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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

 IN RE: PROPULSID PRODUCT MDL 1355
 LIABILITY LITIGATION Section "L"
 New Orleans, Louisiana
 Thursday, April 29, 2004
 9:00 a.m.

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

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P R O C E E D I N G S

(STATUS CONFERENCE)

(THURSDAY, APRIL 29, 2004)

THE COURT: Be seated, please. Good morning, ladies and gentlemen. Let's call the case.

THE DEPUTY CLERK: MDL No. 1355, in re: Propulsid Products Liability.

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

MR. ZIMMERMAN: Charles Zimmerman, your Honor, Zimmerman, Reed for the Plaintiffs Steering Committee.

MR. DAVIS: James Dugan with Gauthier Downing for the PFC. Good morning, your Honor.

MR. IRWIN: Good morning. Judge, Jim Irwin for the defendants.

THE COURT: We're here today for the monthly status conference. As is usual, I met with liaison counsel in preparation for the conference and discussed many of the issues. I'll take them in order.

The first, the Update of Rolling Document Discovery and Electronic Document Production. Anything on that?

MR. IRWIN: Judge, since Mr. Herman is engaged in

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2 combat this morning in other venues, it was agreed that I would
3 attempt to take the lead in addressing the court on the agenda
4 this morning.

5 As the joint report indicates, we have completed
6 the document production. The only outstanding issue now is, on
7 the table is our effort to craft a pretrial order providing for
8 the suspension of some of the preservation measures that are in
9 place. Those measures are obviously expensive. And since the
10 materials that are being preserved now, the materials that are
11 only generated at the very tail end of these issues, we felt
12 and we don't think there is any substantial disagreement from
13 the PFC, that a proper supplementation of Pretrial Order No. 10
14 would provide for an appropriate suspension of these
15 preservation measures.

16 It's complicated though because preservation of
17 these materials is a complicated process in terms of preserving
18 electronic documents on a live server. So we are trying to
19 make sure we get it correct and submit the language that would
20 make sure we didn't make any mistakes and trip up
21 inadvertently.

22 So we are working on that, Ken Conour is working
23 on drafting that order and talking with Johnson & Johnson and
24 Janssen about that.

25 THE COURT: That's a significant area because these are

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cases that may need to be tried in other jurisdictions or in the states, they have an interest in this issue because it may affect the material that they will be using or will have access to. When can that be done?

MR. IRWIN: We are hoping that by the next conference, which we understand is going to be on June 11th, that we will be concluded with that. We will have language prepared and submit it to the Plaintiffs Steering Committee for their review, and they will obviously have to have it reviewed by their electronics experts; and hopefully by June 11th we will be able to submit a proposed amendment to Pretrial Order No. 10.

THE COURT: Let's do that then by the next status conference, and give me a copy of it the day before when you send me the agenda for the meeting so that I will have an opportunity to look at it.

Next one is State Liaison Counsel. Anything from the State Liaison Counsel?

MS. BARRIOS: Good morning, your Honor. Dawn Barrios for the State Liaison Counsel. Considering your comments at the last status conference about the state's possible involvement in any resolution of the Propulsid cases in state court, I believe the defendants are aware that we stand ready, willing and able to help in any regard in that fashion.

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2 THE COURT: Okay. We have a couple of loose ends to
3 tie up on this. I think once we get the momentum, we have a
4 lot of momentum started, but once it's congealed a little bit I
5 think that hopefully we'll be able to do something. It's
6 important that you keep up with it though and keep an eye on
7 it.

8 MS. BARRIOS: Yes, your Honor.

9 THE COURT: Anybody else from the state? Okay. What
10 about Patient Profile Forms?

11 MR. IRWIN: Your Honor, we have agreed, as reported at
12 the last conference and we will maintain at the present
13 conference, that the defendants will suspend filing of PTO-9
14 motions with respect to outstanding patient profile forms
15 pending the settlement process.

16 THE COURT: Let's not do that indefinitely because if
17 you still have 800, 837 that are overdue, if they're not
18 participating we'll dismiss them. From a political standpoint
19 it may not be opportune at this time, but let's keep an eye on
20 that.

21 MR. IRWIN: Yes, sir. Service List of Attorneys, we
22 have the current list.

23 MR. ZIMMERMAN: Your Honor, on the overdue claim form
24 issue. The PSC, of course, doesn't want to seek dismissal
25 because they have the claim form option. And so we would like

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to at least be heard on that at the time it becomes ripe for settlement.

THE COURT: I will, I just don't want to just not do anything and not address it. I've tried to give two and three and four notices to people who are interested in participating in it. If they're not focused on it or not interested or not responding, we can't let those folks pull down the rest of the people.

MR. ZIMMERMAN: Right. But our communication has been there is a claim form coming so don't do anything because you're going to have the opportunity to file a claim form.

THE COURT: I understand, I see that point.

MR. IRWIN: It is your impression that a great number of these outstanding PPF's are outstanding from lawyers and persons who we expect will enroll. So we're encouraged by that.

THE COURT: All right. The Motion on Class Certification.

MR. IRWIN: Yes, your Honor. The PLC has indicated that it is putting that on hold pending settlement process for the time being. We intend to talk to them about that.

THE COURT: Okay. I won't address that, but I have a note to myself to follow-up on that. So I won't do it at this point, but I am interested in resolving that.

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2 As I see it with the class certification issue,
3 the issue's going to be whether or not there are class actions
4 in the various states. The question is whether I send them
5 back to the states to make that determination or whether I do
6 it here and send them back as a class action. So that's the
7 big issues that I will be dealing with.

8 Plaintiffs' and Defendants' Respective Requests
9 for Production of Documents.

10 MR. IRWIN: Your Honor, we discussed that a little bit
11 this morning in chambers in preparation for the conference this
12 morning, and it is our impression that the court prefers
13 instead of a brief from us that we submit merely a letter
14 listing the cases that were contained in the draft brief that
15 we sent to Plaintiffs' Steering Committee.

16 THE COURT: We're talking about 803(6) issues, and the
17 parties at the last conference were told that I'd like to get
18 from them a brief description of the document and the reason
19 why it should be admitted or should not be admitted. And I
20 mentioned to counsel that I would like to have that within a
21 week. Give me any case names or case citations that support
22 your position, that's fine. If I need any additional briefing
23 on it, I'll get to you and give you dates for it. So within
24 one week give me that material, please.

25 MR. ZIMMERMAN: We understand that and that was the

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2 agreement made in chambers, your Honor. We just want to make
3 sure that the letter brief is limited to cases as opposed to
4 argument.

5 THE COURT: I think I know the cases, but give me a
6 list of cases but if you have more I'll look at those. But I
7 just see this -- I really don't need a brief at this time.

8 MR. IRWIN: Judge, the PSC is requesting if we can have
9 two weeks on that instead of one week to submit the whole final
10 package to you.

11 THE COURT: Any problem with that?

12 MR. IRWIN: We have no problem with that.

13 THE COURT: Okay. Two weeks then.

14 MR. IRWIN: Your Honor, the stipulation concerning the
15 use of electronic data, this provides for the preservation of
16 the hard drives on the sales reps laptops, and it was agreed
17 that these would be preserved. And if in the event it was
18 needed to retrieve information off of a hard drive, we agreed
19 it would be done at the transfer to a lower court. We have
20 agreed now on the final pretrial order to submit to your Honor
21 for consideration, and we will get that to you by the close of
22 business tomorrow.

23 THE COURT: Trust Accounts, anything from the
24 plaintiff?

25 MR. IRWIN: I think we are current with respect to the

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2 issues surrounding the trust account.

3 MR. ZIMMERMAN: Yes. Your Honor, there has only been
4 one addition to the trust account in the interim, and there is
5 no further report on the trust account.

6 THE COURT: Eight is Declassified Documents.

7 MR. IRWIN: And by the same token, your Honor, there is
8 nothing to be reported on that. And I think that probably
9 could be removed from the agenda.

10 THE COURT: All right. Mediation is the next item.

11 MR. IRWIN: There have been no mediations, Judge,
12 pending the program, resolution program.

13 THE COURT: And Trial Schedule, any trials throughout
14 the country, any trials in other states?

15 MR. IRWIN: I believe that there has been one case
16 scheduled in Pennsylvania, perhaps Mr. Campion can address
17 that.

18 MR. CAMPION: There is one scheduled for trial at the
19 end of June, but the expectation is that it will be resolved.

20 THE COURT: What about the Indemnity Agreements?

21 MR. IRWIN: We continue to provide indemnity agreements
22 when appropriate and when requested. I do not believe we have
23 been requested to provide any since the last status conference,
24 but we keep that on the agenda so that we can update the court
25 with respect to any development.

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2 THE COURT: The End Game Committee, any report from
3 Mr. Zimmerman?

4 MR. ZIMMERMAN: Yes, your Honor. The term sheet is now
5 completed and will be posted, I believe, forthwith on the
6 court's web site. There are no further issues with regard to
7 the term sheet. The claim forms have been drafted, there are a
8 couple of language issues that we are going to meet today on,
9 and we have committed to the court that the claim forms will be
10 resolved within two weeks and submit it to your Honor.

11 To the extent they are not resolvable between the
12 parties in two weeks, we will submit them to your Honor in
13 opposing forms and your Honor will make the call on any issues
14 that separate us within the claim forms.

15 At that point everything is ready to go. All of
16 the administrative issues are still in play with regard to
17 selecting panels and administrative offices, but all of that is
18 also in the works; and I can report to the court that we are
19 quite a ways along in exchanging the names of panelists, who
20 will be on the medical panel, and selecting administrators, of
21 course we have that, we have Patrick Juneau, and then an
22 assistant to Mr. Juneau, that issue is still in play, but we
23 have been interviewing candidates.

24 So I guess I'm very pleased to report after some
25 delay that we are ready to go and within two weeks the claim

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2 forms will be finished, and we still are trying to hold to that
3 August deadline, although there may be some extension of that
4 enrollment date, if necessary, but we are holding to that date
5 at this point.

6 THE COURT: Okay. And let's get the term sheet to the
7 government through Tom Watson so that we can keep an eye on
8 Medicare claims and have that moved along at the same time so
9 that we're not dealing with any escrows or anything of that
10 sort that might delay or might derail the issue.

11 Let's see. We have two weeks for the claim forms.
12 Either agree on one or give me two and I'll have one from you
13 the next day.

14 What is the other issue that you were going to
15 deal with?

16 MR. IRWIN: I think, Judge, we agree that it's going to
17 be very helpful to the court, for the court's involvement. We
18 agree that this conference call that we scheduled I believe on
19 the 18th of May to report to the court on that is going to be
20 very help. We're optimistic we'll be able to get this thing
21 concluded by then.

22 In all respects, these must be something that we
23 necessarily agree upon, these forms and these term sheets are
24 part of a settlement that we must agree upon. And I thought it
25 was important for us to say that.

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2 THE COURT: I understand that. But my sense of this
3 and once it starts down this road, we've got some momentum
4 going and I'm afraid if we let that drop it's going, we're
5 going to have more problems. So we have to get a form out
6 there, we have to get something that's agreeable that people
7 can fill out and file. You have 800 and some odd now that are
8 delinquent, and the reason they're delinquent plaintiff says is
9 that they're waiting for forms. So we're going to have more
10 and more of that. And then there is a certain unrest that once
11 that starts that can present problems. So we need to do that.

12 MR. IRWIN: We agree with that, Judge, and we want to
13 resolve the issues surrounding the claim form. I believe we
14 have an agreement on the enrollment form, and we should be able
15 to have this re involved by the 18th of May.

16 THE COURT: Global Application of Daubert.

17 MR. IRWIN: We've agreed that we will suspend activity
18 on that pending the program, the implementation of the program.

19 And by the same token I believe that the parties
20 agree that they will suspend activity on motions to withdraw as
21 counsel of record pending the implementation of the program.

22 THE COURT: Stipulation and Pre-Trial Order Providing
23 for Use at Trial of Depositions in State Court and Federal
24 Court.

25 MR. IRWIN: We have exchanged drafts a couple of times,

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2 Judge. We got some comments back from the PSC I believe
3 yesterday or perhaps the day before. We need to talk about it,
4 they suggested a couple of changes that are still under
5 discussion.

6 THE COURT: That's something that the PSC's got to
7 touch base with the states on so that you can get it in a form
8 that they're satisfied with, too. It's one of the aspects that
9 we've been trying to do with this case, and hopefully it'll be
10 helpful toward the ultimate resolution of it. But that's where
11 you need to move.

12 CIS-NED-32 Depositions.

13 MR. IRWIN: As is described in the joint report, Judge,
14 the efforts to conduct that deposition have been canceled
15 pending the resolution of the program and that as was reported
16 last month.

17 And the same can be said with respect to the next
18 item on the agenda concerning the possible summary judgment
19 activity regarding parental liability, Johnson & Johnson
20 liability.

21 THE COURT: And then there is a Motion to Dismiss for
22 Failure to Exhaust Administrative Claims and Notice and Order
23 to Substitute the United States as a defendant. I think I
24 substituted the United States as a defendant. I haven't
25 received any response to the motion to dismiss, I'll,

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therefore, grant the motion to dismiss.

The next one is Stipulation and Order Appointing Patrick Juneau as Special Master in Compliance with Rule 53. There has been some amendment to Rule 53, and I sent it to counsel to take a look at and give me a draft of that stipulation.

MR. IRWIN: We have prepared a proposed order in compliance with the amendment to Rule 53. It was submitted yesterday, perhaps the day before, to the Plaintiffs' Steering Committee. It is my impression that they are generally okay with it, a couple of small tweaks that they want to talk to us about this morning. We will be meeting on that this morning and a couple of other things after the conference. We then need, of course, to circulate it to Mr. Juneau and we will do so promptly.

THE COURT: Let's get it to Mr. Juneau, and I hope to have that from you in week.

MR. ZIMMERMAN: I am happy to report, your Honor, we did review the draft. Only amendments that we're concerned about are structural in terms of language and ways to make things a little more clear, but we have no substantive problems. We're going to get that to Mr. Juneau after we exchange our draft with defense counsel, and we should have that down the road and completed very quickly.

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THE COURT: Let's do that within a week. Blue
Cross/Blue Shield Request for Term Sheet.

MR. IRWIN: I met Ms. West this morning, she has very
kindly introduced herself to me.

MS. WEST: Kimberly West from Birmingham. Nice to meet
you, your Honor.

THE COURT: Good to see you, Ms. West.

MR. IRWIN: And I conveyed to her that the government
was also interested in access to the term sheet. We thought
that we would be able to provide that access. She agreed that
if the access was provided before the general publication of
the term sheet that they would afford all of the necessary
confidentiality. I told her we would be back in touch with her
very promptly about that.

THE COURT: I am concerned about confidentiality,
Ms. West. I've been putting the final drafts on the web site
rather than have it filtered through all sorts of places in
various stages so as to create misinformation or incomplete
information.

MS. WEST: If I could, your Honor. Certainly our plans
have no interest in the term sheet other than they have
reimbursement, subrogation rights. It's very close to the
government's claims.

THE COURT: Yes.

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2 MS. WEST: They seek access only to assure themselves
3 that those have been appropriately dealt with, and if there are
4 any issues to bring to the court's attention before the program
5 or the party's attention and hopefully resolve them. Any
6 appropriate confidentiality protective order, anything that
7 your Honor would request, we're more than willing to agree to.
8 We have no interest in making it public or disseminating it
9 beyond myself and my clients for any purpose whatsoever.

10 THE COURT: I want the public to see it, but I want the
11 public to see it when it's finished and when it's drafted and
12 when it's in its final form. Anything else?

13 MR. IRWIN: We're satisfied with Ms. West's
14 representation on the record that she will maintain this
15 confidentiality, your Honor.

16 THE COURT: Okay. Anything further?

17 MR. ZIMMERMAN: No, your Honor, other than the next
18 setting of the next status.

19 THE COURT: The next status conference, I talked to you
20 all in chambers, will be Friday, June the 11th. And I'd like a
21 status conference in the meantime in-between then, a telephone
22 status conference to see how we're doing with all of the things
23 we talked about here today. And I'll have that telephone
24 status conference on May the 18th at 1:30, and I can do that by
25 phone. Just give me a list of the people who are going to

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2 participate and we'll arrange to get them on the line at that
3 time.

4 At that status conference I'm mainly interested in
5 the items that we talked about that you would get done within a
6 week or two weeks. Anything further?

7 MR. BECNEL: Can I address this Medicare problem?
8 Because with Mr. Irwin's firm, we resolved the Rezulin case six
9 months ago and we still don't have the Medicare.

10 THE COURT: What we've done is the government is
11 involved in it, I met with them this morning, they're on board,
12 and hopefully that will be resolved and then they'll give it to
13 Pat Juneau to resolve at the same time as the other things. I
14 want that resolved, I don't want it hanging out there.

15 So we have started that process, I've asked the
16 government to sit in on the conferences, they have done so the
17 last two months, they have participated; and they're
18 participating in the drafting or at least they're aware of the
19 drafting of the forms, and they have their Washington
20 counterparts up to speed on it.

21 MR. BECNEL: I have been dealing with Dallas and no one
22 will ever give you a decision, they just keep you hanging.

23 THE COURT: I don't think we will have that problem
24 here, but I appreciate you bringing it to my attention.

25 Anything further? Okay. Thank you very much, the