

ROUGH DRAFT

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE:  PROPULSID PRODUCT                   MDL 1355  
LIABILITY LITIGATION                   Section "L"  
  New Orleans, Louisiana  
  Friday, April 25, 2003  
  9:00 a.m.  
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TRANSCRIPT OF STATUS CONFERENCE & PHONE CONFERENCE  
HEARD BEFORE THE HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

LIAISON COUNSEL FOR  
PLAINTIFF:

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BARRIOS, KINGSBORO & CASTEIX

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shouldn't have the burden of that under Rule 45 assuming all of those expenses.

THE COURT: Well, I'll have to decide that, I won't make any preliminary judgment on it. What I would require is that there be some specificity of that as to how many hours, who did it and what was needed and then I'll make that decision. I don't know whether that's recoverable, but I'll listen to it.

MR. TARRANTO: All right. Thank you, your Honor.

THE COURT: All right. Anything else from you, from your standpoint?

MR. TARRANTO: No, I don't think so. Also, your order in this case will be issued, would you then also do it as sitting with jurisdiction for Eastern District of Virginia?

THE COURT: I certainly will.

MR. DAVIS: If you would be kind enough to get me the dates when you guys could let us have access to the documents, I'd appreciate that.

THE COURT: This is what we're going to do. I want plaintiff counsel to contact you by Monday, get some dates that you can live with, write me a letter within ten days from now telling me, I don't care when you do it, if you all are agreeable to a particular date, that's fine with me. But just let me know what that is so that I can put that in the record.

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When I say a list, I'm not saying if it's a letter, a letter from the lawyer to the defendant dated such and such a time, regarding advertising or something of that sort. Don't spell out what's in it, because obviously that is not the way to do it. But get a log, a privilege log give it to the plaintiff and then if the plaintiff wants it I'll require that it be delivered to me, I'll look it over and make the decision as to whether or not it is governed by the privilege or not.

MR. TARRANTO: The reason I mentioned that, there probably will be not many items that are going to fall under attorney-client or attorney product privilege. As an example, when we had some other two litigations involving the same attorneys or plaintiff Herman Mathis. Degge produces over 21,000 documents and pages of material. And there is also a privilege log. And I think the privilege log is only one or two pages at most, but there were only a handful of items. Most of the matters that were privileged concerned the privacy rights of individuals where there were references and medical records or medical information on individuals that required redaction.

THE COURT: Right. There is no problem with that.

MR. TARRANTO: It was worked out. But it's a time consuming process for Degge personnel, and we felt like we

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2 THE COURT: Let me be clear, I'm not saying that the  
3 electronic documents will not be discoverable, I'm not  
4 addressing that at this point. What I am addressing is hard  
5 copy now and I'll revisit the electronic documents at a later  
6 date, and I'll hear from you and keep an open mind on it. The  
7 fact that I am requiring the hard documents is not an  
8 indication that I will require the electronic documents. It's  
9 also not an indication that I will not. I'm not focused on  
10 that at this point. I'm only focused on the hard documents.

11 MR. TARRANTO: The effort to -- if I could raise a  
12 couple of matters concerning the hard documents. There will be  
13 some time involved in retrieving them and producing them. I  
14 don't know exactly how much. But also those documents will  
15 have to initially be reviewed by Degge personnel or counsel for  
16 Degge to identify anything that's trade secret related or trade  
17 related of individuals and there may be a handful of items that  
18 are attorney work product or attorney-client privileged  
19 material.

20 THE COURT: The way that it's done if you feel there is  
21 some attorney work product and you pull those out, give me a  
22 list or log on what you pulled out, just a description of what  
23 the document is and give the list to plaintiff counsel,  
24 plaintiff counsel will look at the list and determine and  
25 decide whether or not those are significant.

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copies and not the electronic documents, they may not be discoverable or they may be discoverable. The point is I make no decision at all on the electronic documents.

On the hard copy documents, I expect that to be worked out, and I direct plaintiffs' counsel to contact defense counsel and get some times, dates and work those problems out. If they can't, bring it to me and I'll act accordingly.

MR. DAVIS: And we will do that within the next 30 days.

THE COURT: I want that done within 15 days.

MR. TARRANTO: Your Honor, a couple of matters I may raise. The person, as far as the time, the person who is going to be responsible at Degge is the administrative assistant to Dr. Jones, had surgery recently, a couple of days ago. The woman is out for the next two to three weeks, so that'll fall on Dr. Jones' shoulders, and she's got a lot of other responsibilities.

THE COURT: I'm sensitive to that. That's enough said. You work it out with the plaintiffs' counsel and let's make it at a convenient time for her.

MR. TARRANTO: Another couple of related matters. First of all, I greatly appreciate the court's willingness to try to initially limit this to the hard documents rather than the electronic because it raised monumental problems.

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2 you have an opportunity to look at the material that they've  
3 tagged, which at that point is a considerable less number. If  
4 they look through 2,000 documents and tag five, you only need  
5 to look at the five documents to determine whether or not  
6 you're going to give them or not give them. And then if you  
7 have any problems with those five documents, tell me, I'll look  
8 at them and I'll make that cut.

9 MR. DAVIS: And, your Honor, with respect to  
10 electronic, we already have in place an confidentiality order  
11 that should protect and avoid any concerns that anyone has as  
12 to the plaintiffs looking at these documents. But what we  
13 would be willing to do as is we've done with others is accept  
14 the documents in their native format, native format or  
15 alternative if Degge would allow us to use their computer  
16 equipment, we will they then go in and do our own searches and  
17 identify what we want and deal with the means of getting the  
18 electronics off.

19 As your Honor is well aware, we have produced  
20 probably more electronic information in this case than most any  
21 other case in the country. We're very familiar with those  
22 issues, and I don't see this as a huge problem provided we have  
23 access to the electronic information.

24 THE COURT: Well, I'm not going to speak on the  
25 electronic information at this point. I'm just looking at hard

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2 the hard copies. If there isn't, then we regroup and see how  
3 we do with the electronic. If even that is necessary.  
4 Hopefully it won't be necessary. But if it is we will have  
5 some track record as to how it was done and some cooperation  
6 demonstrated by the parties, which will be helpful to me at  
7 that time in fashioning a solution.

8 So from the standpoint of the hard documents, it  
9 would be my hope that these could be put in some kind of room,  
10 on some kind of table, let the plaintiffs look through them.  
11 Let them assemble them, let them do whatever they need to do  
12 with them and tell you whether or not they need them copied.  
13 If so, then it's their expense, not yours.

14 ~~MR. HERMAN:~~ <sup>*Davis*</sup> Your Honor, what we will be willing to do  
15 and what we have done with other third parties is sometime in  
16 the foreseeable near future we will send some representatives  
17 to the Degge Group, we will spend the time going through the  
18 documents, we will tag what we desire and we will pay the  
19 reasonable cost for the copying of the hard copy documents,  
20 consistent with what your Honor is saying.

21 THE COURT: What we have done in the past is required  
22 the parties to have somebody from each side there, let somebody  
23 from the defendant look over it, make sure that this is being  
24 done satisfactorily, they know what they're seeing, what they  
25 haven't seen, tag the documents, don't remove anything, then

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2 around I think March 19th, about five weeks ago, that the  
3 majority of the effort plaintiffs' subpoena would require would  
4 be devoted to reviewing the electronic files or electronic  
5 documents and all of the attachments to them, whereas the hard  
6 documents are still very time consuming because there is a  
7 great volume of them, estimated that there are approximately 16  
8 to 20 box of material by a rough estimate that would have to be  
9 compiled and reviewed and produced.

10 But if they can narrow the scope to just the hard  
11 documents, then that would make things, well, speedier and less  
12 costly for everyone. Plus the plaintiffs and defendants might  
13 be able to join in the effort of undertaking the burden of the  
14 cost.

15 THE COURT: Either the cost or the amount, it should be  
16 born by the plaintiffs who want to see the documents, they  
17 ought to be the ones who have the responsibilities of going  
18 through the documents. I don't have any problem if you put the  
19 documents in a room and let them look at them and generally  
20 look through the documents, make a decision as to which ones  
21 they want copied and then it's their ticket, their expense to  
22 copy the documents.

23 I don't know about the electronics at this point.  
24 I suggest that what we do is to look first at the hard copies,  
25 see whether or not there is any way of resolving it only with



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thereabouts, and that this would be a monumental problem, even if it could be done it would occupy the full staff and it would be costly and it would be problematic. It's not my intention to do that. I want to see if there is a method of resolving the problem so that you have as limited time, consequence or effort expended as necessary. Any suggestions from you as to how this can be done?

MR. TARRANTO: Yes, your Honor. One initial comment. A couple of days ago I found out corrected information on staffing of number of Degge personnel from the president. I had previously gotten evidence and the evidence from the assistant to the president, and I think there may have been a difference in her perception of contracted personnel. The actual number that Degge employees is not more than 23 and two year ago it was approximately 48, so they've had a significant economic downturn in loss of staff.

THE COURT: Right, I'm sorry to hear that.

MR. TARRANTO: Director of informatics who is their computer person who is accepting the electronic files, but the staffing is not the person that I mentioned in the papers. I want to correct that right off the bat.

THE COURT: Thank you.

MR. TARRANTO: As far as trying to contain the costs, we had made a proposal to plaintiffs' counsel in correspondence

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Now, talk to me a little bit about the confidentiality, what is a problem, if any, with the confidentiality order?

MR. COGAN: Your Honor, the good news, I think it's easily resolved because the only problem we had is that we did not want to be subject to jurisdiction in the Eastern District of Louisiana per se. Therefore, I think we can solve this problem just by having you enter a two line entry that the confidentiality order that's in effect is hereby ratified in your capacity as a judge of the Southern District of New York under 1407(b). That's one way to do it.

THE COURT: I'll do it. That's the easiest way, if that's satisfactory to you that will be done.

MR. COGAN: That takes care of it. Thank you very much for your help. I appreciate your suggestion and I'll exercise that order.

MR. DAVIS: Thank you, Brian.

MR. COGAN: Am I dismissed?

THE COURT: Yes, thank you very much for participating.

MR. DAVIS: Thank you, Brian.

THE COURT: Let's talk now about the Degge matter. I am aware of your particular problem, you told me in your answers that you have a company or represent a company that at one time was a larger company, now you have some four people or

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1  
2 the subpoena, but I think we've agreed with Plaintiffs Liaison  
3 Counsel that we're going to produce documents that either  
4 principally concern Propulsid or that in some material part  
5 dealt with Propulsid, and that will alleviate the burden that  
6 we would otherwise have of producing what could be an enormous  
7 amount of useless documents.

8 THE COURT: I understand that that's acceptable to the  
9 plaintiffs' counsel.

10 MR. DAVIS: That's correct. We have discussed that  
11 with counsel for McKinsey and have agreed to the scope of the  
12 subpoena duces tecum. And, your Honor, you're correct the only  
13 issue that's remaining is McKinsey's desire for  
14 confidentiality, and we have told McKinsey that we would abide  
15 by Pretrial Order No. 5, which is already in place, and I  
16 believe McKinsey's counsel has had an opportunity to look at  
17 Pretrial Order No. 5 which is the confidentiality order that  
18 your Honor has already issued in this litigation.

19 THE COURT: First, I do appreciate your cooperation  
20 from the standpoint of the court, your court in New York and  
21 also the court here; the cooperation of counsel is something  
22 that this court appreciates, and so I compliment both plaintiff  
23 and defendant in reaching an agreement, at least partially  
24 reaching the agreement that you can live with regarding the  
25 type of material.

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documents and the number of depositions have been staggering. But in a lot of this material I have been sensitive to the fact that it presents complex problems in cost, it presents complex problems in just amount of time, material and also the confidential aspect of it. I'm just not going to require everything to be presented irrespective of cost, irrespective of time, and irrespective of the sensitivity of the material.

But having said that, we have found in this litigation that there are ways of handling those particular problems. I first try my best to work with the lawyers to see what their problems are and to see if I can come up with a solution that their clients can either live with or accept. If they can't, then I will act in a way that I feel is necessary to act. So my need for discussing this with you is to get some input from you and to see whether or not I can come up with a solution that is less onerous to you, more acceptable to you. If I can't do that, then I will find a solution to the problem that just solves the problem.

So I am interested, first of all, in talking on the McKinsey issue because I think that your issue is confidentiality and I'm willing to hear from you.

MR. COGAN: Yes, your Honor. Brian Cogan. And I think you are correct that the only issue we have between us is confidentiality. We did have an earlier issue as the scope of

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designated when needed by the panel, and that's me in this case, may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

So when I'm speaking to you gentlemen, I'm speaking as a judge of your respective districts and I will hear you on that level.

There are several ways of doing it. I can come out to your district and officially sit in your area or I can do it by sitting in my district exercising my authority under 1407(b) to sit as a judge in your district. So I am actually sitting not only in the Eastern District but in your two respective districts.

First with the McKinsey matter, I am sensitive to proprietary information and also to putting matters under seal, and also I am sensitive to the need for confidentiality in many of these matters because we have had all of those problems in the MDL setting. And for your information, I have cases from every state in the union, I have 30 class actions from 28 states, and it looks like there are about 10,000 or so individual claims, at least that's what I'm advised, that either have been filed or are pending filing. So it is a rather extensive litigation.

The parties have thus far given up nine million

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COURTROOM AND PROCEEDING MOVED TO THE JUDGE'S CHAMBERS WITH  
LENNY DAVIS AND MONIQUE GARSARD ALONG WITH BRIAN COGAN  
REPRESENTING MCKINSEY & COMPANY AND LEON TARRANTO REPRESENTING  
THE DEGGE GROUP BY TELEPHONE.)

THE COURT: This is Judge Eldon Fallon, the United  
States District Judge from New Orleans. I have in my chambers  
Mr. Lenny Davis and Mrs. Monique Garsaud. I am recording this  
with the court reporter in chambers.

Who do I have on the line.

MR. COGAN: This is Brian Cogan from Stroock & Stroock  
& Lavan from New York representing McKinsey & Company.

MR. TARRANTO: This is Leon Taranto with Schmeltzer,  
Aptaker & Shepard.

In Washington, D.C. My client is a non-party, the  
Degge Group, Limited.

THE COURT: Let me address both of you all first. I  
have an MDL case going on in our district. I've been  
designated as the transferee judge by the Multi District  
Litigation Panel under Section 1407, Title 28. As all of you  
know in Title 28 USC Section 1407(b) provides that it is the  
judge or judges to whom such action are assigned, and I'm  
talking MDL, the members of the judicial panel on  
multi-district litigation and other circuit and district judges

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efforts of counsel and the court does appreciate that.

We will stand in recess now and get the people on the phone that I have to talk to. The court will stand in recess.

THE DEPUTY CLERK: Everyone rise.

THE COURT: Yes, our next meeting, let's get a date.

THE DEPUTY CLERK: Judge, how is Friday, May 23rd?

THE COURT: How is that?

MR. ZIMMERMAN: Is it possible to do it on a Thursday of that week? I don't know if I'm available or not, but I know that's Memorial Day weekend.

MR. HERMAN: It is.

THE COURT: How about Thursday, do you want to do Thursday?

THE DEPUTY CLERK: Judge, depending on what you have on the Monday. We could do it at nine.

THE COURT: Let's do it Thursday then.

THE DEPUTY CLERK: Thursday the 22nd.

THE COURT: How about the date for the end game.

MR. ZIMMERMAN: We are going to call my office and get some dates.

THE COURT: Let me hear from you all and get some dates.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED IN THE

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nickel.

I just want to say we appreciate the fact that we did not have to take 1,427 30(b)(6) depositions, and as a result we were able to save Johnson & Johnson over \$50 million in fees and costs.

MR. ZIMMERMAN: Your Honor, one statement. We would rather not have those remarks from Mr. Campion, we would rather have money.

THE COURT: The truth of the matter is that both sides deserve credit. I've been continuously impressed with the professionalism and the hard work and the effort that each side has exhibited. I think they've put their emphasis on issues, not personalities, and it has worked to the benefit of their respective clients.

I think a lot of waste is created by counsel fighting each other rather than fighting on the issues and fighting on the legal matters. They somehow or another get distracted and personalities take over. This hasn't happened here and, therefore, the parties have been able to put their resources, as well as their great intellects and abilities on the issues and not personalities.

And the case has worked well so far. I'm a little disappointed that we haven't been able to totally resolve it, but we have come a long way and it has really been through the



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immense database. They proceeded by saying they wanted to do a 30(b)(6) deposition of the person or persons who did it. Obviously there was no such creature. And they were taking dozens of creatures.

I took comfort in the fact the degree of corporation I received from them, primarily Mr. Davis who was the point man, in standing down as we began to develop a database. We developed a database, we gave them the protocol, they made a few changes, we accepted the changes and we put people to work on this. We used an outside outfit. It cost Janssen about a quarter of a million dollars to develop this database, which is now reduced to either one or two CDs, I forget how much. And we gave it to them long ago.

This is a matter, which aside from some original jousting never reached the stage of a battle in this podium, worked out so that they have a database that they can use, which is our database. They expressed some dissatisfaction to the fact that the CD couldn't do more tricks than it could do, but I think that they've solved that. And I think that it is appropriate to note at this time on behalf of the defendants. We thought the cooperation given to us by the PSC on that subject was remarkable. Thank you, Judge.

MR. HERMAN: Your Honor, could I have those remarks under seal. If that gets around the plaintiffs bar, I'm a dead

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remained constant now for about a year, and we don't see any dramatic change up or down on that one. The number of plaintiffs is evenly divided, approximately divided between those in federal courts, either here or about to come here, or on their way here, and those in various state courts. So those may be of assistance.

Next, I have been informing the PSC of trial status of various state court cases so they can fulfill their responsibilities under the various orders you have entered and they've asked for some additional information and we will provide that.

Now, I should like to make a statement, I think I mention it in charm, but I think it's appropriate that some note be taken about Item VIII of the agenda which is about to disappear from the agenda, the 30(b)(6) deposition regarding studies. When someone gets around to writing the story of the Propulsid litigation whenever it ends, both the plaintiff and the defendant sides will take some comfort from what happened.

From time to time Mr. Herman or his colleagues stand up here and bring what they believe to be defense imperfections to our attention and Mr. Irwin or I stand up and indicate how irresponsible those charges are. The issue of the studies that were done by Janssen came on early in this litigation. We're talking about an immense database, I mean an

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2 THE COURT: We haven't seen you in awhile. You were  
3 picking a jury for over a year in Civil District Court.

4 MR. HERMAN: 18 months we picked a jury. I want to  
5 tell you, my colleague Mr. Murray did one of the most  
6 outstanding cross-examinations I've had the privilege to  
7 witness yesterday and it's not over yet. So I want him well  
8 rested for next week.

9 THE COURT: Let me hear from the defendants. Anything?

10 MR. CAMPION: Just one or two things, Judge. So there  
11 may be no misunderstanding on the part of state or federal  
12 counsel, you made a remark to the effect you understand there  
13 have been several other trials, there have been a grand total  
14 of two cases tried to verdict, the one before you, one that was  
15 tried in a state court which is now before the Mississippi  
16 Supreme Court, a third case is being presently tried in state  
17 court in California. So that's the grand total of that.

18 Second, from time to time I have reported to the  
19 court and to the PSC about the statistics that may be relevant  
20 to an understanding of the Propulsid litigation. I advised the  
21 PSC earlier this week that there are approximately 5,500  
22 plaintiffs presently maintaining Propulsid lawsuits. And by  
23 5,500 plaintiffs I mean a plaintiff group that may be a husband  
24 or wife or someone's representative. Eight percent of those  
25 cases or approximately 446 are death cases. The percentage has

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here takes ten, that will get 120 out. We'll see.

MR. HERMAN: We were furnished a list of upcoming trials, we understand it will be supplemented with the names of the counsel of record.

There really are no other issues. I did want to state under fifteen that Mr. Zimmerman, Mr. Hill, Mr. Levin have been talking to the defendants regarding any potential settlement issues, and it's an ongoing process, and it may be necessary for your Honor to convene a meeting just on that issue.

THE COURT: Right. We have an End Game Committee, Mr. Campion is representing the defendants on the End Game Committee, and Mr. Levin and Mr. Zimmerman are representing the plaintiffs on the End Game Committee. And I'm going to be meeting with them to discuss some concrete proposals and how to handle the end of the litigation, what we need to do before ending it, what opportunities still exist in the MDL, and how we go about moving the cases back to the states if need be.

MR. HERMAN: Your Honor, I think that that really concludes the agenda. We've discussed the Robinson deposition issue.

I just want to say it's a pleasure to be in your court, it's nice to see all of your staff looking so bright and young.

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March 13th, 2003, this is under 6.

THE COURT: Right, Motion For Class Certification.

MR. HERMAN: And we are going to be interviewing potential class members, we're going to have to amend at some point, substitute some class members. As I read Newberg, we don't really need class members at all points, but we think before we proceed to cert, we're going to have to have some additional class member or members. Of course, the defendants are going to have to have an opportunity to take any discovery beyond the patient profile forms that they feel they need. And we're going to be acting to do that. And I apologize for skipping over that.

THE COURT: Okay.

MR. HERMAN: Mr. Zimmerman --

THE COURT: Trial Schedule, item 12. We should be setting some more trials in this particular case. I'll look to the parties again, I'll talk with you about that. But we ought to move forward on the cases, at least that I have before me. I can do it in several ways. I can ask all of my colleagues around here, there are 12 of us now, and I can split the whole docket up and each judge can take four or five and we'll get rid of all of the cases, or I can do them myself. I'll talk with you about that, but those are the opportunities. I am not quite sure how many I have in this district, but if each judge

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same effort, an effort to resolve the case without a trial, if possible. Thank you, Judge.

THE COURT: The reason I'm pushing on this obviously is because I see the MDL, I see my role as an MDL judge coming to an end soon, and before it does that I want both counsel to at least be heads-up on the opportunities that an MDL affords. The primary opportunity, of course, is as a discovery vehicle. But the other opportunity is to afford a forum for trying to resolve all of the cases, some of the cases, part of the cases. And I understand the defendants' position regarding the fact that some of the cases at this present time are the ones that they want to target.

But you need to talk with plaintiffs' counsel and you need to pick up the pace on it and see whether or not we can resolve those. And then we will regroup and see where we are at that point. But before the MDL closes down, exhaust your opportunities in this way. I think it would be helpful for both sides.

Trial schedule is the next item. I have under advisement the Brock matter. I'll work on that this weekend and hopefully get it to you by Monday or Tuesday.

MR. HERMAN: Your Honor, I apologize, I neglected to bring up one of the most important matters. The class representative Virginia Gail Jones died in a house fire on

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THE COURT: Ten would be Declassified Documents.

MR. HERMAN: Nothing new to report on that.

THE COURT: Mediation, eleven.

MR. HERMAN: With respect to mediation, Mr. Campion or Jim, do you want to address that?

MR. CAMPION: We provided certain statistics which appear in the report, we've also given to the PSC corresponding statistics regarding mediations and resolutions nationwide. We believe that the work Mr. Juneau has done to date has been valuable. We look forward to working with him on ongoing mediations.

We have given the PSC a list of approximately 10 or 12 matters which are now ready for mediation. We are mindful about your remarks of the goal posts. We are trying to move ahead to some written reduction of those cases we are prepared to mediate, which will have parameters for this, that or the other thing. We have worked with two members on PSC or State Liaison Committee. I think we are making some progress. Our position, however, remains as before which is we are prepared to review three categories of cases and we are not prepared to review the remaining.

I think that this is a worthwhile effort. Indeed, if we were only dealing with one or two cases instead of all of the cases we're dealing with, we would still go through the

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Monday and we will now.

Interrogatory No. 3 is CIS-NED-32 I told them what I thought the answer was and is that CIS-NED-32 still is not complete and there have been no revisions since May 18, 2002 when the draft was produced in Trish Robinson's last deposition.

The remaining part of the Interrogatory No. 1 dealing with 30 odd other individuals or suppliers, consultants if you will, seeking our information on payments to them is voluminous, and it goes back many, many years in some cases for these people or these consultants. Mr. Campion and his office is working on this information directly with the client in New Jersey, and he indicated in our transmittal that we expected to have this response completed in May. If we run into problems, I will let Mr. Herman and Mr. Davis know.

THE COURT: Let's just keep in touch.

MR. HERMAN: We accept those representations of counsel on the record, and look forward to getting the information. There is nothing further on the next issue, your Honor.

THE COURT: That's No. 7 on the agenda. Eight is 30(b)(6) depositions. Nine is Trust Account.

MR. HERMAN: That's correct.

THE COURT: Is that going all right?

MR. HERMAN: Yes, it is, your Honor.



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on Propulsid. We only got a response as to Dr. Zipes and we discussed that. We got no response to Interrogatory No. 2, no response to Interrogatory No. 3, no objections, and we also got no responses in Interrogatory No. 1 to 30 individuals or entities other than Dr. Zipes.

THE COURT: Is this in connection with how much they were paid, are these expert witnesses?

MR. HERMAN: Yes. That's in Interrogatory No. 1. Interrogatory No. 2 that we got nothing on request the countries in which, as of January 2003, the defendants continued to sell the drug product or contained Cisapride. And in No. 3, state whether you have completed your research report on CIS-NED-32, et cetera, which has been the subject of ongoing controversy in this case now for more than two years.

THE COURT: I'll hear a response.

MR. IRWIN: Your Honor, I sent this first response, I believe, last Friday, Good Friday, and both our office and Mr. Herman's office was shutting down. So we delivered it on Monday.

And we indicated in our transmittal in our delivery that we would be answering Interrogatory 2 and 3 within a week. We will do that on Monday. I told Lenny Davis on the phone that Interrogatory No. 2 having to do with foreign labelling, I wasn't sure whether we would have that answered on

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THE COURT: You mentioned trials. We had a trial, of course, here in this district, and I understand that there have been several other trials. I just mention, because I have all of the people here today, that it would be helpful if each side would get together with their respective trial counsel while it's still fresh in their minds and brain bust what problems and/or difficulties and/or solutions which they have found to various problems in their respective trials so as you go on with future trials, you will have learned from what has happened before.

Many things worked very well in the trial before me and counsel, of course, were very proficient and did a good job, which was no surprise to me. There were occasionally glitches that came up during the trial that they can give information on and make it easier for those who come after them for future trials, I suggest you keep an eye on that and do it.

Let's see. The next item on the agenda is 30(b)(6) Depositions Regarding Studies.

MR. HERMAN: We have one as to merits. We served on the defendants interrogatories, and I received from Mr. Irwin on the 21st objections. What we requested in Interrogatory No. 1 is the same information that we've requested from Zipes, from the other defendants, either consultants or individuals with whom Johnson & Johnson has or a relationship with which bears

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& Company attorneys and representatives and the Degge Company attorneys will be on those calls.

THE COURT: The next item on the agenda is Plaintiffs' and Defendants' Respective Requests for Production of Documents. Is that where we are or did I move too fast? Motion for class certification.

MR. HERMAN: No. 6, as I reported to the court, the discovery outstanding would entail some discussion of what depositions will be used for perpetuation purposes and whether stipulations can be made as to depositions taken for discovery to be used as perpetuation.

Secondly, outstanding requests for admissions and objections to those requests or responses, which have been extended, the time limit has been extended. There are some interrogatories, which we'll get to later on, the third party subpoenas which your Honor has just spoken to.

And the issue as to the Robinson, her deposition, your Honor has indicated that'll be taken after the Calvert trial. And as soon as that ends we will notice that deposition.

So those are the main discovery issues outstanding, and we expect to have those completed within the next couple of months and be prepared to talk about a class cert day.

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MR. HERMAN: Your Honor, the next issue that we have are third party subpoenas, and I understand that there are telephone conferences --

THE COURT: I have some telephone conferences set up after this hearing. I will speak with those individuals and talk with them and see what their particular problem is. I will cite them to Title 28, Section 1407 which specifically says the judge or judges to whom such actions, and I'm talking MDL, are assigned, the members of the judicial panel or multi-district litigation and other circuit and district judges designated when needed by the panel may exercise the powers of the district judge in any district for the purpose of conducting pretrial depositions and such coordinated proceedings.

There are about eight cases dealing with this particular matter, I reviewed them. The cases indicate that I have the authority to act as a judge of that particular district. I'll either go to that district or I'll operate as a judge from this district with a hat on from that district. I'll be speaking as a judge, as a district judge in the district to which the defendant resides. But I'll explain this information to them, and I'll see what their position is and I'll, of course, listen to it and then make a decision on it.

MR. HERMAN: Your Honor, I understand that the McKinsey

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him, including everything he's billed directly or indirectly in connection with Propulsid.

The relevant question asked me was this limited in time? Yes, it's limited in time to his work on Propulsid or Cisapride.

THE COURT: Okay. I understand the issue. Dr. Zipes will have two weeks in order to get together any and all documentation which he has in his possession regarding any bills, any statements he rendered and also to indicate how much total money he received from the defendants in connection with his work on Propulsid and Cisapride.

If there is a particular problem, you can file whatever is necessary and I'll deal with that particular problem. But I do feel that plaintiffs have the right to that information.

I'm limiting it to the documents that he has. I'm not saying that he has to go and get documents from other people, but if he's got documents, he ought to present them. If he has copies of bills, copies of statements. I also agree that he ought to know how much he received. I think that that's a fair request.

MR. HERMAN: And I assume this includes his corporation through which he bills?

THE COURT: Right.

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certification to the completeness of the documents.

We're a little -- I don't understand why there is this need to have this certification from Dr. Zipes as to the amount, as to the exact dollar figure, because he's given his best testimony on that. And it troubles me that maybe this is an effort to try to trap Dr. Zipes in some way. It seems to me his fair sworn testimony is responsive to the subpoena that he gave under oath and that a certification from the attorney who collected all of the records, not only from Dr. Zipes but also from the company, is more than a fair response.

So my biggest concern, Judge, is that somehow or another this could be used to trick Dr. Zipes on a technicality that would not be fair to him.

THE COURT: All right.

MR. HERMAN: I think the word is impeachment. I don't know of any expert witness in my experience who didn't send bills, doesn't have a bookkeeper or CPA and knows exactly how much he's been paid and for what he's been paid. If Dr. Zipes didn't keep records or perhaps he didn't report his income or he's funneling it through this corporation, I don't know. I'm not going to make those accusations.

I know what I'm entitled to get, and that is not his sworn testimony of an estimate. I'm entitled to get a response to a subpoena duces tecum of his records certified by

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"response" that one gets to a subpoena like that, and he was deposed.

He gave sworn testimony on the witness stand at the Daubert hearing as to his estimate of the number, which was as the court I think will recall is roughly \$600,000. The underlying issue was how complete was the document production. Well, he produced everything that he had, but we also produced everything we, being the defendants, that we had; and it was the combination of all of these documents, some 9,000 pages of documents, that was described I think inaccurately as a document dump. Because not only did we produce these documents in traditional CD ROM form but they were also accompanied by the detailed index that the court is familiar with.

So the certification issue is an issue that really relates to the completeness of the document production, because he had given his testimony on the amount, the sworn testimony. And the reason, as I think I said in court last time, that he couldn't certify to the completeness of this was because most of the documents, in fact, came from J&J.

So what we did is had Mr. Falletta, who is an attorney, working under the supervision of Mr. Sharko -- as I think the court knows has worked more closely with Dr. Zipes than anybody else -- review all of the documents, Dr. Zipes' documents and the company documents and provide the

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Dr. Zipes certify it as distinguished from Johnson & Johnson producing a dump of various records, some of which may be Dr. Zipes, some of which may be theirs, certified by a lawyer that he's looked at them. We just don't think that satisfies the requirements of the federal rules.

THE COURT: The issue is how much he received money wise, is that the issue?

MR. HERMAN: Yes, remuneration from all work that he has done for Johnson & Johnson through later corporations.

THE COURT: From a certain date to a certain date?

MR. HERMAN: Whether it's direct or indirect through some corporation that he may have set up for which he moves funds.

MR. IRWIN: May I be heard on that issue, please, Judge?

THE COURT: Sure.

MR. IRWIN: I think the issue is also the production of the documents. It was a subpoena duces tecum that was issued to Dr. Zipes, and it asked for his documents that documented the amount of money paid to him by J&J, by Janssen or by law firms in connection with the Propulsid litigation. Dr. Zipes has testified under oath, which is what you usually do when you get a subpoena like that, about these amounts. He was asked about it, his testimony is sworn, and that is customarily the



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cancer surgery at Ochsner, and I think he's probably at Ochsner right now with her.

THE COURT: I understand. Well, he's being well represented here.

MR. HERMAN: Patient profile form, Mr. Irwin.

MR. IRWIN: Your Honor, there are 189 as described in the report that are overdue, 80 that are coming due. We recently submitted to the court, and I believe I saw that the court signed a 54(b) judgment on the last motion. The 189, Judge, is a little more than I expected to see at this point, so we are going to look at that carefully and we'll stay on top of it.

THE COURT: Okay. That's fine. Service list is the next item.

MR. IRWIN: Yes, your Honor, we have Ms. Lambert's copy and I have a copy for Ms. Barrios for the committee and Mr. Davis' copy.

THE COURT: Third Party Subpoena Duces Tecum is the next item on the agenda.

MR. HERMAN: Your Honor, we have an outstanding subpoena that we believe has not been satisfied by Dr. Zipes who is principle witness for the defendants on a number of issues, and what we've requested is that Dr. Zipes and his corporation produce their records on their billings and that

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1  
2 CDs that may need to be replaced. But these are issues that  
3 plaintiffs can work out with the defendants.

4 THE COURT: All right. Anything on that? How about  
5 state liaison counsel, do you have anything to add?

6 MR. HERMAN: Just one issue. Mr. Arsenault said that  
7 he wanted to submit in camera any hours expended, et cetera,  
8 which we have no objection to, and we worked it out with all  
9 state liaison committee folks.

10 THE COURT: All right. With regard to the state  
11 liaison counsel, I have received from Mr. Arsenault a request  
12 that he be supplied and given access to the documentation  
13 supporting the plaintiff liaison's proposal for withdrawal of  
14 funds for payment of costs and attorney fees, and I did a  
15 minute entry requiring Plaintiff Liaison Counsel to deliver  
16 that material to him. The matter has been set for hearing, I  
17 will take it up at that time. And if there are no objections,  
18 I will deal with it perfunctorily. If there are objections I  
19 will consider them and in due course rule on them.

20 MR. HERMAN: Our only concern, and Mr. Arsenault I'm  
21 certain has no objection, that whatever material he receives  
22 that's under seal will be kept under seal by him.

23 THE COURT: Yes.

24 MR. BECNEL: Your Honor, Mr. Arsenault, I don't know if  
25 the court is aware. His mother has been in and out of major

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2 P R O C E E D I N G S

3 (STATUS CONFERENCE)

4 (FRIDAY, AUGUST 23, 2002)

5 THE COURT: Be seated, please. Good morning, ladies  
6 and gentlemen. Call the case, please.

7 THE DEPUTY CLERK: MDL No. 1355, In Re: Propulsid  
8 Products Liability Litigation.

9 THE COURT: Counsel, make their appearance.

10 MR. IRWIN: Good morning, your Honor, Jim Irwin for  
11 defendants.

12 MR. HERMAN: Russ Herman for the plaintiffs.

13 THE COURT: This is our monthly meeting with the  
14 plaintiff and defendant liaison counsel and the state liaison  
15 counsel. As typical, I have received from the parties a draft  
16 of the report of the material that we are to be discussing, and  
17 I'll take them in the order in which I have been given.

18 Update the Rolling Document Production and  
19 Electronic Document Production, Item No. 1.

20 MR. HERMAN: May it please the court, good morning,  
21 your Honor. Russ Herman for Herman Mathis and the Plaintiffs  
22 Legal Committee. And with respect to Joint Report No. 22,  
23 rolling document production is for the most part complete. We  
24 have received 709,000 e-mails approximately of which 350,000  
25 have been reviewed. And our review is ongoing, there are some

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MR. TARRANTO: Yes, your Honor.

THE COURT: Okay. Thank you very much for visiting  
with us, sir.

MR. TARRANTO: Thank you, your Honor.

THE COURT: Thank you, bye-bye.

MR. DAVIS: Thank you.

(WHEREUPON, THE PHONE PROCEEDINGS WERE CONCLUDED.)

## REPORTER'S CERTIFICATE

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

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Karen A. Ibos, CCR, RPR

Official Court Reporter