

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS , LOUISIANA

IN RE: : MDL 1355-"L"  
:  
PROPULSID PRODUCT : New Orleans, Louisiana  
LIABILITY LITIGATION : Wednesday, June 12, 2002  
: : : : : 9:23 a.m.

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

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P R O C E E D I N G S

MORNING SESSION

(Wednesday, June 12, 2002)

(Court convened at 9:23 a.m.)

THE COURT: Good morning, ladies and gentlemen. I'm sorry to keep you waiting. I have been meeting with your liaison counsel to see if we could shorten our meeting, which is our usual procedure. We will take the first item on the agenda. This is our monthly meeting. The first item is an update of documents production, electronic documents production. Let me hear for the record the presence of counsel, please.

MR. IRWIN: Good morning. My name is Jim Irwin for the defendants.

MR. HERMAN: Good morning, Judge Fallon. With respect to item number one, the electronic documents production, we still are awaiting the process and reprocessing of the electronic data. The data that we originally got was sent back to the defendants at their request. Defendants indicated they were some privileged materials. We are having a problem because of the objective coding. I'm not certain what the due date is now for that production, and we will be filing a motion to compel.

THE COURT: All right, I understand that so far 6,500,000 pages of documents have been produced, and we are dealing with

1 251,000 pages of e-mail which was produced by the defendants,  
2 which was produced and shortly after production defendants  
3 indicated that some of the materials were privileged and were  
4 mistakenly produced and asked that it be sent back. It was sent  
5 back, and a portion of this material has been re-submitted to  
6 the plaintiffs.

7 MR. IRWIN: I was not able to speak to Ken Connear yet to  
8 get the status of that production. What happened was that when  
9 we produced the images and the annexed text files and objective  
10 coding files so that they could all be electronically disbursable,  
11 we discovered that the process did not adequately screen  
12 appropriate redactions and so forth. And as Your Honor knows,  
13 we then asked the plaintiffs' liaison counsel that they circuitously  
14 agree to return that material to us, and they did.

15 We then got back to them in a piecemeal fashion the  
16 images, and they have been returned to them. So they have  
17 the images, but they do not have the coding and the text files  
18 that would allow for complete searching, because we had to go  
19 to another vendor to do that. We have done that, and I am  
20 told that by the end of next week there will be the delivery  
21 of the electronic form of that information. So the 250,000  
22 e-mails, and these are domestic e-mails if one can think of  
23 them, they were segregated into Propulsid folders by the users  
24 voluntarily. Those people who felt that for whatever reason  
25 I am going to create a new, open Propulsid file, I think this

1 docuemnt is something I should locate in that file. And that's  
2 what this information is. That will be completed by the end  
3 of next week. That's the domestic.


4 Beer Sup will be, thankfully, we will not have to go  
5 through the same setbacks with Beer Sup that we did with  
6 domestics. We learned that because of those problems and then  
7 had the Beer Sup e-mails sent directly to their new vendor.  
8 Therefore, all of the Beer Sup e-mails together with the  
9 direct and usable text file information will be delivered in  
10 late June.

11 That leaves us with another area. There is a larger area.  
12 This is related to the e-mails that have not been segregated,  
13 e-mails that may find themselves anywhere, who knows where, on  
14 any drive. And last fall and last winter Lenny Davis and Ken  
15 Connear and Dave Buchanan developed search files that can be  
16 carefully worked on to use to provide for the preservation of  
17 their information that was on search terms were going to be  
18 used. And then no one knows what is out there really. And  
19 those search terms were developed, and then the files were  
20 preserved using those search terms. Where it stands now is  
21 that Mr. Connear and Mr. Buchanan need to make sure that  
22 whatever search terms that they use next are the search terms  
23 that are used to retrieve that unsegregated e-mail data. We  
24 don't know what that will retrieve. We don't know what that  
25 language net will haul in, and we don't know how expensive

1 that will be. But that is the, that's the remaining e-mail  
2 issue that needs to be resolved. I think the other two e-mails  
3 will be resolved by the end of this month.

4 THE COURT: Let me hear from you, Mr. Herman, on that  
5 last point. The first two I think have been resolved, and it is  
6 back to the defendants to produce that information at the time,  
7 the first by next week, and the second by the end of the month.  
8 What about the third issue?

9 MR. HERMAN: Your Honor, let me answer your question first.  
10 The third issue: Mr. Buchanan and Mr. Davis are prepared to  
11 meet at any time to discuss any additional search terms that  
12 may be --

13 THE COURT: Let's do that within a week. 

14 MR. HERMAN: Yes, Your Honor. I would be remiss, however,  
15 if I didn't make another statement about this issue. We have  
16 been attempting to get this material now for the best part of  
17 six months. Your Honor can well understand, and I'm certain  
18 everyone understands, it is very difficult to take depositions  
19 and prepare them when you don't have the basic material to  
20 examine the primary witnesses. For example, just this month a  
21 document issued by Robert Vermuhlen -- this is by Janzen  
22 partially in English and partially in a foreign language --  
23 regarding one of the primary studies dated July 27, 1999, asked  
24 how many smoking guns do we need before we pull this drug from  
25 the market? It seems to me a document like that had we had it

1 earlier would have been the subject of questioning. Mr.  
2 Vermuhlen..wasn't even previously on a list to take an immediate  
3 deposition or a 30(B)(6). Not only did it affect class cert  
4 issues, but more importantly now that Your Honor has rendered  
5 this as a class cert, certainly it affects the ability of  
6 individual plaintiffs to go forward. I point that out because  
7 when you are talking about not just 235,000 e-mails but another  
8 400,000 and then some e-mails we don't even know exist, Your  
9 Honor is concerned as to when we thought discovery would be  
10 complete, which is, of course, a more than fair judicial  
11 inquiry, and we have got 800,000 e-mails to review, to code and  
12 then to evaluate. And I believe that's where, you will excuse  
13 the expression, that's where the bone is hidden. It is very  
14 difficult to gauge when discovery can be reasonably completed.

15 So what we would like to do is go ahead since we have  
16 held back, file our motion to produce for all of these issues  
17 and then as the matter is resolved by the defendants we just  
18 immediately notify the Court and take that off. But I think  
19 that we need to have a hearing on these issues.

20 THE COURT: Let's do that and set them all at one time  
21 so I can deal with them all at one time.

22 MR. HERMAN: Yes, Your Honor.

23 THE COURT: Are we finished with the first issue, search item?

24 MR. HERMAN: Yes, Your Honor.

25 THE COURT: Let's go to the second item, the state

1 liaison counsel.

2 MR. HERMAN: Your Honor has met with state liaison  
3 counsel this morning. Mr. Arsenault on behalf of state liaison  
4 committee, you met with us last night concerning depositions  
5 scheduled, and we had two depositions that we believe are set,  
6 one set for next week; and we have the material to go forward  
7 with that. We will. One is set for later, I believe, in the  
8 month, and we don't have the material to go forward. And based  
9 on discussions Your Honor had in chambers this morning, the  
10 MDL expects to list the particular depositions we feel we need  
11 now, the individuals, the 30(B)(6), give them to the defense  
12 counsel, pick dates and places for those depositions, include  
13 the New Jersey and Pennsylvania folks in those discussions,  
14 but go ahead and set those depositions for the rest of the  
15 summer with a schedule that we feel we can meet based upon the  
16 written discovery, the document discovery taken so far.

17 THE COURT: Okay. The Court should say something about  
18 the state liaison matter. I tried early on in this litigation  
19 to take into consideration the discovery interests of both the  
20 state counsel and the MDL counsel. I felt it was good for all  
21 sides and also good for the system if we could encourage and  
22 require coordinated discovery so that the discovery would be  
23 both complete and at the same time would be done one time  
24 rather than exhaust the resources of all sides and create  
25 problems. But this requires cooperation from everyone,

1 particularly cooperation from the states.

2 Now, I know that the states by virtue of the diverse laws  
3 and procedures are more of a loose federation than is the MDL  
4 committee. But still it is essential that we get the coopera-  
5 tion of the states. I met with Mr. Weiss and Mr. Jacoby this  
6 morning, and each assured me that there was some misunderstand-  
7 ing or problems that had arisen through no one's fault, but  
8 that they are interested in pursuing the matter with vigor and  
9 cooperating with the MDL committee..

10 I have also received assurances from the MDL representa-  
11 tives that they are, likewise, interested in participating in  
12 cooperation with the states as long as it does not retard their  
13 development of the material. So let me hear from the state  
14 liaison committee. Anything on that, Mr. Arsenault?

15 MR. ARSENAULT: For an extended period of time, Judge, it  
16 seems like cooperation was moving forward nicely, and deposi-  
17 tions were being coordinated. Recently, though, and I don't  
18 know whether there is just a lack of communication that was  
19 taking place, whether people got preoccupied with the activities  
20 associated with class certification, but it seems that there  
21 has been a diminution in communications. Perhaps that's the  
22 source of the problem. I have got a deposition that I will be  
23 taking Wednesday in Philadelphia, and I anticipate coordinating  
24 that activity as we have been doing in the past with our state  
25 counterparts. And we are amenable to continuing with that mode,



1 and we are assuming that the states are, likewise, inclined.

2 THE COURT: We have an agreement signed by representatives  
3 of the states as well as representatives in the MDL proceedings.  
4 I do expect everybody to abide by those agreements. If they  
5 begin creating problems, I need to know about it as soon as  
6 possible so that I can take action. I don't want it to retard  
7 the development of the discovery process in the MDL. At the  
8 same time, I do want the states to get as much material as they  
9 need. That's the purpose of the coordination. Anybody else  
10 have any comments on this? Mr. Weiss, Mr. Jacoby, I appreciate  
11 both of you coming.

12 MR. JACOBY: Thank you, Your Honor. Just to reiterate,  
13 reaffirm what we said to you in chambers, we have been having a  
14 few sparks; they are corrected, and I will say that we look  
15 forward to continuing to work with the MDL and to move ahead  
16 and prosecute this matter as vigorously as possible.

17 THE COURT: Mr. Weiss?

18 MR. WEISS: I agree with Mr. Jacoby, Your Honor.

19 THE COURT: Let's go to the next item, patient profile  
20 forms.

21 MR. IRWIN: Your Honor, the report, the joint report,  
22 paragraph three describes the status of the patient profile  
23 forms, where we are. And I think as we had suggested at one of  
24 our previous meetings, we thought maybe now was an appropriate

25

1 time to submit to the Court for considration in 54(B). We have  
2 circulated the draft to plaintiffs' steering committee, and I  
3 don't know if Lenny has has an opportunity to read it completely.  
4 I have the original and a copy here which I can give to your  
5 clerk, and then I could then give him a call at such time as  
6 Mr. Davis and I had --

7 THE COURT: Give that to me. As I mentioned in the past,  
8 rather than take these matters one at a time and keep issuing  
9 54(B)s, I like them done all in globo. And at this particular  
10 juncture it seems appropriate that we look at those cases that  
11 I have dismissed to get some finality to those matters. And I  
12 will look it over. Let me hear from you within two days as to  
13 the plaintiffs' position.

14 MR. IRWIN: Yes, Your Honor.

15 MR. HERMAN: Just for the record, we reiterate our  
16 objections to any dismissal with prejudice.

17 THE COURT: I understand. The next item is service list  
18 of attorneys.

19 MR. IRWIN: Yes, Your Honor. We believe it is accurate.  
20 The Court has inquired in the past as we have, as we have  
21 circulated this list at each monthly status conference. We  
22 have not had any inquiries suggesting any flaws in the list.  
23 So, therefore, we believe ti is accurate. And I have a copy  
24 here for your clerk and state liaison committee and for the  
25 plaintiffs' steering committee.

1 THE COURT: And is this the list that appears in Verilaw?

2 MR. IRWIN: Yes, Your Honor, it is.

3 THE COURT: The next item is ongoing studies and  
4 subpoena of department people.

5 MR. HERMAN: Your Honor, I believe you failed to mention  
6 that previous item, FDA subpoena. As Your Honor will recall,  
7 we were advised by the FDA that they found some more documents.  
8 We are reviewing those documents right now. Based on other  
9 information which has been produced, we still believe that  
10 their documents that haven't been produced, we are not prepared  
11 to make a report on that until that review is final. It should  
12 be final before we meet again, and we will make a report to  
13 Your Honor and defense counsel.

14 THE COURT: All right. The last time the issue came up  
15 there was a motion, and in the presence of both liaison counsel  
16 I got the FDA representative on the line, and we talked about  
17 it. And I understood they were going to produce all the  
18 materials that they had. If that is not the case, let me know  
19 about it. Because that was not my understanding from what was  
20 related to me.

21 MR. HERMAN: I'm not suggesting either that there was any  
22 intentional non-production by the FDA. Their last production  
23 it just seems to us that there are tearouts that we haven't  
24 received yet. ~~With~~ With the next issue, we are still having problems  
25 with their Bevin issue. You ordered production. As Your Honor

1 recalls, one of the defense counsel wrote across the top, a  
2 report of the Bevlin study draft. We now understand from  
3 depositions that were taken in Europe this week that there are  
4 actually four drafts. And looking at the definition of  
5 ongoing study and considering the history, the problem getting  
6 this study itself was completed. As far as the raw material,  
7 we still are having problems getting full production out of  
8 their Bevlin study. And I will ask that we will just place  
9 the issue within our motion to produce, comprehensive motion to  
10 produce that we intend to file very shortly.

11 I might add, looking at the next issue which is the  
12 Covance issue, I still on behalf of the PSC object to the  
13 defendants venting our subpoenas to third parties. I don't  
14 understand that process. If I issue subpoenas, the documents  
15 are supposed to be returned to me, not returned to the  
16 defendants and first for them to look at and then for me to  
17 look at. And those documents would be protected by an order  
18 anyway. So there is no, I can't see any reason for that  
19 process to go on. And if we have got more third-party  
20 subpoenas to issue as the case goes on, we will come to court  
21 in advance of issuing those subpoenas.

22 THE COURT: Any comment from defense counsel?

23 MR. IRWIN: Your Honor, I believe that the defendant's  
24 review of some of these materials produced by third parties was  
25 very important with respect to redaction of patient names. I'm

1 sure there were other redactions that were done as well. I  
2 believe in every instance of certification all but three  
3 instances perhaps a certification as to the completeness of the  
4 production was made and a log as to with respect to what was  
5 either withheld or redacted was provided. So it is our view  
6 that all parties' rights are protected in that regard.

7 It is my understanding that the PSC intends to take a  
8 deposition of Covance. They can explore that. We have no  
9 objection to that. We welcome that.

10 THE COURT: Okay. The reason for the material being sent  
11 to the defendants rather than sent directly to the plaintiffs  
12 was just that; namely, to be sensitive to the problem of privacy,  
13 that people who are not parties to the litigation having their  
14 names revealed as to the using or taking of a particular drug.  
15 I felt that at that particular point there was some reason for  
16 being sensitive to that information and at the same time  
17 requiring the defendants to keep a log of anything that they  
18 extracted, and if necessary, delivered to the Court, and then  
19 if necessary given to the plaintiffs. That was the procedure  
20 that I foresaw. If there is any problem with it, I will  
21 revisit it.

22 MR. HERMAN: Thank you, Your Honor. We are going to ask  
23 you to revisit it. We think more than names have been redacted,  
24 and the third party for whom the documents are subpoenaed  
25 should have the obligation to redact names if that's all that's

1 being redacted. But we will ask Your Honor to revisit it, and  
2 we will file our next motion.

3 THE COURT: Where are with it?

4 MR. HERMAN: Motion on class --

5 THE COURT: Certification?

6 MR. HERMAN: Class certification. We have a second  
7 motion pending. We are going to ask that that matter be delayed  
8 until we can determine, and the Court can determine any issues  
9 that may involve appeals to the Fifth Circuit. So that perhaps  
10 those two issues can be brought together.

11 THE COURT: As I mentioned in chambers with counsel with  
12 regard to the order that I just drafted, I didn't have complete  
13 guidance from our Circuit. I looked at the law and there were  
14 some gaps in it that I had to fill. I think I would profit from  
15 the Fifth Circuit looking it over. The 23(B)(2) law is scant  
16 particularly in this particular Circuit. I mentioned this to  
17 counsel so if they do consider appealing -- I'm not saying  
18 appeal it; that's really something that you have to decide --  
19 but I would be more comfortable if you thought it through,  
20 because this is an issue that is not really settled at least in  
21 this particular Circuit. I mention it to you with the under-  
22 standing that you have 10 days as I read the law under 23(f)  
23 in which to act. I know Mr. Levin has been dealing with this.  
24 If you would like to speak at this time? Any comment on this  
25 issue?

1 MR. LEVIN: Arnold Levin, Your Honor. We have given  
2 serious thought to the state of the record on the rule  
3 certification and continue to give it. Our basic view would be  
4 that we should have some, we will at some point in time have a  
5 determination by the Fifth Circuit. And now with the recent  
6 amendment, it would be pursuant to 23(f). However, the class  
7 certification issue has been bifurcated in terms of a unitary  
8 approach as well as a multiple state analysis. We are involved  
9 in the multiple state analysis.. At this time at least the  
10 Court hasn't ruled upon the propriety of that approach to  
11 certification. And it is the plaintiffs' steering committee's  
12 position that until Your Honor rules on that, since both issues  
13 interface with each other especially with regard to (B)(2),  
14 it's more appropriate for the Fifth Circuit to have a complete  
15 record and Your Honor's complete decision as opposed to two  
16 separate appeals. And we are looking now at the vehicle to  
17 make that all possible. We don't feel that a motion to remand  
18 is appropriate or motion for reconsideration with regard to the  
19 first opinion is a jurisdictional issue. And I may be wrong in  
20 that I think those matters are governed virtually by local  
21 rules. They are not promulgated by federal legislature. So  
22 it is not jurisdictional. So we should have either momentarily  
23 or in sort proximity to momentarily something before Your Honor  
24 to put everything in the context so that Your Honor can rule  
25 appropriately on the second phase of class certification. And

1 whichever way Your Honor rules, either side would avail  
2 themselves of 23(f) to have the guidance of the Fifth Circuit.  
3 Thank you.

4 THE COURT: Anything further from the defense?

5 MR. IRWIN: No.

6 THE COURT: All right. Let's go to the next item then.  
7 This is 'plaintiffs' and defendant's respective request for  
8 productionr production.

9 MR. HERMAN: Yes, Your Honor. We have already spoken to  
10 the issue of the various requests for production and motion.  
11 The defendants have an issue about material from the Morgan  
12 Roth Study. I have questioned our folks. We have been in  
13 touch with Dr. Morgan Roth. We beleive everything that we have  
14 or could be produced has been produced and that will be the  
15 subject of a motion brought before Your Honor. We will submit  
16 affidavits in connection with any response.

17 MR. IRWIN: We will take a look at that, Judge. We  
18 wondered whether that might have been broken down in communi-  
19 cation or miscommunication at the deposition. Ms. Sharko took  
20 every doctor. Dr. Morgan Roth said that there were EKGs and  
21 different operations that were in the production for him.  
22 That's been the subject of our ongoing discussions. A motion  
23 in the form of a protective order or whatever that Mr. Herman  
24 is referring to with affidavits might clarify that. We think  
25 that perhaps a follow-up deposition of Dr. Morgan Roth might



1 clarify that. He might say no there are no other interpre-  
2 tations; he might say yes there are. I don't know. There has  
3 been some failure to communicate here is all I can say, and  
4 obviously we need to close the loop on that.

5 THE COURT: All right. On the request for material and  
6 on the motions to compel, both of you have to be sensitive and  
7 aware of the fact that I am interested in having full disclo-  
8 sure in this case. If there is a question of privacy, I can  
9 deal with it. If there is a question of propriety, I can deal  
10 with that. But I am interested in having a full disclosure.  
11 If we don't get full disclosure, I am going to be compelling  
12 full disclosure. And then I will have to deal with how to  
13 compensate the other side for the time, for the expense that  
14 they will bear, that they will incur in pursuing discovery at  
15 a later time when they could have done it earlier. And I  
16 suspect the expenses will be significant.

17 I know the lawyers are in good faith, but occasionally  
18 litigants have an inclination for not finding some material that  
19 they think might not be extremely helpful to them. So they  
20 ought to know that that's going to present serious problems for  
21 them, for their companies, for their interests whether it is  
22 plaintiff or defendant. So you need to communicate that to the  
23 litigants.

24 MR. HERMAN: Yes, Your Honor. With regard to the next  
25 item on your list, remand, the plaintiffs' legal committee sees

1 no reason to remand hearings and decisions at this point.

2 THE COURT: I do have material before me. I will be  
3 rendering my decision shortly on those grounds.

4 MR. HERMAN: Your Honor, new items. Item number 11 is a  
5 very, really very simple matter. Depositions have come back  
6 without exhibits attached to them. We would like a uniform rule  
7 that any document referred to in a deposition or from which a  
8 witness is questioned or anything, photograph or object about  
9 which a witness is questioned at any of these depositions be  
10 attached to the deposition. It is becoming increasingly more  
11 difficult to determine as we go through these depositions to  
12 what a particular witness or attorney may be referring to. Why  
13 we didn't have it before I don't know. But we think in going  
14 forward that there ought to be a uniform rule to that effect.

15 THE COURT: Anything from the defense?

16 ~~MR. PREUSS:~~ <sup>Tom CAMPBELL</sup> ~~Charles Preuss~~ <sup>Tom CAMPBELL</sup> for the defendants. *The procedure* For the  
17 depositions of Janssen witnesses has been that a paralegal or  
18 by firm taking possession of the exhibits, sending a set of them  
19 to one of the plaintiffs' attorneys. we understood was sending  
20 them to the propriety on an ongoing forward basis. We do the  
21 follow-up paper mailing, continue to hold the documents, have  
22 them copied immediately, send a set to the PSC, send a set to  
23 the New Jersey and Pennsylvania people, send the original on to  
24 the original market, one on to the court reporter. And then we  
25 can keep a copy. That way everybody will have them right away.

1 THE COURT: Yes, I think you need to do that, because  
2 while it is correct that you can find a document by pulling it  
3 on the repository, but the problem is that there are six million  
4 documents now. This creates an undue burden.

5 ~~MR. PREUSS~~<sup>CAMPBELL</sup>: Your Honor's point is well taken.

6 THE COURT: Let's do that then.

7 MR. HERMAN: Your Honor, with respect to MDL, I have a  
8 question. I request that whatever exhibits that are sent in  
9 connection with the deposition that they be sent to my office  
10 so that we can check them against the deposition, and then put  
11 them in the depository where they can be accessed. We have  
12 depositions for which we have no exhibits, and we need to meet  
13 with defense counsel and see if they can provide us a set.

14 THE COURT: Let's do that and let's draft an amendment to  
15 our order in dealing with that, and I will adopt that as an  
16 order.

17 MR. HERMAN: We thank you, Your Honor. The next issue is  
18 30(B)(6) depositions regarding studies. We plan to meet with  
19 defense counsel within a week to resolve any question about  
20 these 30(B)(6) depositions. We have individuals who partici-  
21 pated for the defendants as either consultants or employees who  
22 are no longer consultants or employees. We have numbers of  
23 individuals who are listed as being in charge of a particular  
24 study who we later learn is not in charge of the particular  
25 study. And before we go forward with the 30(B)(6) depositions

25 THE COURT: All right. Trust accounts.

1 MR. HERMAN: Both sides have indicated the account will  
2 be set up at the Whitney National Bank. The motion to dismiss  
3 filed by Fortier's Pharmacy, as a representative of the MDL and  
4 PSC, I don't feel that I can properly address Fortier's motion  
5 because it is in an individual case in which we have not been  
6 authorized to either speak to it, brief it or move on it. And  
7 it may be that defense counsel has some information we don't  
8 have.

9 THE COURT: Do we need oral argument on this motion  
10 separate and apart?

11 MR. IRWIN: Not with respect from the viewpoint of the  
12 defendants, Your Honor.

13 THE COURT: All right. I have the classified documents  
14 as the next item.

15 MR. HERMAN: Yes, Your Honor. We had made a request that  
16 all of the documents submitted in connection with the class  
17 certification hearing be de-certified. We were advised -- I'm  
18 sorry, be de-classified, and defense counsel advised us that  
19 all but 12 documents they have no objection to. We haven't  
20 submitted an order yet on the all but 12, but I would like to  
21 submit an order on it that the documents can be immediately de-  
22 classified. And the 12 documents we are still discussing, that  
23 will be the subject of comprehensive motions in the event we  
24 can't resolve that issue. It is important. We have folks that  
25 want to try cases. We think that there are a number of

1 critical documents that we need to be able to get to those folks  
2 and put together a trial binder. That is the reason we made  
3 the request.

4 In addition, although we haven't listed them yet, we are  
5 going to make a motion to de-classify several hundred other  
6 documents that are, we believe, critical and should not remain  
7 confidential. And we believe we will find that they are  
8 placed into the public record of trials that are going to be  
9 conducted in the next six months.

10 MR. IRWIN: And we assume that the plaintiffs' steering  
11 committee will show us those exhibits before they file the  
12 motion. Because with respect to their other list, we were able  
13 to resolve all but, it is actually seven, Your Honor. The  
14 number 12 in the report is a typographical error. It is seven.

15 THE COURT: That's something that the state liaison  
16 committee should be sensitive to and get involved with. I'm  
17 conscious of the fact that the states want to go forward with  
18 the litigation, and they should go forward with the litigation  
19 if that's their desire. The MDL cannot be used to retard the  
20 development of the litigation in the states. It is there for  
21 a purpose of discovery. It is there for a purpose of consoli-  
22 dation, but it is not there to retard the development of the  
23 states' litigation. So if the states do want to go forward  
24 with the trials, they should go forward with the trials. And  
25 whatever is necessary to facilitate that, I will endeavor to

1 accommodate them.

2 With regard to trials, I also am interested in going  
3 forward with the trial of those cases filed in Louisiana, the  
4 trials filed in the Eastern District. I am the forum Court in  
5 those cases. So I am looking forward to beginning to try those  
6 cases, and hopefully we can set trials before the end of the  
7 year on those cases that want or need to be tried. So I'm going  
8 to look to state liaison counsel and the MDL to get together  
9 and give me a list of cases in Louisiana that are ready for  
10 trial. Mr. Becnel, you had something?

11 MR. BECNEL: We discussed last night at the PLC meeting  
12 folks, I have a ton of cases that we have kind of put in that  
13 agreement to hold in abeyance in the court, and I'm wondering  
14 if the Court would be willing to try what he called the basket  
15 of cases; some of the death cases, some of the QT-type injuries,  
16 some of the hospitalization cases in a basket where you would  
17 have as we do in lots of the class actions kind of eight or 10  
18 bellwethers all at one time. So if there is mitigation that  
19 you will ultimately work out, that's wonderful. But if it  
20 doesn't, then we will have some sense of what the value of the  
21 various classifications are.

22 THE COURT: I think the sensible way of doing it would be  
23 to look at the cases that you have that are ready for trial in  
24 Louisiana and to group those cases into reasonable groupings.  
25 And to then go forward with a trial of one or more cases from

1 each of those groups to give us some guidance as to the jury's  
2 view on that particular issue. I think to some extent it is a  
3 forensic call, counsel. I will look at them for guidance. If  
4 they can make it and agree on it, that's important to me. If  
5 not, then I will make the decision as to how we go forward.  
6 But the point is I do want to go forward with the Louisiana  
7 cases. I expect to try them before the end of the year.

8 MR. HERMAN: With respect to that, Your Honor, for the  
9 PSC Bob Wright, Dan Becnel and Steve Murray are going to be  
10 involved in managing the Louisiana cases and counsel that want  
11 to go forward and whose clients want to go forward. And we  
12 believe that there are a number, a fairly substantial number of  
13 those cases, and they will be in a position to report to Your  
14 Honor within the next several weeks.

15 THE COURT: Okay. You get to the point in litigation  
16 where both the litigants and their counsel for various reasons  
17 because of the nature of their particular claim or whatever,  
18 feel they have enough discovery to try the case. And that's  
19 important if they feel that way and want to try their case. I  
20 don't think that the MDL Court ought to retard that interest  
21 and quash that interest. So not only in Louisiana but also in  
22 other states if there are litigants who want to get sent back  
23 to their particular state, I am interested in that. I make no  
24 decision on it at this point, but I am interested in hearing  
25 from them if they feel that they are ready to try their



1 particular case.

2 Also, while we are talking trials, I also wanted to bring  
3 up an issue that I brought up to liaison counsel and that is  
4 the mediation of the case. I am looking to appoint a mediator  
5 to look at all of these cases to see whether or not they can be  
6 resolved. I am calling upon the liaison counsel with help of  
7 the chairs of the settlement committees to get to me a  
8 suggestion on a mediator. If both sides can agree on any  
9 particular mediator, I will appoint that mediator. If not,  
10 then I will need names from each side. And I also will look  
11 into my resources, and I will appoint a mediator. But I expect,  
12 I want to have that mediator selected before our next meeting.

13 MR. HERMAN: Your Honor, Mr. Murray will provide defense  
14 counsel the names of several mediators acceptable to us, and we  
15 will try to arrive with a consensus on that issue. We shall  
16 endeavor and the MDL also to contact all of the MDL lawyers,  
17 give them a formula for preparing their cases for mediation,  
18 signaling them as to which attorneys would like their cases  
19 mediated and provide a list of those also. We are familiar  
20 with the PSC attorneys and state liaison attorneys who wish to  
21 have cases mediated, but the great body of attorneys with cases  
22 out there really we need to make them aware that Your Honor is  
23 going to direct mediation and give them some guidance as to a  
24 formula of what to present at these mediations so they can move  
25 forward.

1           And I might suggest, Your Honor, that if we consider at  
2 an early stage more than one mediator, I don't know what the  
3 reaction is going to be. But I think because of the large  
4 number of cases there are here, it may be difficult for one  
5 mediator to mediate a significant number of these cases.

6           THE COURT: I have seen it done in various ways. With  
7 all of these mediators, it is helpful if you can categorize  
8 the cases or group them so that one mediator takes one group  
9 and another mediator takes the other group. And it can move  
10 forward in that direction, too.

11           MR. HERMAN: I just have one question, and I should have  
12 brought it up in chambers, and I'm sorry I didn't. The  
13 defendants have strongly and repeatedly indicated that they do  
14 not wish to have any dealing whatsoever with those cases in  
15 which an individual asserts what they have suffered, a prolonged  
16 QT, and in which it is alleged that there are no other damages.  
17 Are we to mediate, is it Your Honor's desire that we just  
18 mediate the death cases at that point?

19           THE COURT: No. My idea is to mediate all the cases. If  
20 it can't be, it can't be. But I want to take a shot at it.

21           MR. HERMAN: Thank you, Your Honor.

22           MS. BARRIOS: Dawn Barrios. I have an idea that I would  
23 like to bring to the Court's attention. With regard to the  
24 mediation, and I understand that Mr. Murray will be handling  
25 that, but Mr. Arsenault and I are real involved in dealing with

1 the different states' attorneys around the country. We would  
2 like to be part of the mediation effort in developing the forms  
3 and dealing with Your Honor on that so that I can give a news  
4 letter out to the various states' attorneys.

5 THE COURT: I think that would be helpful. Any problem  
6 with that, Mr. Herman?

7 MR. HERMAN: I have no problem with state liaison counsel  
8 developing a form for state attorneys to use, but I do have a  
9 substantial problem in terms of having that process go on in  
10 the MDL. Many of those attorneys have not contributed, nor do  
11 they wish to contribute, any costs, et cetera, to any MDL trust  
12 funds. They may or may not be dealt with by Your Honor.  
13 Because of that, any state attorneys who may successfully  
14 mediate through this process would necessarily retard the MDL  
15 cases in some way from being mediated. And anything that would  
16 flow out of that mediation, there would be no cost reimbursement  
17 to the MDL, and I don't think that's fair. So while I am not  
18 concerned about state liaison developing its own form for  
19 mediation, or having a mediation process, those attorneys that  
20 have not agreed to participate, state attorneys who have not  
21 agreed to participate with the MDL in cost sharing I would  
22 object to having any mediation that involves them or any process.

23 THE COURT: Let's do it this way: Ms. Barrios, you  
24 participate with Mr. Murray at the hearings or at the mediations.  
25 Let's see where we go with it. I will listen to you if there

1 is a potential problem or suggestion, and we will take it one  
2 step at a time.

3 MR. HERMAN: I do have one other suggestion: There are  
4 a number of state attorneys who have signed an agreement to  
5 participate in costs sharing, and certainly we have no  
6 objection whatsoever to those attorneys participating in this  
7 mediation process.

8 MS. BARRIOS: I agree totally with Mr. Herman, and I  
9 didn't anticipate seeking other state attorneys who did not  
10 agree to share in the costs. I would think they would go hand  
11 in hand if they won their cases to mediate through this Court,  
12 then they would participate in the cost with it as well.

13 THE COURT: Right, okay.

14 MR. CAPRETZ: I have a point of clarification: Is Your  
15 Honor thinking of mediating cases in various states or all  
16 here in Louisiana?

17 THE COURT: No. I was looking to all of them, every  
18 case in the MDL.

19 MR. CAPRETZ: The site of, the venue of the mediation  
20 would be Louisiana as opposed to the state where the case  
21 originated?

22 THE COURT: Yes. I think the mediation would be here  
23 unless there is a particular case that, because of some  
24 logistics creates a problem, then the mediator then will have  
25 to move to the mountain wherever the mountain is. But I would

1 like to have them done here in Louisiana. And I intend to keep  
2 an active role in it whether it be one mediator or mediators,  
3 I will be meeting with them.

4 MR. HERMAN: If it please the Court, I think Jim Capretz's  
5 inquiry really relates to the differences in the application of  
6 states' law. But I think we can assure the Court that the form  
7 packets which we have developed takes into consideration the  
8 variations in state law.

9 THE COURT: I think it would have to. In other words, in  
10 some states some elements are allowed; other states they are  
11 not allowed. In those states where those **elements** are allowed,  
12 they ought to be taken into consideration by the mediator. The  
13 states where those elements are not allowed, they ought not to  
14 be taken into consideration. But I don't think that presents a  
15 problem to the mediator. When I say mediation, I don't mean  
16 that it is reduced to the common denominator in that everybody  
17 would get the same elements, same consideration. It seems to  
18 me that's not the case in an MDL proceeding. Anything further?

19 MR. IRWIN: I think we have a motion to withdraw counsel  
20 of record.

21 MR. HERMAN: We have no objection, Your Honor.

22 MR. IRWIN: I guess this one is a little troublesome. We  
23 don't know much about it. The motion suggests that there are  
24 communication problems between the attorney and the client. I  
25 will describe it in that way. Our problem is that the client

1 is in default with respect to the PPF, and we certainly do not  
2 want to have our rights affected by the withdrawal of counsel  
3 as they relate to the default complied with this Court's order.

4 THE COURT: All right, I will rule on the motion. Do you  
5 have a motion to do anything?

6 MR. IRWIN: We do not, Your Honor. We have withheld  
7 filing other motions because there is not a large population of  
8 them, and we thought it would be appropriate to present them  
9 at one time to Your Honor and not pepper the Court with them.  
10 But that was the concern about withdrawing. We do not want,  
11 defendants do not want that to infringe our rights insofar as  
12 the failure to comply with PTO Number 9.

13 THE COURT: I will defer ruling on that motion then.

14 MR. HERMAN: I would like the opportunity for Mr. Levin  
15 to address the Court on the issue of what action the PSC will  
16 take with regard to class certification.

17 THE COURT: Fine.

18 MR. LEVIN: Arnold Levin. We intend to within the time  
19 prescribed by your ruling, which is 10 days, to file pursuant  
20 to Federal Rule of Civil Procedure 59(E), a motion to alter and  
21 amend the judgment with Your Honor's prior certification  
22 opinion to accomplish what I expressed to the Court the first  
23 time I spoke to the Court today. That will be the vehicle  
24 similar to what you do with a 1292(B).

25 THE COURT: Right, I understand. Anything further? Any

1 other issues? Anything from the liaison counsel?

2 MR. TRUITT: May it please the Court, Bobby Truitt for  
3 Walgreen Louisiana Company, Incorporated. We have a motion to  
4 dismiss pending. It was set for hearing previously in the  
5 Walgreen's matter. The Court had indicated it would take it  
6 under submission and issue a ruling, and I just wanted to bring  
7 that to the Court's attention that that motion is still pending.

8 THE COURT: Okay. I will take that matter shortly, too.  
9 Anything further?

10 MR. IRWIN: The only thing I think would be the date for  
11 our next meeting.

12 THE COURT: Let's get a date for the next meeting.

13 MR. IRWIN: Are we still on Fridays? Is that it? It  
14 had been Thursdays.

15 THE COURT: Thursday. We had something on Friday. I  
16 remember we moved it to Thursday ourself.

17 MR. IRWIN: Originally we had gone for Thursday, but we  
18 had bounced to an occasional Friday.

19 THE COURT: 18th or 25th?

20 MR. HERMAN: Let me check one thing, Your Honor.

21 MR. IRWIN: Either one for the defendants, Your Honor.

22 MR. HERMAN: The 18th for the plaintiffs would be it.

23 THE COURT: Let's do the 18th at 9 o'clock.

24 MR. HERMAN: All right, 9 o'clock the 18th.

25 THE COURT: Court will stand in recess. Thank you.

1 (Status conference concluded at 10:21 a.m.)  
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4 REPORTER'S CERTIFICATE  
5

6 The undersigned certifies, in his capacity of Official  
7 Court Reporter, United States District Court, Eastern District  
8 of Louisiana, the foregoing to be a true and accurate  
9 transcription of his Stenograph notes taken Wednesday, June 12,  
10 2002.

11 New Orleans, Louisiana, this 13th day of June, 2002.  
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16 David A. Zarek  
17 Official Reporter  
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