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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
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IN RE: Civil Action
No. MD 00-1355
PROPULSID PRODUCTS LIABILITY Section "L"
LITIGATION
New Orleans, Louisiana
November 30, 2001

STATUS CONFERENCE
BEFORE THE HONORABLE ELTON E. FALLON,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs' Herman, Herman, Katz & Cotlar
Steering Committee, Herman, Herman, Katz & Cotlar
By: RUSS M. HERMAN, ESQ.
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Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

P R O C E E D I N G S

(Friday, November 30, 2001)

(Call to Order of the Court)

THE COURT: Be seated, please.

MR. HERMAN: Good morning, Your Honor.

MR. IRWIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. CAMPION: Good morning, Judge.

THE COURT: Good morning.

THE CLERK: This is MDL Number 1355, In Re:

Propulsid Products Liability Litigation.

THE COURT: Would Counsel make their appearance for the record, please.

MR. HERMAN: May it please the Court. Good morning, Judge Fallon and learned Counsel. I'm Russ Herman of Herman Mathis in New Orleans for the Plaintiffs' steering committee.

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

THE COURT: Okay. We're here today in connection with our monthly status meeting. I've received from the parties, joint report Number 12, setting forth the proposed agenda for this meeting.

I'll hear from the parties now with regard to the first item, the master complaint and answer.

MR. HERMAN: Your Honor, the master complaint has

1 been filed. The answer has been filed. We're in the process
2 of preparing one or more motions for certification.

3 THE COURT: And the second is the update of rolling
4 document production

5 MR. HERMAN: Rolling document production has
6 proceeded. Most of the non electronic production has been
7 completed. It's about in the neighborhood of four million
8 pages of materials. Electronic database production is
9 ongoing. We're advised by the Defendants that two particular
10 databases, one of which will be ready for production within a
11 week regarding safety, what I'll say is generic safety
12 materials. The other termed "Navigator" they're working on
13 relates to what I'll call organization and marketing.

14 THE COURT: Where are we with the second database?

15 MR. IRWIN: Your Honor, we -- I was not able to speak
16 to Mr. Canuba yesterday after our pre-conference meeting. So,
17 I don't have any more information on that than I did
18 yesterday. I expect that it will be forthcoming shortly. We
19 do have, as I mentioned yesterday, a specific date to produce
20 the Aris G database, that is the safety database.

21 It is two weeks, Mr. Herman, not one. And we will
22 produce that and deliver that within two weeks.

23 I am hopeful that we can deliver the Navigator at the
24 same time. That is the sales database that Mr. Herman alluded
25 to, and I intend to talk to Mr. Canuba hopefully by the end of

1 the day today, and get together with Mr. Herman's office and
2 discuss with them when we can deliver that. I hope we can
3 deliver it at the same time. I would ask for --

4 THE COURT: Yes, I hope so, too.

5 MR. IRWIN: Yes.

6 THE COURT: In fact, I want Mr. Canuba to do that.
7 If he doesn't or if he's not able to do that, I'm going to
8 require him to come to New Orleans and tell me why.

9 MR. IRWIN: All right.

10 THE COURT: So, I want that done by the two weeks,
11 short of some problem that you come up with.

12 MR. IRWIN: Yes, sir.

13 THE COURT: But he should know that if he doesn't
14 produce it by two weeks, I expect him to be here in New
15 Orleans to tell me why.

16 MR. IRWIN: Your Honor, he has appeared before the
17 Court before. I think Your Honor will recall him. He is very
18 skilled in this area and I think if it can be done within two
19 weeks, he'll get it done. If it can't be, I am sure that he
20 will be able to explain what the circumstances are, and I'm
21 sure he'll be pleased to come to the Court and work with the
22 Court in that regard.

23 THE COURT: Okay. Any other problems with discovery
24 of the documents or videotapes or any of that?

25 MR. IRWIN: There is -- yes, Your Honor. There is

1 one other item with respect to the videotapes, and Mr. Davis
2 and I spoke about that this morning. We are going to meet on
3 that early next week with respect to the videotapes that have
4 been delivered, and there may be some quality problems with
5 respect to the images on the videotapes that we may have to
6 work out. And there are some other videotapes that we intend
7 to deliver to them, with some understandings concerning
8 confidentiality and we intend to meet next week and address
9 that.

10 THE COURT: All right. On both sides, the reason
11 that I'm very anxious to have each side have the material,
12 (from the standpoint of the Defendants, I want them to have
13 the Plaintiff profile forms. And from the standpoint of the
14 Plaintiffs, I want them to have the material.) ~~Because~~ we're
15 getting closer to the date of the class certification
16 hearings. And both sides need that information in order to
17 prepare for it, and I don't want to be continuing that
18 certification hearing. So, whatever I can do to assist the
19 parties to get that information, call it to my attention so I
20 can assist you.

21 Okay. The next item, state liaison counsel.

22 MR. HERMAN: Yes. Your Honor, first of all, I want
23 to commend on the record the activities of your appointed
24 State Liaison Committee. Recently, they have provided
25 invaluable service to the litigation by attempting to resolve

1 discovery matters by participating in briefing and argument on
2 anti-injunction issues and in science matters on the
3 Plaintiff's side.

4 And I want to particularly commend Ms. Barrios,
5 Mr. Barry Hill of West Virginia, and Mr. Sam Davis of New
6 Jersey. Mr. Hill and Mr. Davis have recently performed some
7 extraordinary service to the MDL and Your Honor is aware of
8 Ms. Barrios' contribution.

9 We have met with Defense Counsel this morning. We
10 believe that the deposition discovery issues we've agreed to,
11 and I'll let Mr. Irwin address that. Hopefully, by this
12 afternoon we'll be able to present a joint order.

13 THE COURT: Okay, fine. I am aware of the work and
14 the good work that the State Liaison Committee has been doing
15 and I do appreciate that. I think it's important that you
16 have access, as I've continued to say, to all of the material
17 because I'm conscious of the relationship between this Court
18 and the state courts and the people and claims that you
19 represent. The Court has been very fortunate to have capable
20 conscientious people on the Committee, and I do recognize
21 that.

22 MR. HERMAN: We're also very grateful that
23 Mr. Arsenault and Mr. Dumas, who have been recently engaged in
24 a four or five week trial, have returned to us and they have
25 added a great deal to our efforts, and we look forward to

1 having them continue those efforts.

2 THE COURT: Okay. Anything more on state liaison?

3 MR. IRWIN: Your Honor, I would only add to
4 Mr. Herman's comments that we met this morning, Mr. Herman,
5 Mr. Campion, Mr. Preuss, Mr. Davis and I, with respect to
6 structuring an agreement that Mr. Herman just alluded to. We
7 intend to, after this conference this morning, return to my
8 offices in an effort to finish that agreement, which we hope
9 to be able to present to Your Honor later on this morning, and
10 with the hopes that Your Honor could sign such a state-federal
11 coordination order today.

12 THE COURT: Thank you.

13 MR. CAMPION: Your Honor, if I may just supplement
14 that, to a slight degree.

15 THE COURT: Yes.

16 MR. CAMPION: I just want to state for the record
17 that the arrangements which are in place and which I believe
18 will be memorialized today in the final form of the agreement,
19 enjoy the consent of the attorneys who are representing the
20 Plaintiffs in the Court of Common Pleas cases in Philadelphia.
21 That's Mr. Locks and Mr. Weiss. I have been so advised by
22 Mr. Weiss. They enjoy the consent of the New Jersey
23 Plaintiffs' attorneys, I have so been advised by Mr. Weiss as
24 to that. And they specifically enjoy the consent of the law
25 firm of Weiss & Luxembourg, which has over 350 cases pending

1 in both New Jersey and New York.

2 The arrangement will play out as follows: Once the
3 agreement is signed and appended to an order to be presented
4 to you, it then is the Defendant's obligation to see that this
5 agreement is attached to a stipulation or consent order in the
6 various jurisdictions. My expectation is that there will be
7 dozens of these stipulations, either by case or by
8 jurisdiction.

9 I spoke at the motion about a critical mass. We have
10 clearly reached the critical mass. And to the extent we have
11 not received agreement from, or even communication with
12 certain state's attorneys, we shall do so. And if it becomes
13 necessary that the liability of the agreement be tested in
14 those states, we shall do so. We have reserved the right to
15 resurrect the motion.

16 It is appropriate at this time for the Defendants to
17 express their gratitude to attorneys both from the MDL and
18 from the state, both liaison and non-liaison, for the
19 cooperation they have shown. It started at that conference in
20 chambers and continued through this morning, and we expect
21 that we will be signing some time today. And we say to each
22 one of them, "Thank you very much."

23 THE COURT: Okay. That's good news and I appreciate
24 all the hard work that all of you have put into the matter. I
25 am proud of all of the attorneys who worked so hard to

1 accomplish this task.

2 Let's go to Plaintiff profile forms.

3 MR. IRWIN: Your Honor, we are reporting again this
4 month that we have now received 1,185 patient profile forms.
5 103 are currently overdue and ten will become due within 30
6 days. My sense is that those numbers are not unacceptable at
7 this point and we may see those numbers stabilize at a lower
8 level.

9 The next subject has to do with the Plaintiffs that
10 were the subject of a motion last month involving the tropical
11 storm. After that hearing, Mr. Kim's office furnished us with
12 a number of affidavits that satisfied us that the
13 circumstances surrounding the delay of the delivery of those
14 patient profile forms were justified in view of the tropical
15 storm.

16 We have then since received the patient profile forms
17 from all but one of those Plaintiffs that were the subject of
18 that motion, and that Plaintiff is Ms. Chapman. So therefore,
19 I must assume that, for different reasons, they are not able
20 to deliver Ms. Chapman's patient profile form as promised.
21 And therefore, we would ask that the motion be granted with
22 respect to Ms. Chapman, withdrawn with respect to all of the
23 other Plaintiffs.

24 THE COURT: Is anybody here opposing that motion for
25 Ms. Chapman?

1 MR. HERMAN: Your Honor, may it please the Court, the
2 MDL makes its usual and customary objection to dismissal with
3 prejudice.

4 THE COURT: All right. I understand the objection.
5 I'll dismiss it with prejudice. I grant the motion. Give me
6 the necessary documents.

7 MR. IRWIN: Yes.

8 THE COURT: And again, I'm disappointed that the
9 people haven't responded. We've given them every opportunity
10 to respond. They have received numerous requests. The matter
11 has been set for hearing. Everything has been done to
12 encourage them to comply but to no avail. The Court cannot
13 allow litigants to disregard Court orders.

14 I want everybody to have notice. I want them to have
15 an opportunity to respond. I want to hear their problems. I
16 want to deal with their problems. But when they just ignore
17 the Court's orders, their case must be dismissed.

18 What is the next one that --

19 MR. IRWIN: Next, Your Honor, is the motion to
20 dismiss with respect to Ms. Manasco. Ms. Manasco is the
21 elderly Plaintiff who was the subject of a motion last month
22 and it was described in the opposition that she was elderly
23 and confused, and therefore was not capable of filling out the
24 patient profile form.

25 Since that hearing last month, we have received an

1 affidavit from a paralegal in Mr. Kim's office that says,
2 basically, that they have not been able to get her to fill out
3 the patient profile form, that she is confused, and we do not
4 accept this explanation. We believe that they have an
5 obligation -- Counsel has an obligation to work with their
6 client and to get the information. If not, then they have to
7 come up with an explanation that is medically supported.

8 However, I am not professionally satisfied that
9 Plaintiff Counsel, Mr. Kim, has been properly informed by my
10 office of the pendency of this motion right now, even though
11 we have served it on him. There may be some confusion
12 attendant with the fact that they did send this affidavit in.
13 Therefore, I would ask that the Court put this back to the
14 December hearing, and we will notify Mr. Kim of -- to make
15 sure he understands our position in this regard.

16 THE COURT: All right. I'll do that. But also
17 notify him that unless he comes forward with some acceptable
18 reason, that I am going to dismiss the case. He should know
19 that.

20 I'm going to move that to the next meeting and we'll
21 deal with that at that time.

22 MR. IRWIN: Thank you, Judge.

23 Then, finally, with respect to Charles Long. This is
24 a case involving an individual Plaintiff. And ordinarily,
25 Your Honor, we would avoid presenting and burdening the Court

1 with individual motions to dismiss for a violation of Pretrial
2 Order Number 9, for failing to bring or provide a PPF. We do
3 not think that is a sensible way to use the energies of the
4 Court or the litigants, to do a single motion at a time.

5 However, we felt it was appropriate to do this motion
6 because Mr. Long has attempted to voluntarily dismiss his
7 complaint without prejudice. We oppose that. I believe Your
8 Honor knows that such a motion was filed by Mr. Long to
9 withdraw his complaint without prejudice. A similar motion
10 was filed by Mr. Long to withdraw his complaint without
11 prejudice before the MDL Panel. The MDL Panel denied that
12 motion. Obviously, that is not the type of motion that's
13 acted on by the MDL Panel.

14 It was subsequently filed here before Your Honor. We
15 oppose the motion to withdraw this complaint without
16 prejudice, and we have also filed a motion that it be
17 dismissed for a violation of Pretrial Order Number 9. We have
18 attached the usual documentation and we ask that Your Honor
19 grant our motion to dismiss this case.

20 THE COURT: Let me hear from --

21 MR. HERMAN: May it please the Court, Your Honor,
22 last night I received a call from counsel for this party. I
23 was asked to specifically oppose a dismissal with prejudice.
24 Counsel asked me to state affirmatively to the Court that they
25 had undertaken to dismiss their own case without prejudice.

1 I advised counsel that the MDL had taken a position
2 before the Court, consistently against dismissals with
3 prejudice and I would so make the statement on the record for
4 the benefit of counsel and his client.

5 THE COURT: Okay. I understand. I've had an
6 opportunity to review the material. I don't see any reason
7 why this case should be distinguished from the other cases in
8 which I've dismissed with prejudice, so I'm going to grant the
9 motion.

10 MR. IRWIN: Okay.

11 THE COURT: Right. I'll deny the Plaintiff's motion
12 to dismiss without prejudice and grant the Defendant's motion
13 to dismiss with prejudice.

14 MR. IRWIN: We will submit the appropriate orders in
15 that regard for Your Honor's consideration.

16 Judge, there are two other issues relating to patient
17 profile forms that are on the horizon, which I will address
18 briefly because there may be motions developed towards those
19 two issues. One is there are a series of Plaintiffs who have
20 furnished patient profile forms, but have not supplied signed
21 authorizations. But we have been in correspondence with this
22 particular group of Plaintiffs through their attorneys and a
23 number of properly executed medical authorizations have been
24 forthcoming as a result of that correspondence. If we do not
25 achieve substantial compliance with this problem, however, we

1 will present it to the Court for hearing in January.

2 The second issue has to do with the presentation by
3 some Plaintiff Counsel to us of authorizations which are
4 signed in a restricted way. They are not blanket
5 authorizations. It requires us then to go back and get more
6 authorizations signed, and we believe that this is not
7 consistent with Pretrial Order Number 9 and it creates all
8 sorts of delays requiring us to go back again and again and
9 again for additional authorizations.

10 We are discussing this issue with the Plaintiffs'
11 liaison counsel and if we cannot resolve it, then we will
12 present it to the Court for a determination in January.

13 THE COURT: Okay. Oftentimes, in situations like
14 this, the devil is in the details and oftentimes, you can work
15 up some language that gives both comfort to the Plaintiffs and
16 also some efficiency from your standpoint. So, let's keep
17 that in mind and see if you can work it out. If not, I'll
18 work it out.

19 Subpoena to the FDA, next item.

20 MR. HERMAN: We have a dispute regarding some
21 redactions of a few FDA documents and some non-production of a
22 few documents. We have discussed it with Defense Counsel. We
23 expect to work these things out over the next three or four
24 days. If we don't, if we're not able to work them out, they
25 will become the subject of a motion, a December motion.

1 THE COURT: What is the problem at this point?

2 MR. HERMAN: There are some materials that have not
3 been furnished on the basis that either the FDA or Counsel
4 believes they're not germane. Well, we're not satisfied that
5 they're not germane. We're trying to work this out, short of
6 a discovery motion and hearing. There is an issue as to
7 whether all the documents have been produced. We are
8 attempting to work that out.

9 In the last three days, I have been advised that
10 there is another FDA resource, of which we were unaware
11 previously, and which no production has been made. And I
12 hesitate -- I hesitate to even speak about it because I can't
13 -- I'm not even in a position to identify it properly before
14 the Court or to Defense Counsel. I do not want, regarding
15 this non-produced database, a database from the FDA, there is
16 no inference at all that it is a problem participated in or
17 caused by Defense Counsel. That's certainly not true.

18 I'm well aware of Your Honor's prior directive
19 regarding the FDA, and if we can't get some satisfaction on
20 this within the next week, we'll immediately bring it to your
21 attention and Defense Counsel's attention.

22 THE COURT: Okay. And if it presents problems on
23 either the profile forms or any other material from the FDA or
24 for that matter, any material; let's not feel you have to wait
25 until the next meeting. If we can do it sooner than that,

1 then give my chambers a call and I'll set it and we'll do it
2 in between those meetings if necessary. I will give you a
3 special setting so we can deal with this. Because again, I do
4 want you to have the information, both sides, so you will be
5 fully prepared for the certification hearing.

6 Okay. The next service list.

7 MR. IRWIN: Your Honor, there are very few changes to
8 the service list this month, which I would like to feel
9 optimistic -- some degree of optimism. Well maybe it's
10 getting a little more accurate. I think it's darn accurate
11 but I think it may be getting better. So, I have a copy here
12 for Ms. Lambert and Plaintiffs' liaison counsel and the State
13 Liaison Committee.

14 THE COURT: Okay. The next item is an ongoing study
15 subpoena to Bev Glenn.

16 MR. HERMAN: We have discussed the issue with Defense
17 Counsel. The individual for Bev Glenn, I believe his name is
18 Callahan, if I recall the name correctly, has not issued a
19 certification yet. Defense Counsel is going to attempt in the
20 next two or three days to get that certification. Failing
21 that, it will be part of the matters which we will bring to
22 the Court's attention next week.

23 THE COURT: All right.

24 MR. IRWIN: Your Honor, a request for a certification
25 has been delivered by Defense Counsel to Mr. Callahan. It

1 simply is a certification that would state, and does state,
2 that all documents responsive to the subpoena have been
3 produced. We have not been able to be in touch with
4 Mr. Callahan, I am informed, recently. And therefore, I
5 cannot report to the Court the status with respect to that
6 certification at this point.

7 THE COURT: Another way of doing it is to notice him
8 for a 30(b)(6) deposition and take his testimony. That way,
9 swear him in and have him certify the information is complete.
10 You can take it by phone. You can ask him the questions to
11 get comfort that what he did was fully completed and deal with
12 it that way. But we ought to take care of that expeditiously.

13 MR. IRWIN: Yes, sir.

14 MR. HERMAN: Your Honor, I want to advise Defense
15 Counsel and the Court that the week of December 10th, I have
16 to be in California on some business in connection with this
17 matter. I have called Bev Glenn and asked that Mr. Callahan
18 contact me so that I can meet with him directly and have him
19 sign off on the certification presented by Defense Counsel.

20 And if I don't get an answer to that by Monday or
21 Tuesday, I'll be in to see you very quickly with Defense
22 Counsel.

23 THE COURT: Mr. Callahan should know that the Court
24 expects him to do that. If he doesn't do that, I'm going to
25 consider that an affront to the Court and act accordingly.

1 So, he should be advised of that.

2 All right. Let's do the third party Subpoena Duces
3 Tecum.

4 MR. HERMAN: With regard to the third party Subpoena
5 Duces Tecum, we have received most of the certifications and
6 they are in good order. I believe that there is some third
7 party production which hasn't been returned yet, but we have
8 every expectation that we'll receive it very shortly.

9 THE COURT: I'm aware of the problems oftentimes
10 presented with third party material. It's unusual to have the
11 third party submit the material to Defense Counsel before it
12 gets to the Plaintiff's Counsel. The issue that's significant
13 in my mind, that the Defense Counsel has raised, is that there
14 are some issues of privacy or some other issues of concern,
15 that third parties who are not a part of this action may be
16 imposed upon unduly, and other reasons that require this
17 procedure.

18 But that can cause some delays. The way that I see
19 the procedure working is for the material to be sent to
20 someone who documents it with a Bates stamp. All the material
21 they get ought to be sequentially Bates stamped. Then when
22 the Defendant gets it, the Defendant should make the cut as to
23 what they feel should be excluded for privacy reasons, list
24 those Bates stamped items on some sort of document explaining
25 that these are the items excluded and the reason why it should

1 be withheld.

2 Give the material that is not withheld to the
3 Plaintiff. Give the list of documents that have been withheld
4 and the reasons for withholding to the Plaintiffs. The
5 Plaintiffs should look at them, determine whether or not they
6 agree or disagree with that. If they disagree, then they
7 should notify the Court. I will look at the documents and
8 make the determination as to whether or not the material
9 should be produced.

10 The difficulty with that procedure is time. And so,
11 we need cooperation of everyone to move it faster. If it's
12 not going to be moved faster, I'm going to have to reconsider
13 whether or not we go the detour route. So, to the extent that
14 it can be moved faster, I think that the burden is on the
15 Defendants. Do everything you can. If I can assist in that,
16 I'll do so. I'm trying to be sensitive to the privacy
17 problems and to the other problems that were presented, but at
18 the same time, we need to move forward with the production of
19 the information.

20 MR. HERMAN: Thank you, Your Honor. I have one thing
21 to add to the issue, if I might. Some redactions are made on
22 the basis of privilege, some have been made upon someone's
23 determination of relevancy, and some on privacy, the three
24 issues here.

25 Rather than burden the Court or Defense Counsel, what

1 our intention is, is that once we have received all of the
2 logs on relevancy, privilege and privacy, and a complete
3 return of whatever is returned, then under the local rule, we
4 will have a conference with Defense Counsel to try and resolve
5 those issues. And if we can't, we'll bring them all at once
6 for resolution, rather than taking each third party issue
7 separately.

8 I think in the long run it will save time if we do it
9 that way, and that is another issue which should be resolved
10 in the next couple of weeks.

11 THE COURT: From the standpoint of relevancy, I don't
12 see much at issue in relevancy. Relevancy is in the eye of
13 the beholder. I don't see any relevance problems in this
14 case. I see a privilege problem, potentially. I see a
15 privacy problem, potentially. But relevancy, at the discovery
16 stage of the case, relevancy is -- it's too amorphous. I
17 don't see any basis for an objection of relevancy of this type
18 of material in the discovery phase of the case. It's a
19 legitimate argument for the evidentiary phase of the case, but
20 not in this stage of the case.

21 I'm aware of the amendments to the rules where it
22 should be relevant to issues, defenses or assertions, but even
23 with the new rules, relevancy in discovery phase is a very,
24 very uphill battle. So, let's keep that in mind.

25 Motion to enter scheduling order, next item for

1 hearing on class certification.

2 MR. HERMAN: Your Honor, as Your Honor is aware,
3 Mr. Irwin and I have met with Your Honor. The only issue on
4 scheduling, I believe, related to whether there would be a
5 separate Daubert hearing in advance of the actual cert
6 hearing. It's my understanding that, based on those
7 discussions, the Daubert issue would be taken up at the time
8 of cert hearing unless there's some good cause shown in the
9 interim.

10 And to that extent, I think we should be able to
11 present to Your Honor, a motion entering a scheduling order to
12 which we've both agreed.

13 THE COURT: That's my position on it. I don't want
14 to put another obstacle in advance of the class certification.
15 I'm aware of the difficulty time-wise, energy-wise, focus-
16 wise, that the injunction proceeding had on all of the
17 parties. Instead of proceeding with the discovery and trial
18 preparation phase of the case, all sides were stopped and
19 devoted all of their energy, all of their time, all of their
20 talent to dealing with the injunction issue.

21 We ought to be able to deal with the limited Daubert
22 issues in the class certification hearing so that you don't
23 have to gear up for a Daubert hearing in advance of the cert
24 hearing, and then gear up again for the cert hearing. Let's
25 see if we can marry them both together and deal with them at

1 the same time. Remember that the Daubert questions in the
2 certification hearing are very limited in nature. They can be
3 presented by paper. They can be presented by reports. They
4 can be done in a short fashion, rather than the involved
5 Daubert hearings that are often undertaken at the merit phase
6 of the case.

7 But get together and give me the final draft of the
8 matter.

9 MR. HERMAN: I think you have it, Your Honor. It's
10 attached to --

11 THE COURT: I do have it, but I've got two drafts,
12 one for the Plaintiffs and one for the Defendants.

13 MR. HERMAN: I think you'll find that the one
14 attached to Plaintiffs' motion conforms with what Your Honor
15 required when we had these discussions.

16 THE COURT: Well, let me hear from the Defendant. If
17 that's so, then we'll deal with it now.

18 MR. IRWIN: I believe that is right, Your Honor.

19 THE COURT: Okay.

20 MR. IRWIN: There was only a difference with respect
21 to a suggestion for a preamble. And I believe that in light
22 of Your Honor's comments, that the order that we have
23 submitted is satisfactory.

24 MR. HERMAN: The order -- that's correct.

25 MR. IRWIN: That we submitted in our opposition.

1 MR. HERMAN: The order that --

2 THE COURT: Well, take a look at it and let me know
3 by the end of the day.

4 MR. IRWIN: All right. We'd better look at it,
5 Judge. I'm sitting here looking back.

6 THE COURT: Yes, I understand.

7 MR. IRWIN: But the only other comment I'd like to
8 make, Your Honor, with respect to the Daubert issue is that
9 our position has been, and remains, that if appropriate and if
10 we could demonstrate to the Court that it was a proper
11 management of the class certification issue; we would reserve
12 the suggestion that it could be considered, in part, a limited
13 Daubert issue before March 22.

14 THE COURT: I understand that.

15 MR. IRWIN: That was our only position in that
16 regard.

17 THE COURT: I understand that. And if that, if
18 something like that happens, I'll revisit it. But I don't
19 expect it to happen.

20 MR. IRWIN: And with the Court's permission, the only
21 other comment I would make in reflection of my very learned
22 opponent, Mr. Levin's excellent presentation the other day,
23 with respect to the injunction matters and his skilled
24 abilities to always get in the last word, I would just point
25 out to Your Honor that the Visa/Mastercard decision by the

1 Second Circuit on the Daubert issue was published on October
2 17th in Case Number 00-7699, at which point the Second Circuit
3 said, "Although there is a rule for a Daubert test here, it is
4 a limited one, tailored to the purpose for which the expert
5 opinion is offered."

6 And we believe that that is the Court's ruling and we
7 believe that this decision is consistent with that.

8 THE COURT: Okay.

9 MR. HERMAN: Well, I'm a sensitive fellow, Jim, and
10 if you come up with anything on the whiskey rebellion, --

11 MR. IRWIN: I'm looking. I'm looking.

12 THE COURT: Anything on, what is it, Plaintiff and
13 Defendant's respective requests for production of documents?

14 MR. HERMAN: We have, on the Plaintiff's side, a
15 draft as of yesterday of our response. It's being circulated
16 and should be filed very shortly. There are some outstanding
17 requests that Plaintiffs have made that have been -- that have
18 been objected to, that we're not prepared to bring a motion on
19 yet. But I don't think they're issues that should retard the
20 progress that we're making. We've got our hands on enough to
21 deal with right now.

22 THE COURT: There was some mention about the
23 Tennessee problem. Tennessee felt that they were not getting
24 some discovery responses from the Defendant. Anything from
25 state liaison counsel on that?

1 MR. HERMAN: I think we resolved it this morning.

2 THE COURT: Did you? You resolved that?

3 MR. IRWIN: Yes.

4 THE COURT: Okay.

5 MR. IRWIN: Your Honor, may I make one comment on
6 that subject?

7 THE COURT: Yes.

8 MR. IRWIN: The discovery that was directed to the
9 Defendant in the Tennessee case occurred before the transfer
10 to the MDL. It is a case specific discovery and under the
11 Court's pretrial orders, case specific discovery is not
12 permitted, directed towards the Defendant in the MDL setting.
13 We, of course, respond to master discovery.

14 However, since we agreed to answer this discovery
15 before the case was transferred to the MDL, we are going to do
16 that. We discussed that this morning with Mr. Herman and we
17 are going to do it with the proviso and with the Plaintiff's
18 liaison counsel's agreement, that this should not open the
19 floodgates up for individualized discovery here at the MDL.
20 And with that understanding, we intend to answer that
21 discovery.

22 MR. HERMAN: And I've agreed to sign off on that,
23 Your Honor.

24 THE COURT: Okay.

25 MR. HERMAN: With regard to the briefing and hearing

1 on the injunction motion, the only -- I have two statements to
2 make with respect to that. First of all, as we've indicated
3 to the Court, we expect to present the discovery order that
4 gave birth to a resolution of the discovery -- deposition
5 discovery issues that gave birth to the injunction controversy
6 this afternoon.

7 In the agreement, Defendants will withdraw their
8 motion for injunction without prejudice but reserve their
9 rights to reurge same in the event, and in the Defendant's
10 judgment, sole judgment, that discovery or class cert
11 coordination is not functioning.

12 THE COURT: That's fine. Good.

13 MR. HERMAN: With regard to new matters, Your Honor,
14 I can report that Mr. Davis and I met with Defense Counsel
15 early this morning. Issues 1 through 7 have been resolved to
16 our satisfaction. Defense Counsel has indicated with regard
17 to the individual materials that we've requested, that they
18 are prepared to provide those today, and we have already
19 previously discussed today, the electronic database
20 production.

21 So, I'm happy to say we don't -- you don't have to
22 deal with 1 through 7.

23 THE COURT: That's fine.

24 MR. HERMAN: Number 8 has also been resolved. Number
25 9 has been discussed and, we believe, resolved. Number 10,

1 the scheduling of depositions; we are going to give to Defense
2 Counsel today, the list of Defendant's employers, employees
3 and former employees in the United States, who the states and
4 the MDL wish to depose.

5 We are going to, next week, and we fully intend to
6 involve the state's liaison counsel, in the process set up a
7 deposition schedule. The December, two depositions that are
8 noticed in December will go forward. The remaining
9 depositions will not commence until January, but they will
10 commence on an agreed to schedule.

11 With respect to the foreign depositions, we expect to
12 meet and confer next week and have a joint order produced for
13 Your Honor and for the states, as to the guidelines we have
14 agreed to with regard to foreign depositions. So, I believe
15 that the scheduling and coordination issues as regards
16 depositions have been resolved by the agreement reached and
17 will be resolved in terms of scheduling next week. We don't
18 see any conflicts in that on the horizon.

19 MR. IRWIN: We agree with those comments, Your Honor.

20 THE COURT: Fine. What about the SDT and --

21 MR. HERMAN: We discussed that this morning and I now
22 understand the issue and I'm going to resolve it with Defense
23 Counsel in the next week. Basically, there are sets of
24 materials and Defense Counsel need a certification that the
25 materials are complete, and which materials govern the issue.

1 THE COURT: Yes.

2 MR. HERMAN: The last matter is the Plaintiffs will
3 file today, their petition for a mechanism to deposit a
4 percentage of fees -- a percentage of recovery in terms of
5 fees and costs, under the Court's tutelage and direction.
6 Basically, what this motion request is that any MDL case
7 that's resolved by a settlement or judgment, that six percent
8 of the recovery, of the gross recovery, be deposited for the
9 Court's future determination as to fees and costs in
10 connection with the conduct of the MDL by lawyers
11 participating in the conduct of the litigation.

12 Attorneys who have cases in the states who enter a
13 voluntary, a purely voluntary agreement, four percent will be
14 deducted from their gross recovery. The reason for the
15 difference between the six percent and the four percent is the
16 state attorneys conducting their own cases have their own
17 litigation efforts and costs that have to be recognized in
18 some way and this six/four provision seems to have worked
19 equitably.

20 And in addition to that, before this case -- after
21 this case was MDL'd, but before Your Honor selected a
22 Plaintiff's Steering Committee, there was a meeting of over
23 150 attorneys who had cases, who were MDL'd and who had cases
24 that weren't MDL'd, and representations were made that, of the
25 six percent and four percent, and while there was not

1 unanimous agreement, I can report to the Court, there was very
2 general agreement among all counsel, that such a procedure
3 would be fair and equitable, as long as individuals who had
4 state cases would participate on a voluntary basis rather than
5 on a compelled basis.

6 We'd like to file that today, notice it, and set it
7 for hearing at our next conference with the Court.

8 THE COURT: All right, fine.

9 Any comments on any of that from the Defendant?

10 MR. IRWIN: No, thank you, Your Honor.

11 THE COURT: All right. We've talked the last time
12 about a Settlement Committee and I was advised by the
13 Plaintiffs as to the membership of that Committee and also
14 from the Defendants. I would like to, following this meeting,
15 meet with those Committees, with liaison counsel, and discuss
16 some structure or plans, future plans, as to what we're going
17 to do.

18 MR. HERMAN: Your Honor, in that connection,
19 Mr. Davis, Mr. Murray, and Mr. Levin will meet with us -- will
20 meet with you immediately following the conference.

21 THE COURT: All right.

22 MR. IRWIN: As will Mr. Preuss and Mr. Campion, Your
23 Honor.

24 THE COURT: Okay, fine. Anything further?

25 MR. HERMAN: May I have one moment, please, Your

1 Honor?

2 THE COURT: Yes.

3 And while you're doing that, let's talk about the
4 next status conference. In order not to have it in between
5 the holidays, I was looking at January the 4th or January the
6 11th. Does that work for either one of you all? It's both
7 Fridays.

8 MR. IRWIN: January 11th is fine for me, Your Honor.

9 MR. HERMAN: January 11th, Your Honor.

10 THE COURT: Will that work?

11 MR. IRWIN: Yes, Your Honor.

12 THE COURT: It seems to be better than having it
13 December the 28th or 29th, in case people are out of town.

14 MR. HERMAN: No, sir, that will be fine.

15 THE COURT: All right. The next one, then, will be
16 January the 11th at 9:00.

17 MR. HERMAN: And Your Honor, I'm wondering if we
18 might have a date in December to notice what I'll call the fee
19 and cost petition?

20 THE COURT: What's the time frame on that?

21 MR. HERMAN: We'll serve it through Verilaw and it's
22 a --

23 THE COURT: What's our motion days, okay, if we --

24 THE CLERK: Judge, the 12th and the 19th.

25 THE COURT: The 12th and 19th of December.

1 MR. HERMAN: December the 19th. I want to make sure
2 that everybody gets fair notice.

3 THE COURT: All right. We'll set it for that time.

4 MR. HERMAN: We appreciate that, Your Honor.

5 THE COURT: Anything further?

6 All right, thanks very much and I'll see the
7 Committees, shortly.

8 MR. HERMAN: Okay.

9 MR. IRWIN: Thank you, Your Honor.

10 THE COURT: Thank you.

11 * * * * *

12 (Whereupon, the hearing is concluded)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings in the
above-entitled matter.


Dorothy M. Bourgeois

11/30/01
Date