obligation to at least  
16 temper that dismissal with their due process rights, if any,  
17 that still exist.

18 The suggestion that we had, which may have been  
19 ill-stated in our response, was that we would withdraw, send  
20 one more letter at our expense saying, "Your case has been  
21 dismissed with prejudice by this Court absent within 30 days  
22 you showing up with a new lawyer and a completed Patient  
23 Profile Form." The truth is, I don't think we will see any  
24 response.

25 I will inform the Court not only did last week

1 we send a letter informing all 154 of them of this hearing and  
2 none of them have shown up today, that we also sent  
3 investigators out to talk to some 30 of these people and still  
4 have had no response. Our guiding light is tempering the  
5 Court's right to dismiss these cases with prejudice with one  
6 last opportunity.

7 THE COURT: I understand your concern and I take it  
8 in the proper way. You are trying to do your job and serve  
9 your responsibility and serve your client. The difficulty is a  
10 lot of your resources and a lot of your effort is being spent  
11 on this type of situation, this type of problem, and it's  
12 misdirected. It ought not to be exhausting either you or your  
13 coffers or anything else, or interfere with any other aspect of  
14 the litigation. It's distracting us. We are taking time out  
15 from issues that involve people who want to proceed.

16 Cases of this sort demand a lot of attention by  
17 the lawyers, a lot of resources by the lawyers, and if you  
18 spend them on people who are not interested it's a waste of  
19 everybody's time and effort. Even in this motion we are  
20 spending 20 percent of our time this morning on people who  
21 don't want to be here. We haven't given them one notice; we  
22 have given them multiple notices. You have given them notices.  
23 Defendants have given them notices. Notwithstanding that, they  
24 are not here. I understand your problem. Mr. Herman, you had  
25 something to say?

1 MR. HERMAN: No, I don't. Mr. Murray says I don't  
2 need to.

3 THE COURT: I understand the issue. I'm going to  
4 dismiss with prejudice those individuals. Give it to me in the  
5 written form and I will do so. Thank you.

6 MR. HERMAN: I'm always grateful for Mr. Murray's  
7 help and advice.

8 MR. IRWIN: There are two other things, briefly,  
9 under that category. These have to do with the PPF's, again.  
10 We have received a number of PPF's -- they are 132 -- without  
11 medical authorizations. I have the list here. I'm giving it  
12 to Mr. Davis, who has kindly agreed to help us try to work with  
13 plaintiff counsel to get those signed medical authorizations.

14 We also have an issue regarding authorizations  
15 submitted to us that are restricted only to named healthcare  
16 providers on those authorizations. We believe Pretrial Order  
17 No. 9 requires those authorizations be given to us unlimited so  
18 we can get the medical records, and we are obliged to produce  
19 all of those records to plaintiffs' counsel. This is the list  
20 of approximately 132 people that have furnished us limited  
21 authorizations. I'm also giving that to Mr. Davis. We'll talk  
22 about it, and if we cannot work it out we will bring to it  
23 Your Honor.

24 THE COURT: Next: "Subpoena to FDA."

25 MR. HERMAN: One word, for the record, on the

1 authorizations. Plaintiffs, of course, object to any medical  
2 authorizations --

3 THE COURT: Before we get to that, I'm reminded we  
4 did have two motions. One motion as to all of those cases was  
5 a motion to withdraw. I deny the motion to withdraw on all of  
6 those cases and grant the motion to dismiss. I'm sorry.  
7 Continue.

8 MR. HERMAN: Plaintiffs object to any blanket medical  
9 authorizations because of privacy and statutory issues, but  
10 we're attempting to work that out and we have another meeting  
11 set on it.

12 THE COURT: This issue is not uncommon in many of  
13 these cases, and everybody has to be sensitive to the fact  
14 there are privacy issues involved and blanket authorizations  
15 create problems in and of itself. Sometimes the problems are  
16 simply "the unknown" and people fear "the unknown." The  
17 defendants have a right -- and I will enforce that right -- to  
18 get material and information, but let's also be sensitive to  
19 the plaintiffs' right to privacy and interest in not having  
20 their entire life invaded.

21 MR. HERMAN: Your Honor, the next issue is the  
22 subpoena to the FDA. There were some collation and Bates  
23 problems. We have been in touch with the FDA both  
24 telephonically and in writing. They are making an effort to  
25 resolve those problems. We have set up and furnished a chart,

1 Mr. Davis has, of all the documents that they have furnished us  
2 where the Bates numbers are either incorrect or obscured, there  
3 are documents they withdraw as a result of some privilege or  
4 nonresponsive, and we expect all the matters will be resolved  
5 with the FDA in short order and that they will issue a  
6 certification that they have made a complete production.

7 THE COURT: What's our timeframe on that? When do  
8 you expect that to be completed?

9 MR. HERMAN: Certainly by the next conference, but I  
10 would expect within the next two weeks, Your Honor.

11 THE COURT: Let's put that on the next agenda and see  
12 where we are with it.

13 MR. IRWIN: Your Honor, I'm informed that the  
14 documents that were sent to our offices to be processed by my  
15 colleagues will be delivered on November 2 and, like Mr. Herman  
16 has just reported, what the FDA is going to do in response is  
17 some sort of closure letter that they have asked of from the  
18 FDA.

19 THE COURT: The next item is: "Service List of  
20 Attorneys." Do we have that?

21 MR. IRWIN: I think we have the right one this month.  
22 Last month we had a little bit of a problem. I have one here  
23 for Ms. Lambert. Mr. Arsenault is not here today, so I will  
24 give it to Ms. Barrios for the state committee and Mr. Davis.  
25 We think that one is pretty good for right now.



1 THE COURT: Is it still a moving target?

2 MR. IRWIN: It's getting better. We have been trying  
3 to catch up with E-mail addresses. I think it will always be  
4 the subject of updates. We also worked to improve its accuracy  
5 when we prepared the service list on the injunction, so it's  
6 been helped a little bit by that.

7 THE COURT: "Ongoing Studies/Subpoena to BevGlen."

8 MR. HERMAN: The defendants are now assisting  
9 BevGlen. We should have a certification and production by  
10 November 11 of the documents and a privilege log, if any. We  
11 don't expect that there are privileged documents, but if there  
12 are, we expect to get everything by November 11, and BevGlen  
13 will certify we have everything.

14 On the subpoena on Dr. Levy, his counsel has  
15 been in contact with us and says that the documents that have  
16 been subpoenaed from him will be produced next week. Although  
17 I don't see a reference here, I know Arnold Levin of the PSC  
18 and defense counsel have been in negotiation on an order  
19 regarding ongoing studies, production of ongoing studies,  
20 et cetera, and expect that we should be able to present an  
21 order to the Court agreeable to both parties on that issue  
22 within the next two weeks.

23 THE COURT: The motion of plaintiffs' liaison counsel  
24 regarding BevGlen is moot or where do we go?

25 MR. HERMAN: I ask it be deferred to the next

1 conference, Your Honor.

2 THE COURT: Okay.

3 MR. IRWIN: We agree with those remarks.

4 THE COURT: "Third Party Subpoenas Duces Tecum Issued  
5 by PSC," did we cover that?

6 MR. HERMAN: We haven't gotten the materials yet.  
7 Mr. Irwin says he's in touch with these folks.

8 MR. IRWIN: It's my impression that most of the  
9 documents have been furnished, and I think one of the issues is  
10 certifications as to completeness of the response. Yesterday  
11 we delivered a letter to Mr. Herman's office providing a list  
12 of all the entities from whom we have requested certifications  
13 that would give some closure to the completeness of these  
14 subpoenas. As soon as we get these certifications, we will  
15 forward them to the plaintiffs' liaison counsel. I'm assuming  
16 if we don't get them promptly we will have to deal with it, but  
17 I'm hopeful now that this letter has gone out we will be able  
18 to get these certifications within a reasonable period of time.

19 THE COURT: Let's have closure on that by next  
20 conference. If not, somebody move the Court for closure.

21 MR. HERMAN: Yes, Your Honor. The specific gravamen  
22 of the Plaintiffs Steering Committee is that rather than  
23 torture the third parties with depositions or other discovery  
24 devices, to accept certifications of completeness, and once we  
25 get those, if some other problem develops, we'll deal with that

1 in short order. We have tried to avoid fighting over things  
2 that shouldn't be fought over with these third parties.

3 THE COURT: "Motion to Enter Scheduling Order for  
4 Motion and Hearing on Class Certification."

5 MR. HERMAN: Your Honor, we expect it's going to be  
6 finalized. I think there's one outstanding issue we have got  
7 to talk about. We should be able to present that to you. That  
8 order fits within the timetable for class cert. We are mindful  
9 Your Honor wishes us to confer with the Court about status  
10 conferences regarding challenges, cert. issues, and I think we  
11 both believe it's possible to give Your Honor a number of  
12 status conference dates for Your Honor to consider at the time  
13 that we file the joint order.

14 THE COURT: Okay. The next item is: "Plaintiffs'  
15 and Defendants' Respective Requests for Production of  
16 Documents."

17 MR. HERMAN: I'm not in a position to answer for the  
18 individual plaintiffs. I have indicated to the Court that the  
19 Plaintiffs Steering Committee has met with relation to an  
20 ongoing study that has not begun yet, from our perspective, and  
21 as soon as those arrangements have been finalized -- and that  
22 will be within the two-week timeframe -- we will, of course,  
23 supplement for the MDL Plaintiffs Steering Committee and within  
24 the confines of the ongoing study, joint agreement, supplement  
25 the request for information that has been served on us under

1 our duty to make continuing discovery responses as issues  
2 develop.

3 MR. IRWIN: Your Honor, we had, I'm sure the Court  
4 will recall, served interrogatories with respect to ongoing  
5 studies to all counsel. We held a conference call and a  
6 Rule 37.1 conference. We now have almost all the answers to  
7 those interrogatories, and we had referred in the joint report  
8 to the prospect of filing possibly a motion to compel with the  
9 24 other that remain outstanding. In light of Mr. Herman's  
10 report that they intend to supplement their discovery responses  
11 and identify the ongoing studies that they have advised us a  
12 little bit about, I think probably the need for us to file a  
13 motion to compel on these few other litigants who have not  
14 answered is probably not a high priority and we may not need to  
15 burden the Court with that.

16 MR. HERMAN: Your Honor, we would expect that the  
17 mutual agreement be reached and our supplementary answers on  
18 this issue be filed by our November meeting. There is one  
19 other issue on ongoing studies that just flashed. Yesterday in  
20 New Jersey, during oral argument, counsel for defendants  
21 indicated that there had been a study or was an ongoing study  
22 from which a medical abstract had been published. We had  
23 previously, in our answers to discovery, attached a copy of  
24 that abstract as the only response that we knew about.  
25 Defendants yesterday, in oral argument, contended that some

1 individuals in that study were plaintiffs in Propulsid  
2 litigation and that it had been paid for by plaintiffs. I  
3 indicated and I want to indicate for the record that the MDL  
4 Plaintiffs Steering Committee does not believe any of those  
5 folks are plaintiffs. We have no knowledge that they are  
6 plaintiffs. We certainly didn't pay anyone for that abstract  
7 or in connection with it.

8           Having said that, I want to make it very clear  
9 on the record that just as the defendants go out and have  
10 studies made and spend lots of money, we can't expect that  
11 plaintiffs who have lost children or who have been damaged  
12 permanently or have continuing problems go out and finance out  
13 of their pocket hundreds of thousands of dollars for studies.  
14 Any implication that it's somehow a negative thing for  
15 plaintiffs to fund legitimate studies we strenuously object to.

16           I want to make it clear on the record we haven't  
17 done that in connection with the material already filed with  
18 this Court, that we do intend to have an ongoing study proceed,  
19 but we're not the least bit embarrassed nor should we be by  
20 funding a legitimate study.

21           THE COURT: The next item: "Modification of Pretrial  
22 Order No. 9." I understand that's been completed and we need  
23 not address it any further. The next item: "Injunction  
24 Briefing."

25           MR. HERMAN: Yes, Your Honor. The plaintiffs have

1 met and are meeting again today with attorneys from Texas,  
2 Tennessee, West Virginia, Pennsylvania, New Jersey, Alabama,  
3 all of whom are intending to submit briefs, a number of whom  
4 are intending to request oral argument before the Court on the  
5 issue. We will provide the Court next week and defense counsel  
6 with the curriculum vitae of those counsel who will meet with  
7 Your Honor in the status conference preparatory to argument so  
8 Your Honor will be familiar with the attorneys.

9           We will endeavor to avoid any duplication both  
10 in briefing and oral argument. I understand yesterday a brief  
11 was filed, although I haven't read it. There will be possibly  
12 some briefs filed that we are not coordinating because, for  
13 whatever reason, either we failed to communicate or people did  
14 not access Verilaw or the Court's web site; but as those briefs  
15 come in, if they are not folks we have been in communication  
16 with, we will communicate directly with them and include them  
17 in the loop.

18           MR. IRWIN: Your Honor, I would add that we have  
19 circulated to the Plaintiffs Steering Committee a draft  
20 supplement to the affidavit of Mr. Urquhart, my partner. It is  
21 basically a housekeeping kind of supplement to update a couple  
22 things. It is my understanding from Mr. Herman they do not  
23 have an objection.

24           MR. HERMAN: We have no objection and we don't think  
25 it should delay the schedule Your Honor has set forth.

1           MR. IRWIN: We appreciate that and will file it  
2 tomorrow. We also understand that sometime next week  
3 Mr. Herman will be furnishing to us and to the Court CV's of  
4 the people who are expected to argue in opposition to the  
5 injunction. We appreciate being informed about that. We  
6 included at the end of the joint report our concern about  
7 making sure that both me and those who are going to argue in  
8 opposition to the injunction are served on the respective  
9 Fridays that the briefing deadlines come up.

10           For example, the memo in opposition is due on  
11 Friday, November 2, and we are making efforts to make sure, as  
12 is Mr. Herman's office, that we get served on Friday -- not  
13 Saturday, Sunday, Monday -- because we sure need that time over  
14 the weekend. By the same token, when we file our reply brief  
15 the following Friday, on the 9th, we will make sure the people  
16 who are going to argue in opposition to the motion are served  
17 on Friday so they get our brief on that Friday, as well.

18           THE COURT: The reason I want to meet with you all  
19 preliminarily, that is to say, as a status conference before  
20 the oral argument, is that all of us know that you can put a  
21 lot of issues in briefs; for example, you may pick 15 issues  
22 and brief them, but from the standpoint of oral argument you  
23 are not going to be able to argue 15 issues. You have to  
24 prioritize. I will profit from oral argument on issues I have  
25 the most difficulty with. If I understand an issue that both

1 of you have addressed in briefs, the purpose of my preliminary  
2 status conversation with you before oral argument is to tell  
3 you, "I understand that issue. Let's not waste time on that  
4 particular issue. I understand it."

5           The fact you have put it in the brief doesn't  
6 mean that you have to orally argue every one of those  
7 particular issues. I'm looking for you to prioritize. There  
8 are certain issues that are critical from the standpoint of  
9 argument and there are other issues that you can treat  
10 thoroughly and completely in written form.

11           Be aware of that when you talk to your people,  
12 particularly from the standpoint of the plaintiffs. If you've  
13 got issues you can segregate out and have one person speak on  
14 each of those issues, it is more helpful than having everybody  
15 go over the same thing over and over again.

16           MR. HERMAN: May it please the Court. I think I can  
17 orally, at least, give the Court and the defense some idea of  
18 the attorneys who will be arguing and where they are from at  
19 this point. Mr. Majestro (ph.) from West Virginia, Mr. Locke  
20 on behalf of New Jersey, Mr. Saul Weiss on behalf of  
21 Pennsylvania, Mr. Colvin on behalf of Tennessee, for the MDL  
22 I'll make the introductions and have some brief argument, but  
23 the major arguments will be carried by Mr. Arnold Levin of  
24 Pennsylvania and Mr. Chris Seeger of New York and New Jersey.  
25 At the present time we also have Mr. Albright (ph.) from Texas,



1 who I believe does not plan to make oral argument. We are  
2 expecting several amicus briefs, although until Monday I won't  
3 be sure who will be submitting those.

4 THE COURT: At the status conference, when we get a  
5 little further down the road and I have had an opportunity to  
6 study the briefs, I'm interested in getting everybody on the  
7 same page so I'm not dealing with a railroad track argument  
8 where everybody is just going their own way and they never  
9 converge and meet. I'm interested in hearing or receiving some  
10 sort of agenda from the plaintiffs as to which issue they are  
11 going to address and who is going to address it. Then the  
12 defendants ought to be able to meet that issue and address that  
13 particular issue.

14 It doesn't help me if the plaintiffs talk about  
15 "A" and "B" and the defendants then get up and address "C" and  
16 "D." It's of no help. They have to know what you are going to  
17 talk about and you have to know what they are going to talk  
18 about. I don't mean how you going to deal with it, but the  
19 issue, so everybody is on the same page.

20 MR. HERMAN: Yes, Your Honor. We read you loud and  
21 clear.

22 THE COURT: Okay. One issue that I do want to at  
23 least broach with you is something we haven't talked about at  
24 this point and that is settlement. Usually in a case we all  
25 know, having been down this road most of our lives now, that

1 there is a feeling that let's talk settlement when we're all  
2 ready prepared for trial, and right before the trial we sit  
3 down and talk about settlement. I don't see that as a way of  
4 handling this particular case.

5 I think we have to have somebody designated from  
6 each side whose job is to consider the settlement of the case.  
7 I see this as an ongoing discussion, or at least a discussion  
8 that has several chapters to it, as opposed to resolving it on  
9 the first sitdown. I do think it's timely. We have been at  
10 this now about a year. You all may not have all of the trees  
11 and rocks in the landscape, but you have a feel for the general  
12 terrain of the landscape. It's time to carve out somebody from  
13 the plaintiffs, if you haven't done so, and give them the  
14 agenda to view the case settlement wise, same way from the  
15 defendant, and then I'll be meeting with you status conference  
16 wise in the next period and discussing with you about how we go  
17 about the settlement discussions, whether a magistrate does it  
18 or some other way. I don't think it's too early to begin  
19 looking at that aspect of the case.

20 MR. HERMAN: May it please the Court. Mr. Murray  
21 will chair our settlement team and we'll advise the Court of  
22 the other members in due course. If we don't appoint  
23 Mr. Murray, he'll just tell us we are wrong, anyway.

24 THE COURT: The way I see going about that is I will  
25 meet in the relatively near future with the settlement teams to

1 discuss the mechanics of it. I'm interested in your input as  
2 to whether we go with a magistrate court, certain outside  
3 arbitrators, or something of that nature, some mechanism that  
4 we can deal with it.

5 Anything further? From the settlement  
6 standpoint, the state liaison committee should keep an eye on  
7 that, get some input into that committee so you can at least  
8 know what's happening and participate. Anything further?

9 MR. CAMPION: I would address the statistics for you.  
10 As of about three days ago -- and we are rounding -- we have  
11 about 2,800 plaintiffs active in both state and federal:  
12 Approximately 1,600 before you or on the way; approximately  
13 1,200 in the state courts. You have now 234 cases which have  
14 come to you from CTO's, another 17 on the way. Of these 251  
15 cases, 31 -- or about 12 percent -- are class action cases.

16 On the tolling agreement front, the numbers play  
17 out as follows: As of a couple days ago, in excess of 14,400  
18 people had signed tolling agreements. The vast majority of  
19 those attorneys are people before you in one of the other  
20 cases. We have another 1,500 cases, plus or minus, in the  
21 Ashford case. That's the Louisiana case. So you have in  
22 excess of almost 16,000 people in the tolling agreements; in  
23 the course of passing back and forth in the mails, about  
24 another 7,000.

25 THE COURT: Anything from anyone else? Let's talk

1 about the next meeting. The injunction hearing is November 15.  
2 The monthly meeting, I'm looking at November 29. What are we  
3 trying to do, Fridays now rather than Thursdays?

4 MR. HERMAN: Yes, Your Honor.

5 THE COURT: So that would be November 30. Anything  
6 further?

7 MR. IRWIN: Can I just please check my calendar on  
8 that? I did understand Your Honor to say November 29?

9 THE COURT: November 30.

10 MR. IRWIN: That's fine.

11 THE COURT: Set it for 9:00 on the 30th. Anything  
12 further? Thank you. Court will stand in recess.

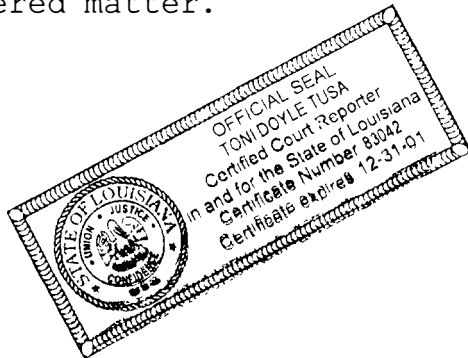
13 THE DEPUTY CLERK: Everyone rise.

14 (WHEREUPON, the Court was in recess.)

15 \* \* \* \* \*

16 CERTIFICATE

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



23  
24 Toni Doyle Tusa  
25 Toni Doyle Tusa, CCR  
Official Court Reporter