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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: PROPULSID PRODUCT LIABILITY LITIGATION

MDL 1355
Section "L"
New Orleans, Louisiana
Friday, August 23, 2002
9:00 a.m.

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

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Proceedings recorded by mechanical stenography, transcript produced by computer.

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P R O C E E D I N G S

(STATUS CONFERENCE)

(FRIDAY, AUGUST 23, 2002)

THE COURT: Be seated, please. Good morning, call the case.

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

THE COURT: Let's make your appearance for the record.

MR. HERMAN: Good morning, Judge Fallon, good morning folks, I'm Russ Herman of the law firm Herman, Mathis and Herman, Herman, Katz and Cotler, here for the plaintiffs management committee.

MR. IRWIN: And Jim Irwin for defendants.

THE COURT: We're here this morning in connection with our monthly meeting, and in advance of the meeting I have been provided by counsel an agenda. We'll take the matters in the order that they've been given to me. The first item is update of rolling document production and electronic document production.

MR. HERMAN: Your Honor, the electronic production is rather recent. We have 56,000 documents, rather speak in terms of documents than pages that have been returned because of some technical problem the defendants have cooperated in getting us

back many of the discs where there are problems. Some of the documents are written in a foreign language and we've got to hire interpreters to interpret them. Either in Flemish or Dutch, even though we do have someone on staff that Mr. Becnel has retained to come in and assist in that.

There are numerous e-mails that have yet to be delivered and certainly reviewed. The defendants are producing them in an orderly fashion and the technical problems they have moved as soon as they've been alerted to deal with them.

THE COURT: What time frame are we looking at, what's reasonable and realistic? Let me hear from the defendant on that.

MR. IRWIN: Your Honor, the technical problem that has been experienced lately on the e-mails has been with respect to the, to two types of attachments, one is the access database attachment and the other is the Excel spreadsheet attachment. Other attachments like text files and Power Point and that sort of thing they're okay. But I think as we've all observed in the past they're all on the cutting edge of this.

So it was explained to me yesterday that these problems with using these attachments should be worked out in the next few weeks. I know that I saw an e-mail yesterday in a memo today from Mr. Conour and someone in Mr. Davis' office about how to work out these problems with these two types of

attachments. The non-segregated e-mails that we've talked about before that reside on the general servers, we were able to work with the plaintiffs and agree upon the universal search terms that everyone had to agree upon. These search terms have produced, thankfully, a much smaller universe of e-mails that we were anticipating.

So we're hopeful that that process would be completed -- I'll be able to give the court a better picture shortly, but we're hopeful that process will be completed before we expected. The last thing I heard was perhaps in October.

And the other thing is the electronic databases, and the CIMS electronic database, the domestic one has been produced and the international one will be produced next week.

THE COURT: With regard to the attachments, do you have somebody who is in charge of that, some technological knowledgeable person?

MR. IRWIN: Yes, we do. I couldn't tell you who it is, Ken Conour is working with that person. Mr. Davis may know who that is. But there is somebody working on trying to resolve. It has to do with the way it was described to me yesterday, Judge, you have to insert page breaks apparently in these spreadsheets. If you don't insert a page break in the spreadsheet it comes out, you can't print it up, it comes out

endless, the data can't be contained on one print page. So when Mr. Herman's group tries to print it up they can't do it right now, so these page breaks have to be inserted, that's the way it is described to.

MR. HERMAN: Mr. Keith Altman, and he has conferred with Mr. Conour, and as of August 21st I have a report from Mr. Altman, it was seven different problems with the production and he has three suggestions on how to correct it and he has been in contact with Mr. Conour.

THE COURT: In addition to that --

MR. DAVIS: Jeff Hewitt is the technical person who has been assisting the defendants and they have had one or two other venders who have also been involved.

On the plaintiff's side, Barb Frederickson together with David Buchanan, who you're familiar with with the Seeger Weiss firm. We have consistently met and conferred when these issues come up. This issue was just recognized with the most recent electronic production that's come in over the last month or so. We had ongoing problems, Ken Conour was communicated with and when we had a bad CD or two it was quickly addressed. When we had a problem earlier in the month with CDs that didn't come in as the domestic CDs had come in, that is the foreign one didn't come in in the same formatting, it was addressed and after some time it was cleaned up.

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Keith Altman who assisting us with the depository has been loading these CDs into the depository which your Honor visited. The memo that Russ is speaking about was prepared by Keith Altman and was sent yesterday to Ken Conour. They have not communicated back and forth yet. We asked for a meeting and I imagine that Ken Conour will, in fact, have a meting with us and address this soon. It is not an unheard of type of conversation, especially with the problems that the defendants had early on in getting this production done as you're aware of.

THE COURT: I understand. The problem with this type of situation is that oftentimes when it is everybody's responsibility it turns out to be nobody's responsibility. Now, we have to look to Ken Conour. He is the one that if there is a breakdown it's going to be his responsibility to determine the scope of the problem and find a solution to the problem. I need him to come to court and tell me what the problem is and what he's going to do to remedy it. He is the one that the Court is going to be looking to.

MR. HERMAN: Your Honor, we consider this one of the two most important issues today. And I'm referring to Mr. Altman and the report he sent me, which has been sent on to Mr. Conour. I think it's important for the court to note the following. I'm not going to read all of the problems that he

says there are, I'm just going to read his recommendations.

Files that are in the format that is not general text such as word documents must be produced in original format. Anything short of this renders the files virtually useless. It's clear from the production as it currently stands that the company that assisted with the production were unable to provide the attachments in a usable format. For example, in No. 2, if the 105 files that have greater than 200 pages is only one that contains the words redact, this would indicate that there were no redactions on other files. With this in mind there should be no reason why they cannot be produced in original format. When there is an attachment that is a file name it should be added to the master document.

In my opinion, without having original documents, it will take far longer to review the e-mails. It will also likely lead to erroneous conclusions about the data because of the induced errors. As a result the conclusions may lead the MDL to not explore important areas as well pursue avenues that are of little importance.

In short, it's not just a question of production. Your Honor has visited our facility. We have lawyers and paralegals every day there attempting to read these, they have to be objectively coded, they have to be subjectively coded, then they have to be reread on the second cut as to whether

they may be relevant or not and if they're relevant they have to be marked in order of importance.

When we're faced with the quantity of production of electronic production and given the fact that some of it is in foreign language and has to be translated, it is a substantial undertaking that's going to take us a substantial amount of time. Once the technical problems are resolved.

THE COURT: I understand that for some matters the solution is time and people. But with technical problems that is not enough. The technical problem must be solved or dealt with first. The technical problems are oftentimes easier spotted than the solutions. So Mr. Conour has to not only spot the problems but also come up with some solutions.

Let's turn to No. 2, State Liaison Counsel.

MR. HERMAN: State Liaison Counsel continues to be active. Mr. Hill has assisted ide not only in the science area but in helping to prepare materials for experts, et cetera. Mr. Arsenault is here as a representative of the State Liaison Counsel, he attended our meetings last night as he has with every meeting Mr. Capretz is here from California whose offered to assist in any way he can. And we also have representatives, Ms. Barrios is here and others, and their efforts are appreciated and they continue to operate.

In terms of the liaisoning with various states,

such as New Jersey, there is not really a great deal to report in terms of activities in Pennsylvania or New Jersey, other than certain mediations we understand have been ordered in New Jersey. Judge Corodemus has indicated she wants to set some matters.

THE COURT: Mr. Hill, Mr. Arsenault and Mr. Capretz, I appreciate the work that you are doing and urge you to continue to participate. If we're going to get through this in a cooperative manner it's going to rest on your shoulders and it's going to be because of your efforts. And I appreciate your efforts.

Any response, any comments that you have? Are you satisfied that you're getting enough access to materials, enough documentation, enough opportunities to discuss and give input?

MR. ARSENAULT: Judge, the communications from us to the state is an important, I think, task we are charged with. We've got a draft of a newsletter that we submitted to Mr. Herman several days ago, I'm certain he is going to review that shortly and that will increase the communications between us and the state. That's ongoing and we think the communications have worked efficaciously.

Secondly, the relationship, we have the settlement committee. Your Honor has expressed on several occasions that

you want this committee to have some role with that. Mr. Herman indicated yesterday that apparently there are some protocols in place that we will be advised of and when the time is right we'll play some role with regard to that ongoing activity.

MR. HERMAN: I did review the newsletter and sent it back to Ms. Barrios with a note that she could go ahead forward with it.

THE COURT: No. 3. Patient Profile Form and Authorization.

MR. IRWIN: Yes, your Honor, we have reported in the joint report the situation involving the numbers right now, and I think that's self-evident, unless the court has any questions about the status of the numbers I would turn to the motion that's pending before your Honor on PTO No. 9.

THE COURT: That's the one that you've given to me a number of matters that you seek dismissal on?

MR. IRWIN: Yes, sir.

THE COURT: There is one that I received a response from and I understand we have received some responses this morning.

MR. IRWIN: Yes, your Honor. I'm happy to address those. I have some charts here and I've given copies to your clerk Mr. Fernandez, and if I may have a moment I will try to

clarify this for the record.

There are 37 plaintiffs subject to this motion that have not given us PPF's and have not responded in any way, shape or form. We would think that these 37 plaintiffs should be treated the same way the court has treated them in the past. The list that we've given to Mr. Fernandez, and I would ask that it be placed in the record, is titled Propulsid plaintiffs with over due PPF's. There is a column that indicates the name of the plaintiff, the lead plaintiff case, the MDL docket number, the specific docket number for the plaintiff, the plaintiff's counsel and the due date, the original due date of the PPF.

I think that this is a very convenient and accurate document, accurate to the best of my knowledge, your Honor, that would describe those individual cases that are overdue and should be treated similarly to treatment in the past.

We have given to your clerk another list that I would also ask be placed in the record, and this is a list of the PPF's that have been received since we filed the motion. There are 14 PPF's that were received since we filed the motion. One of them is the Mary Francis Ashley case, and I believe that's the case your Honor had reference to. That is the plaintiff attorney in that case is Mr. Jack Baldwin, the

MDL docket number 02-12134. Mr. Baldwin did file an opposition, he did contact my office, we made an agreement and we would request that the court dismiss our motion as moot with respect to Mary Francis Ashley.

THE COURT: All right. Let that motion be dismissed as moot.

MR. IRWIN: With respect to the remaining 13 Propulsid plaintiffs that are on this list, of those remaining 13 who have given us PPF's three of the PPFs are in compliance, and I'll state those names for the record. One is Nita Fletcher, No. 02-0115, another is Brenda Ratti, R-A-T-T-I, number 02-1216, another is David Simmons, number 01-2694, they are in compliance, properly signed and executed.

The remaining on that list are not in compliance, even though we have received them, they are not signed in many instances, they are lacking authorizations in many instances. As we described to your Honor in our chambers conference this morning, we will move to, move the court for an order asking that these remaining PPF's that were submitted to us tardy be put in compliance and also ask that we be reimbursed $250 per violator, and we'll submit a motion to that and we will serve those individual plaintiff attorneys with the motions.

THE COURT: With regard to the ones in which you haven't received any compliance at all, if you haven't filled a

motion file a motion to dismiss those. If you have filed a motion I will dismiss with prejudice with the understanding that plaintiffs liaison counsel opposes any dismissal and if it is dismissed they wish it to be without prejudice.

I will overrule their objection and dismiss it with prejudice.

With regard to the other cases where you want to tax as cost, file that motion and I'll call upon the parties to respond. And depending upon their response, I'll rule on that motion.

MR. IRWIN: And finally, your Honor -- incidentally, we do have a motion pending before the court with respect to those 37 non-responders, and so we would suggest that we would submit that judgment to your Honor with the court's consideration.

Finally, there is a list that I've given to your clerk of duplicate plaintiff cases with overdue PPF's. What we determined when we filed this motion is that some, and we've known this and I think it's been discussed from time to time. Judge, there are some duplicate filings before your Honor. Plaintiffs who have filed two cases.

This list of four duplicates is a list of four plaintiffs who have duplicate cases, but who have in the other case given us a PPF; therefore, we would suggest that these cases should be withdrawn or dismissed without prejudice. We

will contact the plaintiff attorney in these cases, it is Zoe Littlepage for all four and suggest that it would be appropriate to dismiss these without prejudice, we will work with her on that. In the meantime as respects these four plaintiffs, our motion on them can be dismissed as moot.

THE COURT: Okay.

MR. IRWIN: And again I would ask that those three lists be made a part of the record.

THE COURT: Let it be made part of the record.

MR. IRWIN: Thank you, your Honor.

THE COURT: The next item on the agenda is the subpoena to the FDA.

MR. HERMAN: Your Honor, it's essentially been complied with, there are very few outstanding issues and they're mentioned in the report.

THE COURT: The record should reflect that the court appreciates the FDA's work on this and urges them to finish up the full compliance so that we can move on with this litigation. The next item on the agenda is No. 5 - Service List.

MR. HERMAN: In that regard, FDA has indicated they're going to send us those documents and certify them.

THE COURT: When are you expecting that?

MR. HERMAN: We expect those certainly by the end of

this month.

THE COURT: Okay. Let's tell them that the court does expect it by the end of the month.

MR. IRWIN: Service list, your Honor, we have a current list, I will give one to Ms. Lambert.

MR. HERMAN: I want to make it clear that the FDA sent those documents to defense counsel and we will be getting them from defense counsel with the certification not from the FDA's office.

MR. IRWIN: That's correct, your Honor. We have also given a service list to Mr. Arsenault for the state committee and to Mr. Herman's office.

THE COURT: The sixth item is the Ongoing Studies/Subpoena to BevGlen.

MR. HERMAN: That's correct, your Honor, the matter is under advisement by the court. And that has to be a confidentiality designation, there are several areas in which that motion deals with, one is the material involved with ongoing studies and the other is the Shell Morganroth study.

MR. HERMAN: That's correct. We have also similar issue with respect to item No. 9, CIS-NED-32, which also involves confidentiality and our motion to have that study and the data upon which it's based declassified.

THE COURT: Third party subpoena duces tecum issued by

the PFC.

MR. HERMAN: Covance has indicated that they will comply and we have every reason to believe it will. It doesn't appear to be a problem at this point. The subpoena issued by Dr. Thomas Abell we've heard from his counsel and we understand that there will be an affidavit from Dr. Abell and we don't wish the court to act on this at this time. We believe we will get the cooperation we need.

With respect to Dr. Herron, we don't know what status the production is, he's providing documents to the defendants. We just need to know when we're going to get them.

THE COURT: What's the situation there?

MR. IRWIN: Judge, I was afraid you were going to ask that. That's the one thing on this list I don't have an answer for. I will have to -- I can advise your clerk's office, I may have an answer on my desk when I get back. But the subpoena has been served on Dr. Herron. I think, I believe someone in Mr. Preuss' office has been working with Dr. Herron. I have information, I just can't answer your question right now.

THE COURT: Let me know by the end of the day and we'll move on with that.

MR. IRWIN: Apparently we have the information, I'll keep my fingers crossed that I'll call back and let your Honor know and let Mr. Herman's office.

THE COURT: And when can you get it to him then?

MR. IRWIN: If we have the information I'll have to see what form it's in, Judge, I don't know.

THE COURT: Let's get it to him by Monday unless there's a big problem; and if so, bring it up and I'll deal with it.

MR. HERMAN: We've generally been able to work these out between us pretty rapidly once they receive the information. It's not the defendants who delay. Sometimes they have trouble getting the information from the parties.

THE COURT: Call me this afternoon and let me know whether you have the information and whether you can get it to them on Monday.

MR. IRWIN: Will do, your Honor.

THE COURT: Thank you.

MR. HERMAN: With respect to the SmithKline Beecham, all we're waiting for is a certification that their production is complete. We expect to receive that shortly, it does not appear to be a problem.

THE COURT: The next item is the class certification motion.

MR. HERMAN: There's been a joint agreement that until the electronic data has produced that matter won't be scheduled, unless your honor deems to have it scheduled at some

point, certainly within the court's discretion.

Item No. 9 with respect to plaintiffs interrogatories and requests for production of documents set No. 5, we're reviewing the response we got. The objections generally particularly in the affidavit in many instances exceed the amount of information we got. There will be a dispute that has not yet been resolved, and we are going to attempt to meet again in order to resolve this dispute placed before the court as soon as possible.

The two issues that I can think of after making my review there are boxes identified where information can be found rather than information by J numbers or Bates numbers in response to requests. Specific responses. Now, it may be that that is not going to be a problem after we get together and talk about it.

What is a problem is our request for consultant information in which defense counsel has submitted an affidavit saying it's going to take thousands of hours, an extraordinary amount of money to provide the information requested about consultants. I don't understand the basis for that because if you have a product and it's 13 years old and you've had consultants, it seems to me that the information about who the consultants are, what their addresses were, what they were employed to do just that basic information should not entail an

extraordinary amount of time or resources. But we have not had a chance to really sit around the table and attempt to resolve that issue, and I'm hopeful that in the next week we can sit down and do that.

THE COURT: That seems to me to be important and I suggest both of you focus on the issue because once the issue is resolved then additional work needs to be done. So let's try to cut through that issue. If it can't be cut through, bring it to me so I can deal with it.

MR. HERMAN: More important issue for the plaintiffs, CIS-NED-32. The defendants, your Honor, have conducted, and I'll use a number that's safe, between 600 and 800 studies regarding Propulsid. Many of these studies they discontinued for whatever reason. Some of them they criticized their own studies. Many of them were criticized by the FDA. There were attempts to get a number of these studies published that failed.

After two or three tries one of the studies they wanted to rely on to keep the drug on the market was finally published in a journal, although plaintiffs question the data. Recently in e-mails we discovered, and this has been in the last three weeks that a study by the name of T-100 was considered in Beerse and a person who was very involved in Propulsid has a very important study that could very well save

Propulsid for the market or it could be a disaster. That was contained in an e-mail.

We don't know what the data is, we do know the study was discontinued, we believe that if it were beneficial the data would have been produced, published and provided to the FDA. CIS-NED-32 the study was completed sometime ago. The only thing that we have is a lawyer's signature, defense lawyer's handwritten word draft on that document. We don't think it's a draft.

But if it is a draft, the delay having the draft finalized for a substantial amount of time. Our consultants tell us that they not only need to review all of the underlying data in that study, they need freedom to consult for peer review purposes and in the event that that information confirms theories regarding the relationship between Propulsid and prolong QT and serious cardiac injury, they intend to have the matter not only peer reviewed, but to form part of a journal articles which we believe the public needs, the FDA needs and is entitled to.

We have requested that CIS-NED-32, that the confidential seal come off of it. It's their study, they did it, they have the data, they have chosen not to have a final draft, they have had the luxury for 13 years of submitting what they thought was beneficial for public use and then relying on

it now in litigation and withholding what they don't think is good for them from the public. And I don't know how that relates to learned intermediary, but CIS-NED-32 may not only relate to the mechanism of causation and injury, but may also be one of the linchpins upon which an introduction of the learned intermediary defense in this case will be based.

We have briefed the matter, I can only say to your Honor we believe that our experts, and they tell us that they need it declassified in order to use the data for their own purposes, not just in connection with this litigation but in connection with peer review and submitting the journals.

Now, that's important to us. It's important because although the Fifth Circuit has not set forth that all of the Daubert principles are written in stone, for example, methodology, peer review, publication, et cetera, that you can look at one or a combination of. There is no question the defendants have already telegraphed that they're going to, you know, they're going to attack on learned intermediary, they're going to attack on the question of Daubert we need, we believe, a fair playing field. The e-mails related to T-100 and CIS-NED-32, CIS-NED-32 was moved offshore, that's our understanding, that's why it has the NED in this rather an CIS-US, Cisapride U.S.A. would have been a study here, CIS-NED would be a Cisapride or Propulsid study overseas.

That full information hasn't been produced. We need that information in order to have experts give us opinions as to what that data and what those studies reflect. We believe that it is a very serious matter. We also believe as Mr. Murray has pointed out to me several times, that the whole issue is on what basis does it remain confidential? It's not a trade secret. The origin of it was to support marketing and production of a drug that the FDA on many instances was challenging. The drug has been voluntarily withdrawn from the market, except in compassionate use, and that's provided on a limited basis I think without payment. So it's not a commercial use.

And I believe particularly, for example, Louisiana's got a sunshine law that says that documents that may reveal public hazard that the defendants have got a burden of proof in addition to the federal burden of proof to show that these documents must or should be remain confidential.

The last thing I want to say about this issue, your Honor, the reason confidentiality agreements are entered into in MDL's and in federal court are so that the discovery process isn't retarded. And so you enter in and you negotiate really a form confidentiality order, everything goes into it so the production can start and the review can start and the processes aren't retarded.

That does not mean that plaintiffs have acceded to the fact that there is confidentiality, it does not mean that the defendants have somehow obviated their responsibility burden of proof wise. So the marital has been briefed, it's been argued.

I appreciate your Honor's indulgence for letting me make this continued argument on the record.

THE COURT: Let me hear from the defendants, particularly CIS-NED.

MR. CAMPION: It is a very small response, CIS-NED-32 remains a work in progress. The analysis has not been completed, there has been deposition testimony given as to what additional work is needed. We haven't finished the study, they are disappointed in it but that is the fact. They have the underlying materials.

Second, with the issue most recently raised by my colleague, I bring this court's attention, we have one that is a matter of prematurity. The plaintiffs have quite properly imposed work product upon the expert report materials that they have produced, they have every right to do so and I believe one of the few things that plaintiffs and defendants on this litigation agree is that they have that work product protection and that it should be kept to their advantage.

We know there is in place a series of agreements

whereby the work product material will be shared with counsel in state court litigations in return for an agreement. We have brought to the attention of the PFC the fact that at least in one litigation, now we know in two, that some counsel who we do not believe are not parties to the fee sharing agreement are now trying to make some use of that material. And we have before you an order to provide protection for everybody. So now we come to the business of the consultants that they have to review CIS-NED-32 material.

In the existing orders that you already have in place there is ample protection for them to have all of their consultants and their consultants consultants review all of those materials upon signing the proper document. If, as and when they decide that they want to have a peer reviewed effort made, at that point they are obviously giving up the work product material production. If, as and when they make that choice, the matter is right for resolution. It is not right for resolution today.

I think they are entitled to do their work with their experts and if they decide they want to make a peer review effort then they're going to have to come in and brief the point at that point.

THE COURT: What is your response to the fact they haven't received the material yet on CIS-NED-32?

MR. CAMPION: They have what we have. We have turned it over. I think the disappointment that they have is that CIS-NED-32 is not completed. We have a draft of a report there is no doubt. But there is deposition testimony to the effect that the reason the report has not been made a final report is we are waiting for some additional interpretations. My recollection is it's from Covance, but I don't want to make any, make a sworn statement to that effect, but it has been testified to.

So I think the issue of the declassification is premature. If at some point they want to make peer review efforts, we will come before you and argue the motion.

MR. HERMAN: I appreciate learned counsel's agreement that work product should be protected. Nevertheless, I think the matter is of such importance to the public that this matter be aired, we give up our work product protection in regard to CIS-NED-32.

There are several documents reporting CIS-NED-32. The last dated document was marked by a lawyer for the defendants as a draft, which is not company practice according to other documents that we've seen. We don't see any reason why confidentiality on CIS-NED-32 should be lifted. And if other litigants whether they've signed agreements have access to it, well, we would hope that they'd make good use of it.

THE COURT: All right. The next item is the deposition procedure.

MR. HERMAN: I don't think at this stage it's an issue, your Honor, for us to consider today.

THE COURT: Shell/Morganroth study.

MR. HERMAN: We have contacted, as I indicated we would, Dr. Shell directly. We received material which we sent to the defendants. We understand now that Dr. Vincent may have material and we will personally contact Dr. Vincent. We don't have any knowledge that he does have it, but we will undertake, our firm will undertake to contact him directly and whatever he's got make a return on it.

MR. IRWIN: And the only thing that we would add to that is, your Honor, we will look forward to receipt of that. And once we get it we will then call upon Dr. Shell and Dr. Vincent to give us the certifications that will be customary and are customary in this case that it is complete.

THE COURT: What time frame are we looking at for this exchange?

MR. HERMAN: I think we can do it next week.

THE COURT: Let's do it then within ten days.

MR. IRWIN: That would be fine, your Honor.

THE COURT: The next item involves a 30(b)(6) deposition of the defendant.

MR. HERMAN: We're attempting to work this out and I think we may be able to work it out just based on the database rather than a lengthy deposition. Mr. Campion provided us with a database, asked us what additional information we needed. We expect to get that, I'm not sure what the delivery date is, but we think it will certainly avoid a lot of deposition testimony and may take some limited deposition testimony. But it basically will provide the information that we would seek in this series of 30(b)(6) depositions.

THE COURT: Any comment from the defendant on that?

MR. CAMPION: Yes, my colleagues points are well taken. We received their additional material that they wanted in the database this week. Their request for categories, they're a little different than what we expected, I returned from vacation this week. I am making a determination as to whether there is any difficulty.

The inquiries they ask for appear to be clearly discoverable. So then we will be able to put this thing out for bid to people who can then come in to started study and develop the database, we will make it available either inside or outside of the deposition.

THE COURT: What is the time frame?

MR. CAMPION: We'll put it out for bid next week. I don't know how much it's going to cost. This is not an

inexpensive item, I may have to do something and then simply give them the database and then tell them to put their people to work. I would hope I would have something positive to report, it may not be a conclusion, but something positive.

THE COURT: Trust account is the next item.

MR. HERMAN: There is an issue that I apologize to the court that I want to bring up in connection with this, even though it's sort of germane. And that is at some point we are going to have to submit a substantial request for admissions as to authenticity of documents as to foundation, as to business records so that we're assured in whatever trials are conducted that whatever documents we deem by plaintiffs to be relevant and important, there are not going to be arguments about authenticity or foundation or whether they're business records as defined in the federal rules of evidence.

And I point that out because by the next time we meet we hope to have discussed that with the defendants and presented them before we file it with the request for admissions.

THE COURT: Let's try to do that with a stipulation, consider stipulating that Evidence Rule 901 is satisfied and whatever else you we need to stipulate.

MR. IRWIN: Your Honor, very early on, and I'm glad to know that maybe Mr. Herman forgets some things too, because I

know I do. Very early on in one of our first pretrial orders we did prepare and your Honor ordered, we have a stipulation that provides for a 901 authentication on all documents produced by us that were prepared by us. So if a Janssen or J & J document that's found in our files, it was prepared by us it's authentic, there is a stipulation in the pretrial order already.

We were not able to cross the business records bridge at that time because it was at the beginning of the production. We probably can now, we can probably address some 803 treatment or categories in the business records to take care of foundation and take care of the business record exceptions in most circumstances I would think.

THE COURT: The thing to recall, to remember is when you do the stipulation let's make it broad enough that the states can use it as well as this court.

MR. HERMAN: The reason I bring the authenticity issue up, in the depositions there are handwritten notes on some of the documents and witnesses have not been able thus far on most occasions to identify who made the handwritten notes. So that differs somewhat from what the original agreement stipulation was.

With regard to the trust account, in order to save expenses we've met and we'd like to, these moneys are really

the court's moneys held in trust until the court is, there is a hearing and the court decides. What we've agreed if the court will grant plaintiffs and defendants leave to do this is to open an account at the Whitney National Bank that will be an interest bearing checking account but would require two signatures, one from their side, one from our side in order to have any funds released. And we would only do that upon a suitable order by the court rather than putting it in a formal trust account which means that we're going to have to pay some substantial fees out of those funds.

THE COURT: Any objection to that?

MR. IRWIN: No, your Honor. Our only comment that we would add to that is that our office in all likelihood, Mr. Preuss' office will maintain the records, will maintain them confidentially. We'll provide statements to Mr. Herman's office as to account balances and what not but the specific contents of the deposits will remain confidential to protect those confidential segments that apply. Obviously the records will be available for your Honor's inspection at any time.

THE COURT: All right. Declassified documents, we talked about, this is just general as opposed to the specifics CIS-NED and Shell/Morganroth.

MR. HERMAN: This is general and we're also contemplating depositions with the documents attached to the

depositions being declassified at some point. And we've set up a database and we're attempting to go through these depositions and documents now for declassification purposes. And of course we'll present a list of the depositions and the documents to counsel before we file a formal request.

Next item is mediator status.

MR. HERMAN: Mr. Murray has met twice, Mr. Davis, Mr. Murray and I met with the defense counsel, we interviewed some applicants, Mr. Juneau was our joint recommendation to the court. We made that recommendation to the court since then there's been other discussions, mediation will begin now on September 17th.

The parties will make presentations generally to depositions before that date, there are approximately 20 cases ready for mediation in the two areas that the defendants have specified, which are death and pediatric cases. And we expect that they will proceed mediation will proceed in short order.

THE COURT: What's the plan from the standpoint of when to submit the material, as I understand it you orally present to Mr. Juneau on the 17th. When is the written material forthcoming?

MR. IRWIN: Your Honor, I don't think that's been decided. I think probably I was appointed this morning to give Mr. Juneau a call this afternoon and confirm the 17th date. I

would be happy to ask him then when he would like us to get the written material to him, and I'd be happy to call the court this afternoon and inform the court of his preference.

THE COURT: Let's write me a letter and copy to the plaintiffs committee setting forth that you've talked to Mr. Juneau and this is when he wants the material and that you've confirmed that with the plaintiff's committee and that they're going to send the material on such and such date and you're going to do it on such and such a date.

MR. IRWIN: Yes, your Honor.

MR. HERMAN: Mr. Murray and Mr. Levin and Mr. Davis are going to handle these first mediations contemplated that Mr. Levin and Mr. Murray will continue with future mediations. The mediations are separate from the settlement process. There will be our PLC members involved in that. When state cases in the MDL are mediated, we will bring in representatives from the state liaison committee to be present at that mediation or in the event there are settlement discussions, a settlement discussions.

Mr. Juneau has indicated to both parties that he is willing to mediate these cases in New Orleans, and so it should be very convenient for counsel and the parties to have this mediation with less expense than ordinarily might be entailed.

THE COURT: Any input, Mr. Arsenault, on this? Do you need to monitor this or need any access to anything?

MR. ARSENAULT: It would helpful for us to be engaged in some of the dialogue with the special master at whatever point Mr. Herman thinks is appropriate.

MR. HERMAN: I think that once we make, when we make our presentation of a general overview of the case it would be helpful to have Mr. Arsenault present. We don't want a lot of folks there. And Mr. Arsenault has participated from the beginning rigorously in the case, we feel very comfortable with him being present.

THE COURT: Mr. Arsenault, it's important at that meeting that you give him some feeling for the numbers of cases in state court and the areas that you're dealing with and the law differences or elements of damage or things of that nature.

MR. DAVIS: Yes, your Honor.

MR. HERMAN: Also Mr. Hill's cases are going to be mediated and he is a member of the State Liaison Committee and we would expect that Mr. Hill will be present for the overview or that he'll send someone to be present and that he may participate or be present for all of the mediation that take place since we haven't decided on what order they're going to take place. And I'm certain he would want to be there.

MR. HILL: I will be.

THE COURT: Good. Okay, Mr. Hill.

Next item is the motion to withdraw as counsel of record.

MR. IRWIN: Your Honor, I can report on that. My office has been in touch with plaintiff attorney in that case, and my information is that he does desire to withdraw. He will be getting the appropriate paperwork into the court. It is a few days late as we understand it, but we're willing to accept to wait and presumably his information will be in compliance with your Honor's order which would permit his withdrawal. Our rights to proceed as may be necessary on a pro se basis against the pro se plaintiff will be reserved.

THE COURT: All right. Okay. That completes the items of old business. We now have new items, the first item is the trial schedule.

MR. HERMAN: Your Honor, I have a number of remarks to make with reference to trial schedule.

THE COURT: So the record is complete on that let me relate the following: I had an opportunity to meet on several occasions with counsel to discuss the trial of the matters. I first began discussing it at least one meeting or perhaps two meetings ago calling everyone's attention to the fact that there have been trials set and completed in several states. Mississippi comes to mind and I think one in Texas, I'm not

sure about whether the latter has as yet been tried but the one in Mississippi I know was tried. And there are many other cases that are proceeding, either to trials, or have trials currently set, I am particularly aware of cases in New Jersey that have been set for trials.

I am also aware of the fact that lawyers who are not liaison counsel, or on the committees of the MDL are concerned oftentimes when their cases are designated MDL's and sent to the MDL court. They often feel that they lose total control of the case and they don't hear from their case for some period of time. It's the black hole comment that we hear discussed and often read about in the literature. Various bar associations are beginning to weigh in on that concern.

Mindful of this concern, I expressed an interest to counsel in extending to counsel who either are on a committee or who are not on the committee an opportunity to proceed with trials in their cases. Certainly the ones in Louisiana I can set for trial. Certainly the ones in the Eastern District I can set for trial. The other cases, of course, under Lexicon I can't try but I can send back when they are ready. I have not excluded the possibility of sending back those cases from other jurisdictions in which counsel and litigant indicate that they are ready, willing and able to try their case.

With that in mind, I asked the liaison counsel to give me a list of cases. I felt that I was communicating with everyone expressing an interest in receiving a list of Louisiana cases that were ready for trial. Apparently I wasn't clear or wasn't perceived as being clear by counsel, and I got a list of cases all of the case that were filed in Louisiana.

In any event, I had further conferences with counsel to discuss proceeding to trial with those cases in Louisiana that were ready and willing to be tried. At least at the start of this process, I felt that the plaintiffs ought to select the cases that they wanted to try rather than have the defendants pick those cases that they want to try since we were moving them up. I was advised by Mr. Daniel Becnel that he was ready, willing and able to try a number of his cases.

I met with Mr. Becnel and liaison counsel. The cases were originally set to proceed to trial in October and November. Mr. Becnel indicated he had difficulty because of prior commitments with trying cases in October but that he could try the cases in January. I therefore set two cases or three cases, two that he indicated and another one that he said someone else wanted to try.

With that understanding, I set three cases for trial in January. It was my understanding that the parties were willing, able, ready to try their case, that's what

Mr. Becnel indicated to me at the conference. And that's what we're talking about now, those trials. I set them in January, one per week, and we're scheduled to proceed with those trials. The names of two were given to the defendants by Mr. Becnel and he indicated he would name another on or before the upcoming meeting.

The defendants indicated to me in my conference that they were ready to try the cases in October. I, nevertheless, moved the trial dates from October to January and that's where we are now. I'll her from state liaison or from MDL liaison counsel on this whole issue.

MR. HERMAN: I certainly have a response to make first on behalf of the MDL and official capacity as liaison counsel, and then because I also have individual cases speaking as an officer of the court on behalf of our firms and our own client. And I'll try to differentiate which remarks are personal and which are universal.

And I certainly agree that your Honor's account of this process is accurate. As a member of the liaison counsel and as a member of the executive committee, the PFC, I want to address in Mr. Becnel's absence issues that he would address were he here personally. And it's not an effort on his part to avoid addressing these issues at all.

And certainly in this courthouse and the

courthouses of the state, Danny Becnel has never shied away from a trial date, he is a trial lawyer and he tries cases and he tries them well and he tries them with success. He's scheduled to take and agreed to take depositions in Belgium for a week or two in October.

He has provided the facility where the office is, he has provided employees full-time, he has participated in other depositions and in this case and we have had substantial discussions, not only about the cases he selected and their readiness for trial or the availability to get them ready for trial and some assumptions he made, in making those statements, and that we all make from time to time.

I think it's fair to say that on behalf of Mr. Becnel and the PFC that the cases are not ready for trial and cannot be ready for trial and cannot be prepared fairly to represent those clients according to the schedule which your Honor has set. And the setting of these cases has ramifications far greater than Mr. Becnel's clients. Cases in which there is inadequate discovery, cases in which there is inadequate expert testimony, cases in which there is inadequate preparation, none of which are in the control of a plaintiff lawyer produce bad results, and they not only produce bad results in this courthouse, in this case, but those bad results are transferred like the West Nile Virus all over this country,

even though there are Louisiana specific ruling on learned intermediary, rulings on summary judgment, motions to dismiss, learned intermediary, critical issues in the case, Daubert issues are transmitted from case to case, from jurisdiction to jurisdiction and venue to venue.

One of the terrible failings of complex litigation is that lawyers who are inadequately prepared, not by their own design or by their own design, not by their failure or by their failure produce a bad result which immediately is transferred to other cases where lawyers are really attempting to get cases prepared. I want to emphasize that Mr. Becnel is a lawyer that tries cases, his cases are well prepared, and I frankly for the reasons I'm going to state do not believe that we are in a position to select cases to have tried.

I first want to address what I believe is untold and inaccurate criticism regarding MDL's. There is literature about a black hole. Your Honor's read it, I've read it, I've listened to it in seminars. There is a terrific anguish in the plaintiff bar on removal. Not in Propulsid, but in some cases where cases have been removed and they should go back to state court lawyers feel and they are intentionally delayed and caught up in MDL instead of remand being acted on and under the law improper remanded cases not being sanctioned.

It's difficult to find a case in this country

where there's been an improper remand in the MDL and there has been a sanction assisted. They don't like it. I don't like it. The MDL doesn't like it. That is not true in Propulsid. We don't have that problem here. Lawyers complain that the discovery process is too slow and they're not brought up-to-date.

That is an accurate feeling outside in the plaintiff bar, but not in Propulsid. Your Honor has a web site, these meetings are open, they're not closed. We have a liaison committee that functions. We have been in touch and open ourselves to seminars to lawyers who have state cases. And our process has been continuing since the inception of the case.

There are lawyers who complain that they want their cases sent back to state court, particularly if they've got a venue they like, a judge they like, and a jurisdiction they like. Well, neither your Honor or I can control that process. The fact that cases have been tried in Mississippi to verdict and Texas, which the defendants say are abhorrent and don't even form the basis for a rationale for mediation or settlement does not mean that cases have been tried and tried in jurisdictions which don't have favorable law as to learned intermediary and other issues in these cases. It's a complex case.

Old friend of mine that your Honor may be familiar with, Lanny Vines from Alabama once said in these cases, told me 20 years ago, said brother Russ, they bury the bone deep. If you want to get off the porch and run with the big dogs, you better be able to yelp and scream and you better have to have some teeth to go with the bark because they got great lawyers on the other side and a dog buries the bone deep.

We are only now getting to the critical evidence in the case. I don't say that the defendants delayed anything on purpose, we did make extensive discovery requests. But it's their records, they're the one who put the drug on the market and then withdrew it because they didn't want to go to an FDA advisory committee.

The e-mails are where the bone's buried. And unfortunately we didn't have a lot of this information when we went to cert here. And there are two examples. As an officer of the court I tell your Honor that I personally reviewed 8,000 documents that had been called in order to take two days of depositions and was able to deal with maybe 500. And the critical exhibits were e-mails. And one of them from the person over in Beerse says I wish we'd have this for mediation, it may not have changed an opinion or your opinion or anyone's opinion but it was important in which he says how many smoking guns do we need before we take the drug off the market? In

which he says there is a problem, 15 percent of tore side death Zonder, Z-O-N-D-E-R, QT prolongation, we got that word interpreted, meant without, there is an abstract extract of a consultant meeting inside Propulsid in 1998 which is extraordinarily critical and says, you know, you could have handled this problem ten years ago but you didn't do the test.

You know, we don't have the transcript, all we have is an extract. And when I took the deposition the fella who convened the conference can't tell me where the transcript is. Now, these are not, these are issues that weren't discovery. Another e-mail that has come in in the last two months is from a consultant and a cardiologist overseas who says with reference to X drug it's the most dangerous drug on the market, it rivals Propulsid. A lot of these e-mails are in a foreign language.

Now, the Fifth Circuit is particularly difficult on Daubert. It doesn't require that all of the Daubert requisites be met, according to the latest juris prudence. But we know day in and day out in this courthouse and in this circuit the way Daubert is applied is different than it's applied in the Ninth Circuit, Eleventh Circuit, elsewhere.

But a Daubert hearing that denies the plaintiffs an expert in a case in Louisiana in federal court will be transported to Mississippi, well not Mississippi because the

rule is different there, but will be transported to the Second Circuit, the Eleventh Circuit, the First Circuit, the Ninth Circuit, the state houses all over this country, and they're going to be depositions taken by great defense lawyers and say wasn't your testimony excluded in a federal court in Louisiana because you couldn't meet the requisites. And the answer is going to be yes.

And it's going to effect the decisions of the other states, and we have in the MDL, your Honor, most respectfully, a responsibility to lawyers maybe they didn't sign a four percent agreement, but their clients are out there. And we've got a professional obligation to meet. I say your Honor, you're looking at the most competent plaintiff lawyers I know involved in this case. They were carefully selected by your Honor from a number of applicants.

But Mr. Becnel's case is not my case, it's not Mr. Murray's case and Mr. Levin's case, it's not an MDL case. Which brings me to the due process issue. The defense due process issue as an attack on consumer classes began 15 years ago at a DRI seminar, how do we know that because there was legislation introduced and the DRI document came forward.

Since that time the University of Virginia graduate school for judges, the Judicial College in Reno, the judicial conferences have all bought into a one-sided due

process argument where the defendants say we're entitled to due process but the consumers who have suffered personal injury are not. Now, it's not up to the courts to resolve that issue, and I don't criticize the courts for coming to that conclusion, but it is a fact.

It's an absolute fact and in the Fifth Circuit is a leader in the judicial thinking regarding due process in these cases, it's undeniable. And again, that's not a criticism of this court, any of the Fifth Circuit courts or the courts of appeal. The other circuits have followed. I think all but two have followed right in line with the Fifth Circuit issues and the Supreme Court in pertinent part has adopted that thinking.

So that's the law of the land, I have to live within that construct. But while I'm living within that construct, our job now is only discovery. That's all this MDL is for is to satisfy discovery. It's supposed to be for the convenience of the parties.

But it's also to assure due process for those folks out there, 20 million of them that took Propulsid. And the only way they can be satisfied with the due process in this system is for an MDL committee that is committed to spend its time and its resources to do best the job it can in discovery and it's not like an ordinary case. It's not like a complex

case like an explosion where a committee can go out and do discovery in a year and provide the mechanism of causation, the liability and be prepared to try that case no matter how many cases there are arising out of an explosion.

The case is far too complex, this drug was distributed in 70 countries, the adverse drug event material and other material developed in those countries was not often shared. The e-mails show there was internal confusion and problems in communication among key people within the organization. I don't know what we're to do. Not only do we have to get the electronic discovery in, but somebody's got to read it.

And after somebody inputs it, reads it, codes it objectively, codes it subjectively, then you have to get a group of senior lawyers in to say, well, that may be relevant but we don't need it or we need to follow this up.

And I want to say one more thing about this issue of discovery. One of the key documents that we used in the deposition last week has redaction in it. A consultant's redaction, not a lawyer, there were no lawyers present. It doesn't appear on a privy list, we've got to go back now and search every redaction, not in all of the thousands of documents that have been produced, but in approximately 8,000 that have been labeled relevant and material, and see if

they're redactions and now we're going to cross-reference them with a privilege list that we took for granted was accurate.

Again, I don't say that it was intentional, I know that it wasn't and I accept that it wasn't. But good lawyers have to do good jobs and if there are redactions in key documents we've got to follow-up on them.

Now, given the state of discovery, I have to now depart from PFC and talk about what I feel is an advocate because it would not be fair on this record for me not to express my consternation, my difficulty in telling other lawyers who are knowledgeable who have worked on this case I'm not trying any of my cases right now.

We have cases that are set. Based on what I've seen in the last week, I'm not going to try any cases. Because, and my duties with the MDL conflict with the duties I have with the client. I want to see the e-mails. I want to see T-100 and the underlying data, I want to see consultants get together in a free atmosphere and look at the data and CIS-NED-32 and be able to discuss it.

Now, your Honor may rule otherwise and I accept that, but I'm entitled to look at e-mails on why T-100 was stopped when it was supposed to be a life saver and it may very well have been a killer. I'm entitled to look at that, my clients are entitled to have someone, at least, prepare a time

book. The MDL is committed to provide lawyers in the MDL with a trial product. Deposition excerpts, demonstrative evidence, precut videos and the key exhibits.

We have commenced that process. That's been ongoing for a couple of months now. But we don't have a product that we can turn over to Danny Becnel who made an assumption that our experts, generic experts were ready to testify and that they would be available to him when our generic experts have said we need the freedom to examine this material and our material associated with it, and if we feel it's valid to incorporate it and have it peer reviewed and published.

And it's impractical, it's impractical, your Honor, for me to as an individual advocate to work under the burdens of a Daubert opinion which now is required two trials in every case a minimum, a Daubert trial and another trial was supposed to save time when a judge already have discretion as regards experts anyway, but I have to live under that burden.

It's expensive for me. And then to come before a court in a case we've been working on three or four years and spent $1 million preparing and say, well, gee, you were never published on this subject, were you? And then have it go to the Fifth Circuit where they may look at it and say, well, if it was valid why wasn't it published and why should the

defendants control publication. I mean, they've got enough entries with these journals --

THE COURT: Let's tie it up now, Mr. Herman, I've got the jest of your view and you are beginning to repeat yourself.

MR. HERMAN: Yes, your Honor. In summary, your Honor, I believe that the work of this MDL committee with its charge has not nearly concluded or substantially concluded, and until it's substantially concluded, your Honor, on behalf of Mr. Becnel and those of us who have labored in this case, we do not believe that a case can be prepared at this point and presented in the time frame, notwithstanding Mr. Becnel's representations earlier.

THE COURT: All right. Thank you. Any comments from the defense?

MR. IRWIN: Yes, your Honor, I will try to be brief. My recollection as to when the discussions on this subject started was in early June. At about the time frame in the PFC after your Honor ruled on class certification and about the time the PFC filed its motion for reconsideration of class certification.

When that was under advisement that's when I recall we had a conference in your Honor's chambers and your Honor raised for the first time the prospect of setting case for trial this fall. I think you might have even mentioned

September. I know I'm almost certain the month of October was mentioned by your Honor at that time.

We as a group plaintiff and defense counsel talked about how that could be ambitious, but we realized that a lot of work was going to have to be done. Over the next few meetings that we had with your Honor in June and July, those discussions continued, and those were in liaison counsel meeting on occasion, sometimes Mr. Herman was not there. I think he was there for most of them. I was there for all of them.

We then got to the point where we came to the July 18th conference. And I remember at the July 18th conference that I met Mr. Rebennack for the first time, and we joked I guess we would be seeing a lot of you this fall and he said, yes, you will. Because he had 45 of the 67 cases that were, we were looking at. So I guess I was a little surprised later on to find out when we met the last time that Mr. Rebennack was not going to be putting his cases up for consideration.

And then your Honor scheduled eight cases for trial this fall, that was the first thing, the first official order that came out. And as I recall those eight cases were scheduled for trial beginning in November. So the key word or a key word to us that these should be representative cases, cases that would touch upon a cross section of the population

so that we could process these cases in such a way to get some yield, some instruction out of it.

We talked about scheduling those cases for trial, your Honor ordered them for trial in November and we had the most recent meeting in your Honor's chambers where Mr. Becnel and others were there. And we heard statements and position by Mr. Becnel and others that they did not think they would get the case ready for trial in November. Mr. Becnel I specifically recalled said that he could get cases ready for late January or early February.

And your Honor hearing more on the discussion ordered that trials will go in early January. And it was my impression that they were then going to get ready and go in early January and it was said we all, including Mr. Becnel, that we will be ready to go in early January. Three cases were supposed to be given to us selected by plaintiff counsel.

I guess I'll leave for another day the comment that at some point in time the defendant has not, should have an opportunity to weigh in on this case about what cases go to trial and what is representative.

But we received only two cases. Your Honor got those cases, we got those cases from Mr. Becnel's office and Mr. Amedee, one as Diez, the other was Reed. Your Honor issued a minute entry scheduling Diez for January 6th and Reed for

January 13. We still have not received the third case to be chosen, and they understand it's ordered that we will be receiving that today.

We think under these circumstances, the history of this case, I will not belabor the degree of discovery that's been conducted, motions, class certification hearing that's been held. We think it's reasonable not, certainly not unreasonable to be able to prepare three cases for trial in January. And so we're ready to go, your Honor, we would like to know No. 3 as soon as possible today, we're ready to initiate discovery tomorrow on the other two that have already been identified, rather the discovery that we're prepared to send out will go out on Monday.

THE COURT: All right. I understand the issue. Liaison counsel for the plaintiffs makes the point that it is his responsibility to get the cases ready for trial. That's accurate, it is the responsibility of the plaintiffs committee to conduct the discovery in the case. In fact, Lexicon teaches us that this court doesn't have the power or jurisdiction to try cases that have not been filed in Louisiana, unless they're transferred under 1404. 1407 doesn't give that authority.

Therein lies the rub that exists between individuals who do want to try their case and the plaintiffs committee whose responsibility it is to prepare the cases and

discover the cases. And in the discovering mode, the cases cover the whole spectrum. They go from A to Z with regard to liability. There are some cases that are ready for trial before other cases are ready for trial. But MDL counsel can't carve those cases out. MDL counsel have to continue discovery until the Z case, the last case on the spectrum is ready for trial. That's what their job is, that's what their fiduciary responsibility is.

But there needs to be some balance it seems to me between that responsibility and the need or interest of the other lawyers who want to try their cases. In this instance we have a lawyer who indicated to the court on at least two occasions that he wanted to try his cases. He selected the cases and agreed to the trial dates. He happens to be on the MDL committee. Therefore, he should be aware of the big picture as well as the position that his cases occupy in the spectrum of cases that make up this litigation.

So I will plan to try those cases. Mr. Amedee, Mr. Becnel's colleague, is in the courtroom; he was there and he is on what Mr. Becnel has termed his trial team. I tell Mr. Amedee to, by today get to the defendant the last case either one of Mr. Becnel's cases or another case, failing which I'll pick a case and go with that one. But I would like to give the opportunity to the plaintiff to pick a case.

MR. AMEDEE: Can I address the court, please?

THE COURT: Sure.

MR. AMEDEE: I am Roy Amedee, and am attorney of record along with Mr. Arsenault in the Diez and the Reed case. We did, in fact, present these cases to be put on the trial calendar I think last week.

And because of events that have occurred, your Honor did set them for trial, as Mr. Herman pointed out there have been certain events that have occurred in the last week, especially in my mind that I have to respectfully request the court on behalf of my clients, not Mr. Becnel, to remove these cases from the trial calendar.

I think we heard for an hour today the reasons that I would go into as to why I would like to do so. The MDL is formed for the basis, for the purpose I should say of completing discovery and the selection of generic witnesses. This has not been done. What I'd like to try Mr. Diaz's case, of course I would. I mean, I have a widow, a paraplegic son, I have a gentleman who never had a heart problem before whose doctor had the forethought to give him a cardiac work-up to put him on this drug to make sure and preclude any esophageal pain was not caused by something other than gastritis.

His work-up was fine. Six months later after taking the maximum dose he drops dead suddenly. Perfect case.

But I cannot in good conscience go forward. I would have to remove myself as attorney of record, go forward with this man's case when there is still electronic discovery, FDA discovery, additional depositions, there are no experts, it's preposterous.

THE COURT: But Mr. Amedee, you and Mr. Becnel have been on the committee, you knew about this. You know that there's been over 7 million documents discovered over two years, over $30 million or 20 some odd million dollars expended in the discovery thus far. Not including attorney's fees.

We've been meeting for over two years now. At every meeting either you've participated, Mr. Becnel's participated or has been aware of what transpired. And I called upon all counsel for Louisiana cases a couple of months ago to pick a case or to tell me who is ready, if anybody is ready. Mr. Becnel came forward and said we're ready, we want to go to trial. So I said let's go to trial. You picked the case. The dates were picked as a convenience to your calendar.

You've got more than 50, more than 100 cases and you picked the cases to be tried. You and Mr. Becnel met with me, you tell me that these are the cases you want to try. You move my docket from October to January, tell me January is fine, you're okay with January, and I set the cases for trial in January. And now I find that it's just an insurmountable

burden for you to go forward with the cases.

You are the ones who said you want to try the case and now you don't want to try the case.

MR. AMEDEE: Judge, I can't speak for Mr. Becnel, I have not been keeping up with the progress.

THE COURT: I hear it and I understand the issue and I have been patient and I wanted to let all parties full express themselves. It's important that these matters get on the record and get on the record thoroughly and completely. So I do feel that they're on the record thoroughly and completely. I do look forward to trying the cases on those dates.

Anything on the remaining items on the agenda , for example, the trial schedule throughout the country? Insurance indemnity agreements, use of plaintiff's expert reports.

MR. IRWIN: Your Honor, with respect to the motion to withdraw, something that I failed to mention to your Honor about the Scott case, something that I spoke about yesterday with plaintiff's liaison counsel's office, that might be appropriate, your Honor might want to consider posting that withdrawal order on the court's web site as a guide to other plaintiff counsel who might want to withdraw and know the procedure.

THE COURT: All right. Anything further on any of the

new items on the agenda?

MR. HERMAN: No, your Honor, not really. I do want to correct or make one statement for the record, if your Honor would allow it with regard to trial schedule.

THE COURT: Certainly.

MR. HERMAN: I was at every conference either participating by phone or in person in which the trial matter was or trial setting was discussed, except for the last one when I was in deposition and couldn't attend either in person or on phone. I just want to state that for the record.

Secondly, I have a clear recollection that it was the defendants when they originally brought this issue said that they couldn't be ready until April or May for trial, and it was only after I suggested that in one of those conferences that October and November, we just couldn't be ready, I didn't know if anybody could be ready, that the defendants evidently in the last week or two have said, okay, we can be ready in October and November. And I just wanted to indicate that for the record as being my recollection.

With regard to trial scheduled throughout the country, the defendants have provided us a list of trial dates, needs to be supplemented from what we understand and they've agreed to supplement it.

With regard to use of plaintiff's expert reports,

you will be presented an order very shortly that it will be suggested jointly by plaintiffs and defendants. As liaison counsel, your Honor, I know that you've spent a lot more time on these issues and you've been very indulgent with allowing counsel to express to you on behalf of the MDL and individually his remarks about these issues, and I greatly appreciate it.

THE COURT: Anything further on new matters? Let's talk about the next meeting. What's the date for the next meeting?

MR. IRWIN: Excuse me, your Honor, I was asked to make a comment to the court that with respect to those West Virginia motions that we referred to briefly in chambers this morning, there has been no opposition filed to those as we understand it.

THE COURT: All right. I should tell the state liaison counsel that I have three cases, one Louisiana case and two West Virginia cases dealing with motions to dismiss the local pharmacy. I've looked them over, studied West Virginia law as well as of course Louisiana law. I do plan to dismiss the pharmacy in those particular cases and expect to be out with an opinion either today or first thing Monday.

MR. HERMAN: Mr. Davis points out that I skipped over the question of indemnity agreement, I did that because it's under advisement.

THE COURT: I understand. Let's get a date for the next meeting. 20th or 27th of September, consistent with anybody's calendar?

MR. HERMAN: I know the 20th of September there is a meeting in the new Meridia in Cleveland.

THE COURT: The 27th is better?

MR. HERMAN: Yes, your Honor.

THE COURT: Before we leave today, I want to talk with you all about the pending motions and rule on them. I have several before me, the one motion, the Norcisapride issue, are you ready for me to rule on that now or do you want me to hold ruling on that?

MR. IRWIN: Your Honor, I thought the agreement was that ruling would be withheld and there is a motion to continue I think pending before your Honor that was filed by plaintiffs on that subject.

THE COURT: The next motion before me involves indemnity agreements, the defendant has entered into an indemnity agreement with various pharmacies, the plaintiff seeks copies of these agreements and moves to produce. The defendant has pursuant to the court's instructions delivered to the court a copy of the indemnity agreement for an in-chambers inspection, in camera inspection. I have reviewed the indemnity agreement.

ROUGH DRAFT

After reviewing the documents and considering the law applicable to the issue, the court grants the plaintiff's motion to produce the documents. The defendant shall forward to the plaintiffs liaison counsel the relevant form of the documents within three days.

The next motion is a motion for a protective order filed by the third party Neuro Transmitter and Environmental Testing Foundation. I was asked by counsel to take this off of the calendar at one time but it is, has been under submission or at least under consideration. I haven't received any response or any discussion regarding this protective order. Does anybody have any comment on that?

MR. IRWIN: Your Honor, I think -- is this the motion filed by Peter Butler on behalf of Dr. Shell?

THE COURT: That's it.

MR. IRWIN: With the court's permission I would like to take a look at that, I think it's moot.

THE COURT: I'll dismiss it as moot with the understanding that the party can refile it if the issue is presented. The motion is dismissed as moot without prejudice.

Finally, before me is the plaintiff's motion regarding the confidentiality designation of various documents in accordance with Pretrial Order No. 5. They seek to remove the confidential designation on all or some of the documents.

ROUGH DRAFT

Let me make some general comments about the issue in general.

Freedom of expression and openness, or transparency are significant characteristics of our society. They are the threads that have stitched together our flag and our form of government. They're one of the aspects, one of the qualities, one of the characteristics which define us as a people. It's what makes Americans different, America different from many other jurisdictions, many other countries around the world. The public at large has a keen interest in this.

These concepts, however, often come in conflict with other equally important issues, issues of privacy, issues of propriety, issues of ownership, issues of patent, issues of copyright. The area where the conflict becomes most apparent and becomes most heated is in the trial arena where individual litigants have a constitutional right to have a free and fair trial.

A part of a free and fair trial includes open discovery so that the party who has a right to a fair trial can be prepared to go to trial. The parties in litigation often recognize the conflict between these two interests - the public interest in transparency and the litigant's private interest - and it is not unusual for the parties to meet to discuss whether or not this conflict can be resolved, at least temporarily by way of some agreement.

ROUGH DRAFT

That's what was done in this particular case with Pretrial Order No. 5. The purpose of Pretrial Order No. 5 was not to write in stone and not to put it to rest forever, but to recognize that in order to get free discovery and in order to get prompt discovery and in order to encourage both sides to produce and receive discovery that was necessary for the litigants, the litigants in this particular case, to agree, that the documents would be treated with confidentiality, with some degree of protection.

The public does have a right to know, that's part of our system. Our cases are open, our trials are open, our courts are open, our government's open. But the court has to balance the public's right to know with the litigants' right to proceed with a fair trial. And that's the purpose of these agreements oftentimes, and the parties recognize that, that in order to avoid a plethora of constant motions to compel they meet and draft or seek to draft an agreement.

Under the terms of the agreement which exists in this particular case, the plaintiffs are to receive the material or the defendants are to receive the material and they can do with it what they will as long as its use is confined to this particular case, these particular litigants.

Everybody represents somebody, you are excellent advocates and you represent your clients. I too represent

somebody, I represent this room, the room involves not only the public but the flag and all that it stands for. I seek and I try the best I can to first make sure that litigants who appear before me have a fair trial. Occasionally in order to accomplish this goal I have to put things under seal, occasionally I have to make things confidential, occasionally I have to lock the courtroom and allow only those litigants in it. It's not done willy-nilly. It's done because the first responsibility that I have is to make sure that the litigants who appear before me have a fair trial.

I am convinced that the pretrial order in this on confidentiality is important to the litigants. I feel that a lot has been accomplished as a result of that order. We've only had one, perhaps two, motions to compel throughout the existence of this litigation.

I do think this order No. 5 has played an important part. I'm convinced that it served the litigants. Well, over 7 million documents have been produced with very little motion practice.

I feel that the litigation is not completed, it's not finished yet, there are still documents which need to be produced, there are still some people to be deposed. You are winding down, hopefully, getting to whether it's lost bones, deep bones, buried bones, other information either defendant or

plaintiff, you are getting now to things that because of the past discovery seems to take on more meaning now.

In any event, you all have not yet completed discovery. The present motion seeks to alter the pretrial order to remove the confidential designation, first across the board and then in specific areas. After due consideration the court denies the plaintiff's motion at the present time to remove the confidentiality designation across the board for the following reasons: First, discovery is not yet complete. Such change across the board in my opinion would in all probability have a chilling effect. It may well retard future discovery, it may well hurt the states in their interest in proceeding with the litigation and precipitate multiple motions, needless motions, take time and energy from counsel when they should be spending that time and energy in the final throws of discovery and in the preparation of the lawsuit for trial.

Second, I feel that continuing the confidentiality designation will not adversely effect the plaintiffs since they have and have had access to the material and can use it and can discuss it with their experts, can have their experts confer, can have their experts discuss it with other experts, as long as it is within the confines of the confidentiality order.

There are, however, two specific areas that pose concern, and I think legitimate concern that the plaintiffs

raise. One area is the CIS-NED area that was discussed, CIS-NED-32 and the other area is the Shell/Morganroth study. Plaintiffs express concern that the lack of transparency or lack of openness regarding the CIS-NED material may well play a part in their Daubert proof, that their experts will be thwarted in their opportunity to achieve peer review if they can't publish articles reporting their findings.

That may be a legitimate concern, and so with regard to these two areas I will not make any ruling regarding whether certain material can or cannot be published or articles can or cannot be compiled. I'll have to treat that when and if there are articles. The articles haven't been written, I don't know what will be in them, I don't know whether anything will be in them. But to just open it for publication when nothing is submitted for publication, I think will be too broad.

In summary, I do deny the plaintiff's motion for removing the designation generally.

But with regard to CIS-NED-32 and the Shell/Morganroth study, I make no ruling about whether or not they can publish material and obtain peer review. I will defer ruling on that until there is an article or a presentation or a protocol or a plan that I can look at and make that decision with some specificity.

I should say, however, that there may come a time

when the litigants have no longer any interest in obtaining information and they will reap no benefit from any confidentiality designation. At that particular point the public's right to know may predominate and the public's right to know may express itself by altering the Pretrial Order No. 5 or the abolition of Pretrial Order No. 5.

Presently I don't feel the public is hurt in any way by delaying discussion or delaying receipt of this information since Propulsid is no longer on the market. It hasn't been on the market for sometime now, and so the public is not being exposed to any danger even assuming it is a problematic drug. So the public's interest must stand behind the litigants' interest, and I think the litigants' interest in this particular case predominates and would dictate that I deny such a motion.

Thank you, gentlemen. The court will stand in recess.

THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

ROUGH DRAFT

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.

_____

Karen A. Ibos, CCR, RPR

Official Court Reporter