

P R O C E E D I N G S

MORNING SESSION

(Wednesday, June 12, 2002)

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

1 THE COURT: Good morning, ladies and gentlemen. I'm
2 sorry to keep you waiting. I have been meeting with your
3 liaison counsel to see if we could shorten our meeting, which
4 is our usual procedure. We will take the first item on the
5 agenda. This is our monthly meeting. The first item is an
6 update of documents production, electronic documents
7 production. Let me hear for the record the presence of
8 counsel, please.
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13 MR. IRWIN: Good morning. My name is Jim Irwin for the
14 defendants.

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

24 THE COURT: All right, I understand that so far 6,500,000
25 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 wenter 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 Janzer
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 consideration 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 it 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 Bevlin 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 production of documents.

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 believe 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:~~ ^{TOM CAMPBELL} ~~Charles Preuss~~ ^{TOM CAMPBELL} 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. ^{CAMPBELL}PREUSS: 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

1 regarding particular studies, we need to reach some uniform
2 way of making sure we have got the right deponent or deponents
3 in advance. It is not a criticism of the defense counsel in
4 any way, just a matter that's got to be resolved so that we can
5 take these critical depositions.

6 THE COURT: Let me hear from defense on that.

7 MR. PREUSS: Your Honor, we originally understood this
8 was a question of 30(B)(6) depositions resting 800 more or less
9 clinical studies that we identified. Your Honor may recall
10 that earlier this year a question was raised by PSC about their
11 ability to find clinical studies. It was ordered from the
12 Court, and we prepared a computer printout. It is very, very
13 substantial Bates stamp numbers and some relevant dates. We
14 have assigned a scientist in the company to be supported by an
15 outside consultant to start to gather together the information
16 that we think they want. To the 30(B)(6) examination about
17 these studies, we plan to meet with them and get their input.
18 We want to have this thing resolved before this study, the 800
19 study starts.

20 THE COURT: We skipped the Morgan Roth study.

21 MR. HERMAN: I had spoken about that earlier, Your Honor.

22 THE COURT: I'm sorry. Anything further on that from
23 the defendant?

24 MR. IRWIN: We addressed that, Your Honor.

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 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.
12
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14 

15 David A. Zarek
16 Official Reporter
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