

RECEIVED

JAN 29 2003

ROUGH DRAFT 2

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CHAMBERS OF  
U.S. DISTRICT JUDGE  
ELDON E. FALLON UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE:	*	Civil Action
	*	No. MD 00-1355
	*	
PROPULSID PRODUCTS LIABILITY LITIGATION	*	Section "L"
	*	
	*	New Orleans, Louisiana
	*	January 28, 2003
* * * * *	*	

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

APPEARANCES:

For the Plaintiffs:	Domengeaux, Wright, Roy & Edwards
	By: BOB F. WRIGHT, ESQ.
	556 Jefferson Street
	Box 11
	Lafayette, Louisiana 70502-3668

For the Defendants:	Irwin, Fritchie, Urquhart & Moore
	By: JAMES B. IRWIN, V, ESQ.
	Texaco Center
	400 Poydras Street, Suite 2700
	New Orleans, Louisiana 70130

Also Present:

For Plaintiffs:

Roy Amedee, Jr.  
Richard J. Arsenault  
Dawn Barrios  
Daniel E. Becnel, Jr.  
Jim Capretz  
Leonard Davis

## ROUGH DRAFT 2

1 APPEARANCES CONT'D.

2 Barry Hill  
3 Julie Jacobs  
4 Arnold Levin  
5 Fred S. Longer  
6 Edward J. Parr, Jr.  
7 Carlos Prietto  
8 A.J. Rebennack  
9 Lynn Swanson  
10 Jim Watts  
11 Mark Whitehead

12 **For Defendants:**

13 Thomas Campion

14 Court Audio Operator: Cindy Usner

15 Transcriptionist: Dorothy Bourgeois  
16 c/o U.S. District Court  
17 500 Camp Street, Room C151  
18 New Orleans, Louisiana 70130  
19 (504) 589-7720

20 Proceedings recorded by electronic sound recording,  
21 transcript produced by transcription service.  
22  
23  
24  
25

ROUGH DRAFT 2

P R O C E E D I N G S

(Tuesday, January 28, 2003)

(Call to Order of the Court)

THE COURT: Be seated, please. Good morning, ladies and gentlemen.

Let's call the case.

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

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

MR. WRIGHT: Your Honor, I'm Bob Wright, one of the Co-Liaison Counsel for the Plaintiffs. Mr. Russ Herman is out today. If it's -- with permission of the Court, I'll stand in for him.

THE COURT: That's fine.

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

THE COURT: We're here today for our monthly status conference on the MDL matter. The parties, as usual, sent me an agenda. I've had an opportunity to meet preliminarily with the Liaison Counsel for each side to discuss the agenda briefly, and now we'll go through the agenda. First, the update of rolling document production.

MR. IRWIN: Your Honor, I'm pleased to report that this has been going smoothly. I think where we are now is a

## ROUGH DRAFT 2

1 few remaining foreign language e-mails are being processed in  
2 London. And the expectation is that the matter will be  
3 completed in March of 2003, as we've described in Paragraph 1.

4 THE COURT: I notice that it's some 7 million  
5 documents now or thereabouts.

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

7 THE COURT: Any comments from the Plaintiffs'  
8 Committee?

9 MR. WRIGHT: No, Your Honor.

10 THE COURT: State Liaison Counsel?

11 MR. WRIGHT: Well, we've been actively participating  
12 with them in scheduling depositions. I don't know if they  
13 have anything to --

14 THE COURT: Anything from State Liaison Counsel?  
15 What about the cases in the states, how are they  
16 proceeding? Any trials?

17 MR. ARSENAULT: No, but we had a dialogue several  
18 months ago Sol Weitz with regard to whether they were going to  
19 continue to participate or agree to continue the coordination  
20 efforts and we've heard nothing from them for the last four or  
21 five weeks.

22 MS. BARRIOS: I'm sorry -- I -- Your Honor, I did  
23 have a conversation with Mr. Weitz about three weeks ago and  
24 he said that he had called Your Honor --

25 THE COURT: Yes.

## ROUGH DRAFT 2

1 MS. BARRIOS: -- and worked it out with you on his  
2 motion.

3 THE COURT: Right. He did call me and we discussed  
4 the situation and I think he has decided to not file the  
5 necessary motion. He felt that it had worked itself out. So,  
6 I'm happy to hear that.

7 Also, it's been the intention of the Court that the  
8 states feel that this MDL is helpful to them. If you need any  
9 information, you need to let me know so that we can work it  
10 out. It's not my intention to inhibit you in any way in  
11 proceeding in your jurisdictions, but only to be a forum from  
12 which you can be assisted and not retarded in any way.

13 Let's go to the second one, please. The next is  
14 Patient Profile.

15 MR. IRWIN: Yes, Your Honor, the paragraph refers to  
16 the numbers as they are now. We have prepared -- I've seen  
17 the draft of the next motion we intend to file, which we would  
18 expect will be the last motion, to address dismissal of the --  
19 those Plaintiffs who have failed to respond in any way. We  
20 understand that the PSC reserves its continuing objection to  
21 such a motion.

22 THE COURT: The PSC has consistently objected to it  
23 from the standpoint of their responsibility and duty. I  
24 respect that. They take the position that it should not be a  
25 final judgment, it should be without prejudice.

## ROUGH DRAFT 2

1 I've heard arguments for both sides. I feel it  
2 should be with prejudice. Those who want to proceed in the  
3 case have a right to proceed, but those who do not want to  
4 proceed and will not comply with numerous requests have to be  
5 culled out. After being given notice and afforded an  
6 opportunity, when they persist in their reluctance to proceed,  
7 we have to get them out of the lawsuit so that those who do  
8 wish to proceed can do so efficiently.

9 So, I've decided to dismiss those with prejudice, so  
10 get me the motion and I'll continue to do that.

11 Service list of attorneys, I have that information.  
12 It's current.

13 MR. IRWIN: Your Honor, I have the updated service  
14 list. I'll put it here and Ms. Lambert's and Mr. Davis' copy  
15 and Mr. Arsenault's copy for the Committee.

16 THE COURT: All right.

17 Ongoing studies/subpoena to BevGlen, that's mooted  
18 now. We have all of that information.

19 Six, third party subpoena duces tecum, any comment on  
20 that?

21 MR. WRIGHT: Mr. Davis will handle this.

22 THE COURT: All right, let me hear from Mr. Davis.

23 MR. DAVIS: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. DAVIS: On December 18th the PSC in the MDL

## ROUGH DRAFT 2

1 served a subpoena duces tecum on the Defendant's expert,  
2 Dr. Douglas Zipes. As the Court is aware, Dr. Zipes is the  
3 Defendant's expert in quite a number of cases. Many of the  
4 matters -- there were ten items rather. Many of the items  
5 that were requested are what I'll call generic type  
6 productions; for instance, compensation, time records, and the  
7 like.

8 We have spoken with Defense Counsel and we understand  
9 that a return in the MDL will be made very soon. We are  
10 waiting to see that return and as soon as we receive that  
11 return, we'll be in a better position to advise if the  
12 subpoena has been complied with.

13 THE COURT: Let's talk about dates. What does "soon"  
14 mean?

15 MR. IRWIN: Your Honor, with respect to this subpoena  
16 and the next one involving Sciens, we expect a response will  
17 be made at least in letter form on the Zipes subpoena this  
18 week from Mr. Fritz Zimmer, who is Mr. Preuss' partner in the  
19 San Francisco office, and should be completed by the end of  
20 next week Mr. Zimmer tells me.

21 Mr. John Winter is handling the Sciens subpoena, and  
22 the time frame in response to the Sciens subpoena is generally  
23 the same. Mr. Winter is in the Patterson Belknap Office in  
24 New York.

25 THE COURT: Tell Mr. Zimmer and Mr. Winter to copy me

## ROUGH DRAFT 2

1 on the information and tell them that I want it done by that  
2 timetable. If not, they have to come to Court and tell me why  
3 it hasn't been done.

4 MR. IRWIN: Yes, Your Honor.

5 THE COURT: Thank you.

6 The next item on the agenda is Motion for Class  
7 Certification. The parties have agreed to defer that.

8 The next item is Plaintiffs' and Defendants'  
9 Respective Request for Production of Documents. Anything on  
10 that?

11 MR. DAVIS: Your Honor, I can report on two matters.  
12 With respect to Interrogatory Set Number 6, we have gotten a  
13 partial response from the Defendants and I understand that the  
14 balance of the response to Interrogatory Number 6 will be  
15 forthcoming by the end of the month.

16 MR. IRWIN: I think it will be here by the end of  
17 this week. I spoke to Mr. Caneur (phonetic) yesterday and it  
18 was going out of his office yesterday or today directly to  
19 Mr. Davis. So, that should complete the response to Request  
20 for Production Number 6, Your Honor, that basically called for  
21 Minutes, Board Minutes, the Domestic Minutes had previously  
22 been delivered, and these were Minutes from Beerse. They're  
23 in the mail.

24 THE COURT: Mr. Davis, let me know by the end of the  
25 week whether you receive it; if not, I'll convene an immediate



## ROUGH DRAFT 2

1 conference.

2 MR. DAVIS: Will do.

3 With respect to the Request for Admission and  
4 Interrogatory regarding business records that were sent in  
5 November of last year, we have had additional communications  
6 with Defense Liaison Counsel. In the course of those  
7 discussions, we tried to resolve the dispute that existed.  
8 Defendants objected to responding to the authenticity or  
9 business record hearsay exception as to all of the documents  
10 that they had produced in this litigation. We went back to  
11 the Defendants and asked that they respond to approximately  
12 4,000 or 5,000 documents. We are waiting for those responses.

13 We've had some additional discussions regarding those  
14 and there had been a request that the objective coding that  
15 was provided by the Defendants be supplied back to the  
16 Defendants so that they could get a better handle as to the  
17 particular documents. What was produced to them were Bates  
18 numbers only. And we are having discussions on that, but we  
19 would like to get some responses on that.

20 THE COURT: As I understand it, we're dealing with  
21 approximately 4,000 documents and you need to know the  
22 Defendants' response on the status of these documents to  
23 satisfy the business records exception to the hearsay rule.  
24 You've given them about ten or 12 pages of four-column numbers  
25 and the Defendant takes the position that if you have given

## ROUGH DRAFT 2

1 those four-column numbers of 15 pages or thereabouts, someone  
2 of your group must have known what those numbers were. The  
3 Defendant asks that you advise them of the heading or nature  
4 of each document so that they could look at it and determine  
5 their position on the hearsay exception.

6 Your response, as I understand it, is that the list  
7 was compiled in Committee format, Committee fashion and the  
8 numbers are the only information you have. You don't have any  
9 raw data written down to identify those numbers and in order  
10 to give the Defendant the information, you would have to do  
11 precisely what they would have to do, namely pull up each  
12 number, find out what it is, and describe or identify it. So,  
13 you'd have to use the same decoding information that the  
14 Defendant would have to use.

15 I suggest you discuss it, because as I mentioned to  
16 you, whatever my ruling on this issue is going to be, it will  
17 hold forth throughout the litigation. If somebody gives you a  
18 list of numbers, I will make the same ruling.

19 So, talk about it. If you can't resolve it, let me  
20 know and I'll resolve it.

21 MR. DAVIS: Will do.

22 MR. IRWIN: We will try to do that this week,  
23 Your Honor.

24 THE COURT: Let me hear from Counsel sometime the  
25 following week. If you can't, then I'll know it and I'll make

## ROUGH DRAFT 2

1 a decision immediately on it.

2 Trust Account?

3 MR. WRIGHT: Your Honor, I think Counsel has  
4 expressed to us that the matter had been taken care of.

5 THE COURT: Okay. We have a trust account in the  
6 Court now and Defendant Liaison will deposit the money into  
7 that account. Then I suspect I will hear from Plaintiff  
8 Liaison Counsel regarding the distribution of those funds,  
9 partially or wholly.

10 MR. WRIGHT: Yes, Your Honor.

11 THE COURT: Declassified documents?

12 MR. WRIGHT: Pardon me?

13 THE COURT: Did I skip any inadvertently?

14 MR. WRIGHT: Did you have something you wanted to  
15 discuss on the Diaz matter?

16 MR. IRWIN: I believe that -- I think with respect  
17 to Roman IX, Shell/Morganroth, we have received the  
18 certification. I believe that that can be removed from the  
19 agenda, Your Honor.

20 THE COURT: That's fine. Number 10?

21 MR. IRWIN: Roman X, the 30(b)(6) deposition. We  
22 have delivered a CD that was a database of the 800 plus  
23 studies. We are supplementing that CD with respect to  
24 information involving the publication and disclosure of those  
25 studies and that will be delivered, as Mr. Campion reported

ROUGH DRAFT 2

1 this morning, a week from this Friday.

2 THE COURT: Okay. We talked about the trust account.  
3 Declassified documents, any comments on Item 12 on the agenda?

4 MR. IRWIN: Your Honor, I would only add that in --  
5 in corroborating what we discussed this morning in preparation  
6 for this morning's conference that the PSC is going to  
7 identify for us the documents that they seek to have  
8 declassified. We will review those documents and consult back  
9 with the PSC no later than Friday with respect to our  
10 position. We may well be able to resolve this. We will try  
11 to do that by the end of this week and we will report to the  
12 Court accordingly.

13 THE COURT: Fine. Let me just say a word on  
14 declassifying or classifying documents.

15 As I mentioned before, there's a conflict often  
16 between the public's right to know and the efficiency and  
17 effectiveness of the discovery process. The public has a  
18 definite right to know. That's why our courts are open to the  
19 public. I believe in that concept.

20 The problem some time that the courts in this country  
21 are faced with, and it's a real practical problem, is that  
22 immediate disclosure to the public sometimes retards discovery  
23 and it affects the litigants, the litigants who are before the  
24 court. And courts are called upon to weigh the public's right  
25 to know against the litigant's right to the efficient,

## ROUGH DRAFT 2

1 effective preparation for trial.

2           If the public has an overriding interest, if a drug,  
3 for example -- since this case involves a drug -- if a drug is  
4 still on the market, if there is a complaint that the drug is  
5 injurious to large portions of the public, then perhaps that  
6 overrides even the litigant's right to an effective and  
7 efficient trial.

8           But, in this particular case the drug is off the  
9 market. Any complaints, if there were any complaints, are no  
10 longer problematic to the public. And so in weighing the  
11 issue of classification, I felt it was best to go forward with  
12 the litigation, classify the documents so that the documents  
13 could be readily produced by the Defendant with some degree of  
14 comfort that they didn't have to worry about proprietary  
15 interests, or trade secrets, or anything of that sort because  
16 it would only be used for this litigation.

17           But, my thinking is that that's not a perpetual.  
18 After the discovery phase is completed or after there is no  
19 longer any reason for the litigants to get the material  
20 because they've already gotten the material, or whatever,  
21 then the matter has to be revisited. The classification is  
22 not done in perpetuity; it's done temporarily, and that's what  
23 we're dealing with now.

24           So, when you consider it, consider it at least with  
25 that view in mind.

## ROUGH DRAFT 2

1 MR. WRIGHT: And, Your Honor while it was agreed to  
2 in conference, it may be best to put it on the record. In  
3 addition to our agreeing to provide them with information  
4 concerning the declassification, it's my understanding that  
5 Defendants have agreed that they will not in any way interfere  
6 with any of these portended reports or studies to be written.

7 MR. IRWIN: Your Honor --

8 THE COURT: Is that another issue?

9 MR. IRWIN: I think that's another issue. I don't  
10 think we have a disagreement in principle with what Mr. Wright  
11 has said, but we want to look at what the motion addresses.  
12 We do want to look at the exhibits that are sought to be  
13 declassified, and we do want to get back with the PSC by the  
14 end of the week and advise the Court accordingly.

15 THE COURT: I think it's specific, it's case specific  
16 meaning document specific. I understand that.

17 MR. IRWIN: That's what we thought the motion  
18 addressed, Your Honor, yes.

19 THE COURT: I think that's so.

20 The next Item is 13, mediation. Any comments on  
21 mediation?

22 MR. WRIGHT: Mediation is ongoing, Your Honor.  
23 There's several matters to be mediated, tomorrow in fact.

24 THE COURT: All right. I discussed briefly the issue  
25 of mediation with Liaison Counsel. I should express myself to

## ROUGH DRAFT 2

1 the full Committee on mediation.

2           You need to know that I'm concerned about the  
3 progress of the mediation. I'm advised that 13 cases, 12, 13  
4 cases have been subjected to mediation and seven of them have  
5 been disposed of since the mediation process began. Good for  
6 those seven, but this is an MDL case. It's not just a dozen  
7 cases or thereabouts. So, that approach creates a problem in  
8 and of itself.

9           The MDL Court can be of assistance to both sides by  
10 having in one forum an opportunity for you to discover one  
11 time for all of the cases. It's an opportunity for you to  
12 work out some agreements that you can live by throughout the  
13 litigation. It's an opportunity for you to take depositions  
14 for all of the cases, and a lot of other opportunities present  
15 themselves for the effective, efficient handling of the cases,  
16 and one of them is to see whether or not cases can be resolved  
17 by settlement.

18           But, when you're doing it in an MDL format, you have  
19 to be able to work up some formula or method, some program to  
20 deal with the settleable cases. You can't approach it one  
21 case at a time. We don't have enough time for that and the  
22 MDL proceeding is not designed for this method.

23           If you're going to approach it one case at a time,  
24 that's okay, that's a way of doing it. But, that's not a way  
25 of doing it in the MDL forum. If that's going to be the

## ROUGH DRAFT 2

1 method you pick, you need to go back to the states. You need  
2 to go back to the various Federal Courts from where these  
3 cases originated. They can do that as well, if not better,  
4 than an MDL Court can do it.

5 An MDL Court can do it en globo. An MDL Court can  
6 assist you if you're trying to deal with categories or a  
7 formula. Once you work out the categories or formula, then  
8 you simply fit the cases designated settleable into those  
9 categories or formula. Either they fit or they don't fit.

10 In talking with Counsel, Counsel for the Defendants  
11 indicate that ball park wise they think there may be about  
12 400 to 500 cases that they feel they can settle or would be  
13 interested in considering for settlement. I would hope there  
14 would be more, but that's better than a dozen.

15 However, with that amount of cases, you can't do it  
16 one case at a time. You have to look at those cases, the 400  
17 or 500 cases, and try to categorize those cases, put them in  
18 four or five categories. Then in each of those categories  
19 you've got to get the best case and the worst case, and that's  
20 the goal post. Every other case in that category ought to fit  
21 between those goal posts.

22 You don't have to analyze each and every case. If  
23 you do, you are going to run out of time. If you want to do  
24 it that way, you've got to go to another court. I can't be of  
25 any help to you. I'm just one Judge. We've got in this



## ROUGH DRAFT 2

1 national 860 Federal Judges. You can do a better job with  
2 them than you can with just one Judge. It's okay to work with  
3 me, the MDL Judge in this case, if you're going to work with  
4 the categories, but if you're going to do it just one case at  
5 a time, I can't be of service to you.

6 I see this case as being in its final months now.  
7 This is the final year for this case. I want to begin  
8 recommending to the MDL Board, MDL Committee cases that are  
9 ready to go back. We may not be there yet, but we're close to  
10 there, and that's another issue that we'll talk about later on  
11 with the end game report. But, that's my thinking on  
12 mediation, and I would like you all to try to approach with  
13 those comments in mind.

14 If I find that it's not being approached that way,  
15 I'm going to call off mediation and let you just do your  
16 thing. Let's spend more time on discovery and don't waste  
17 time on mediation. So, this is our last shot at it. By next  
18 time both sides have to let me know about the progress so that  
19 I can say, yea or nay on mediation in the MDL forum.

20 Mr. Becnel, you had a comment?

21 MR. BECNEL: Yes. Your Honor, I don't think it's the  
22 lawyers for the Defendants, but I think it's the Defendant has  
23 entered this mediation process in bad faith.

24 THE COURT: Well, I don't cast blame on anybody, it's  
25 different approaches. That approach may work in certain

## ROUGH DRAFT 2

1 instances. It doesn't work in the MDL format. But, I don't  
2 want to be in a position of saying who's at fault at this  
3 time. I'm just saying that whoever has constructed that  
4 approach has to rethink it. And if they don't rethink it and  
5 persist in using it, then use it some place else, not in this  
6 Court.

7 MR. BECNEL: Then I wanted to bring something else to  
8 the attention of the Court. As you know, we have a number of  
9 basically stays on a lot of Plaintiffs cases that haven't  
10 filed, hadn't done fact sheets, hadn't done a lot of things,  
11 and I don't think they have any clue as to what's out there.

12 But the Enron -- since the Firestone case, which two  
13 weeks ago the Supreme Court said finally that state by state  
14 class actions are viable. National classes are no longer  
15 viable. And in fact, the Fifth Circuit -- I brought back the  
16 first Firestone case and they removed it again, and the Fifth  
17 Circuit just dismissed it.

18 So, I would suggest that what I think this Court  
19 ought to do and put on its agenda, because I know Mr. Herman  
20 is interested in that and most of the lawyers from Louisiana  
21 are interested in that, is to tee-up a Louisiana class action  
22 against these Defendants.

23 THE COURT: You know, the other item on the agenda  
24 was class certification and Liaison Counsel talked about  
25 withholding resolution of that issue at the present time.

## ROUGH DRAFT 2

1 But, the issues of class certification on a state level are  
2 still pending and outstanding.

3 The Daubert hearings are also still to be resolved.  
4 I will shortly begin Daubert hearings; one way or the other, I  
5 will resolve the Daubert issues. I will also resolve one way  
6 or the other the issue of class certification state wide.  
7 I've got before me the national class certification. Both  
8 Counsel asked me to withhold judgment on that. That's also an  
9 unresolved issue. In short, there are four or five issues  
10 that are before me or will soon be before me that we've got to  
11 focus on. I wanted you all to focus on settlement, but if  
12 that looks to me that it's not working, we've got to get to  
13 work on the other things.

14 MR. BECNEL: May it please the Court, as you know,  
15 when Mr. Amedee and I filed our original case, we had a  
16 Louisiana class and also a national class and I think that's  
17 before the Court. I would like to move immediately for the  
18 Louisiana class' certification and have some scheduling order  
19 to deal with that.

20 THE COURT: Well, that's not on this agenda.

21 MR. BECNEL: All right.

22 THE COURT: Let's bring that to the Liaison Committee  
23 and get some reading from them on it, and bring it to me and  
24 we'll talk about it by next time.

25 MR. BECNEL: Thank you.

## ROUGH DRAFT 2

1 THE COURT: The next item on the agenda after  
2 mediation is 14, Trial Schedule. We're still in a trial mode  
3 on several of the cases?

4 MR. IRWIN: Yes, we are, Judge. There are still --  
5 the three cases are still on the docket. Next Monday, of  
6 course, is the Daubert Hearing. You have a Motion for Summary  
7 Judgment, which we will address briefly. I think  
8 realistically briefly considering the Daubert agenda. That  
9 will be heard on Monday as well.

10 THE COURT: And with the Daubert agenda, I understand  
11 that the MDL Committee wishes to present argument at the  
12 Daubert Hearing, which is not opposed, so they'll have an  
13 opportunity to express themselves.

14 I do think, as I mentioned to Counsel earlier, I do  
15 think that these cases will likely be my ruling on Daubert.  
16 Having said that let me say, unless these cases are just  
17 totally sui generis, unless they're just out there totally  
18 different from all the other cases, I'm going to look upon  
19 this as the Daubert Hearings for this group of cases. So, I  
20 need input from whoever needs to give me input on those  
21 issues, and from the Defendants a response to that input.

22 Pharmacy Indemnity Agreements.

23 MR. IRWIN: Yes, Your Honor. As we execute them, we  
24 transmit copies to the Plaintiffs' Liaison Counsel and we will  
25 continue to do so.

## ROUGH DRAFT 2

1 THE COURT: Fine, thank you.

2 The next item is Verilaw. Anything further on  
3 Verilaw?

4 MR. IRWIN: Your Honor, we do not think there's  
5 anything that needs to be reported any further on Verilaw at  
6 the -- for the time being.

7 THE COURT: Okay. And the Pro Se Plaintiff, Reynaldo  
8 Perez?

9 MR. IRWIN: Yes, Your Honor. We put this on the  
10 agenda because his claim may be subject to dismissal for  
11 failure to properly serve the Defendants in the transferor  
12 proceeding. We did not want to initiate piecemeal filings  
13 without first briefing Your Honor on the situation. And with  
14 Your Honor's blessing, we would go ahead and consider filing  
15 such a motion.

16 THE COURT: Yes, let's do that. File it and I'll  
17 look at it and we'll get it one way or the other out.

18 MR. IRWIN: Thank you.

19 THE COURT: Thank you.

20 The next item is the End Game Planning Committee.  
21 You all have met and talked about that?

22 MR. WRIGHT: Yes, Mr. Arnold Levin handled that.

23 MR. LEVIN: Do you want a report in open court, sir?  
24 Arnold Levin. For the Plaintiffs, Bucky Zimmerman,  
25 myself, and Len Davis have met on at least two occasions with

## ROUGH DRAFT 2

1 Mr. Champion and others with regard to attempting to find a  
2 global solution that worked with regard to resolving this  
3 litigation. We did not find it. The other side was not  
4 receptive to any of the suggestions we have made. And none of  
5 us were novices at how to end a case.

6           Unfortunately, the state of the law for an MDL Judge  
7 with Lexicon and a host of other decisions by Courts of  
8 Appeals that do not give you the comfort that you seem to need  
9 to develop a juris prudential end game are not there.  
10 Therefore, short of giving Your Honor a Browning submachine  
11 gun, I think that this MDL -- and this is my view -- has  
12 served its purpose and has done very well in serving its  
13 purpose.

14           Back when it was established for discovery, today  
15 because of Lexicon, it is a discovery court and really not  
16 much more. Therefore, it's our suggestion that the best way  
17 to handle this case other than the Gestalt process of trying  
18 to find what 500 cases Mr. Champion wants to find and wants to  
19 settle, can't be done here. We're going to ask the Court to  
20 remand cases to the various Federal District Courts.

21           Mr. Herman has done a miraculous job of controlling  
22 state litigation in this case. We've never had state courts  
23 biting at us. But, perhaps now is the time for state courts  
24 to bite at the Defendants.

25           There are state courts under consideration by the End

## ROUGH DRAFT 2

1 Game Committee, if that's -- it just doesn't sound right, but  
2 I guess I fit that mold. There are state courts that are  
3 removal friendly, remand unfriendly, and we're just going to  
4 have to litigate them. A Louisiana State Court case in this  
5 Federal Court is under consideration, as Mr. Becnel said.

6 But, I think we're at the end of the line with regard  
7 to attempting an end game in this particular Court. We have  
8 nobody to talk to. They may be right, but we have nobody to  
9 talk to with regard to an end game, so we're just going to  
10 have to go to the various different forum that are provided  
11 for us under Lexicon.

12 THE COURT: Any response, Mr. Champion?

13 MR. CHAMPION: Well, I don't really view that as a  
14 response to the letter I sent to the Plaintiffs' Committee  
15 yesterday. I think they'll reflect upon the proposal I made.  
16 But, I do confirm that they have come to us with a proposal to  
17 put in place some system whereby every Plaintiff or every  
18 potential Plaintiff is in a position where he or she can  
19 collect compensation and we have told them we will not enter  
20 into that kind of a system.

21 We have identified categories of cases which are  
22 essentially the categories we are now mediating and mediating  
23 with some success both in the State and Federal side. We've  
24 given them a proposal as to that and we look forward to their  
25 response.

## ROUGH DRAFT 2

1 THE COURT: Okay. What the Committee has to do is to  
2 focus on the issues that the MDL Court can still deal with.  
3 Any discovery issues that need to be brought before me, let's  
4 clean that up, any Daubert issues, any class cert issues, any  
5 other issue that I can be of help to you on, I want to be of  
6 help to you, including the mediation, assuming there are  
7 groups of cases and you can work out some formula for the  
8 cases. That's what you need to be doing, devising a formula.

9 If there are 500 cases that the Defendants want to  
10 settle, or feel they can settle, or feel they're interested in  
11 talking about, work on a formula for those cases, and then it  
12 will work, but not case by case basis.

13 I do agree that I'm getting to the point where the  
14 MDL is ceasing to be of assistance to you and we can't allow  
15 it to be a black hole. We can't allow it to be a place or  
16 forum that once it gets here, it never gets back. I don't  
17 think that's of service to any litigant, plaintiff or  
18 defendant.

19 So, let's determine what the MDL Court can do and do  
20 it. For those things it can't do, I'll begin moving them back  
21 or at least recommending that they be sent back to the states  
22 so that those latter things can be done.

23 Anything further from anybody? Any other issues that  
24 we haven't covered?

25 MR. IRWIN: Not on our side, Your Honor.



## ROUGH DRAFT 2

1 THE COURT: While everybody is here, let's see, what  
2 is the next meeting? Okay, they tell me that everybody will  
3 be here for the Pretrial on the 7th. Is that doable or is  
4 that too much on our plate?

5 MR. BECNEL: The 7th of February?

6 THE CLERK: No, sir, March.

7 THE COURT: The 7th of March. Is that doable? The  
8 7th of March at nine o'clock and I'll see the Committee, the  
9 Liaison in the office at 8:30.

10 Anything further?

11 MR. BECNEL: It's 8:30, isn't it, Your Honor? The  
12 Pretrial is 8:30.

13 THE COURT: The Pretrial is at 8:30? Okay, that's  
14 fine. This will be at 9:00.

15 Anything from the states?

16 The Court will stand in recess. Thank you.

17 THE CLERK: All rise.

18 \* \* \* \* \*

19 (Whereupon, the hearing was adjourned)

20

21

22

23

24

25