



ROUGH DRAFT

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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)

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

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

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

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

15 MR. IRWIN: And Jim Irwin for defendants.

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

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

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1  
2 back many of the discs where there are problems. Some of the  
3 documents are written in a foreign language and we've got to  
4 hire interpreters to interpret them. Either in Flemish or  
5 Dutch, even though we do have someone on staff that Mr. Becnel  
6 has retained to come in and assist in that.

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

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

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

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

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

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

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

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

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

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1  
2 endless, the data can't be contained on one print page. So  
3 when Mr. Herman's group tries to print it up they can't do it  
4 right now, so these page breaks have to be inserted, that's the  
5 way it is described to.

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

11 THE COURT: In addition to that --

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

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

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

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

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

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

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

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

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

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1  
2 they may be relevant or not and if they're relevant they have  
3 to be marked in order of importance.

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

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

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

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

25           In terms of the liaisioning with various states,

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

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

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

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

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

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2 you want this committee to have some role with that.

3 Mr. Herman indicated yesterday that apparently there are some  
4 protocols in place that we will be advised of and when the time  
5 is right we'll play some role with regard to that ongoing  
6 activity.

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

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

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

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

19 MR. IRWIN: Yes, sir.

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

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

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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

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

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

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

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

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

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

6 I will overrule their objection and dismiss it  
7 with prejudice.

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

12 MR. IRWIN: And finally, your Honor -- incidentally, we  
13 do have a motion pending before the court with respect to those  
14 37 non-responders, and so we would suggest that we would submit  
15 that judgment to your Honor with the court's consideration.

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

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

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

7 THE COURT: Okay.

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

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

11 MR. IRWIN: Thank you, your Honor.

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

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

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

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

24 THE COURT: When are you expecting that?

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

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1  
2 this month.

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

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

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

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

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

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

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

25 THE COURT: Third party subpoena duces tecum issued by

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1  
2 the PFC.

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

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

13 THE COURT: What's the situation there?

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

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

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

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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

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2 point, certainly within the court's discretion.

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

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

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

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1  
2 extraordinary amount of time or resources. But we have not had  
3 a chance to really sit around the table and attempt to resolve  
4 that issue, and I'm hopeful that in the next week we can sit  
5 down and do that.

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

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

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

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

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

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

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

ROUGH DRAFT

1  
2 it now in litigation and withholding what they don't think is  
3 good for them from the public. And I don't know how that  
4 relates to learned intermediary, but CIS-NED-32 may not only  
5 relate to the mechanism of causation and injury, but may also  
6 be one of the linchpins upon which an introduction of the  
7 learned intermediary defense in this case will be based.

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

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

ROUGH DRAFT

1  
2 That full information hasn't been produced. We  
3 need that information in order to have experts give us opinions  
4 as to what that data and what those studies reflect. We  
5 believe that it is a very serious matter. We also believe as  
6 Mr. Murray has pointed out to me several times, that the whole  
7 issue is on what basis does it remain confidential? It's not a  
8 trade secret. The origin of it was to support marketing and  
9 production of a drug that the FDA on many instances was  
10 challenging. The drug has been voluntarily withdrawn from the  
11 market, except in compassionate use, and that's provided on a  
12 limited basis I think without payment. So it's not a  
13 commercial use.

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

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

ROUGH DRAFT

1  
2 That does not mean that plaintiffs have acceded to  
3 the fact that there is confidentiality, it does not mean that  
4 the defendants have somehow obviated their responsibility  
5 burden of proof wise. So the marital has been briefed, it's  
6 been argued.

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

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

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

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

25 We know there is in place a series of agreements

ROUGH DRAFT

1  
2 whereby the work product material will be shared with counsel  
3 in state court litigations in return for an agreement. We have  
4 brought to the attention of the PFC the fact that at least in  
5 one litigation, now we know in two, that some counsel who we do  
6 not believe are not parties to the fee sharing agreement are  
7 now trying to make some use of that material. And we have  
8 before you an order to provide protection for everybody. So  
9 now we come to the business of the consultants that they have  
10 to review CIS-NED-32 material.

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

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

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

ROUGH DRAFT

1  
2 MR. CAMPION: They have what we have. We have turned  
3 it over. I think the disappointment that they have is that  
4 CIS-NED-32 is not completed. We have a draft of a report there  
5 is no doubt. But there is deposition testimony to the effect  
6 that the reason the report has not been made a final report is  
7 we are waiting for some additional interpretations. My  
8 recollection is it's from Covance, but I don't want to make  
9 any, make a sworn statement to that effect, but it has been  
10 testified to.

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

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

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

ROUGH DRAFT

1  
2 THE COURT: All right. The next item is the deposition  
3 procedure.

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

6 THE COURT: Shell/Morganroth study.

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

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

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

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

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

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

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

ROUGH DRAFT

1  
2 MR. HERMAN: We're attempting to work this out and I  
3 think we may be able to work it out just based on the database  
4 rather than a lengthy deposition. Mr. Campion provided us with  
5 a database, asked us what additional information we needed. We  
6 expect to get that, I'm not sure what the delivery date is, but  
7 we think it will certainly avoid a lot of deposition testimony  
8 and may take some limited deposition testimony. But it  
9 basically will provide the information that we would seek in  
10 this series of 30(b)(6) depositions.

11 THE COURT: Any comment from the defendant on that?

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

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

23 THE COURT: What is the time frame?

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

ROUGH DRAFT

1  
2 inexpensive item, I may have to do something and then simply  
3 give them the database and then tell them to put their people  
4 to work. I would hope I would have something positive to  
5 report, it may not be a conclusion, but something positive.

6 THE COURT: Trust account is the next item.

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

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

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

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

ROUGH DRAFT

1  
2 know I do. Very early on in one of our first pretrial orders  
3 we did prepare and your Honor ordered, we have a stipulation  
4 that provides for a 901 authentication on all documents  
5 produced by us that were prepared by us. So if a Janssen or J  
6 & J document that's found in our files, it was prepared by us  
7 it's authentic, there is a stipulation in the pretrial order  
8 already.

9                   We were not able to cross the business records  
10 bridge at that time because it was at the beginning of the  
11 production. We probably can now, we can probably address some  
12 803 treatment or categories in the business records to take  
13 care of foundation and take care of the business record  
14 exceptions in most circumstances I would think.

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

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

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

ROUGH DRAFT

1  
2 the court's moneys held in trust until the court is, there is a  
3 hearing and the court decides. What we've agreed if the court  
4 will grant plaintiffs and defendants leave to do this is to  
5 open an account at the Whitney National Bank that will be an  
6 interest bearing checking account but would require two  
7 signatures, one from their side, one from our side in order to  
8 have any funds released. And we would only do that upon a  
9 suitable order by the court rather than putting it in a formal  
10 trust account which means that we're going to have to pay some  
11 substantial fees out of those funds.

12 THE COURT: Any objection to that?

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

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

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

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1  
2 depositions being declassified at some point. And we've set up  
3 a database and we're attempting to go through these depositions  
4 and documents now for declassification purposes. And of course  
5 we'll present a list of the depositions and the documents to  
6 counsel before we file a formal request.

7           Next item is mediator status.

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

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

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

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

ROUGH DRAFT

1  
2 would be happy to ask him then when he would like us to get the  
3 written material to him, and I'd be happy to call the court  
4 this afternoon and inform the court of his preference.

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

11 MR. IRWIN: Yes, your Honor.

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

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

ROUGH DRAFT

1  
2 THE COURT: Any input, Mr. Arsenault, on this? Do you  
3 need to monitor this or need any access to anything?

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

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

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

17 MR. DAVIS: Yes, your Honor.

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

25 MR. HILL: I will be.

ROUGH DRAFT

1  
2 THE COURT: Good. Okay, Mr. Hill.

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

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

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

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

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

ROUGH DRAFT

1  
2 sure about whether the latter has as yet been tried but the one  
3 in Mississippi I know was tried. And there are many other  
4 cases that are proceeding, either to trials, or have trials  
5 currently set, I am particularly aware of cases in New Jersey  
6 that have been set for trials.

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

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

ROUGH DRAFT

1  
2           With that in mind, I asked the liaison counsel to  
3 give me a list of cases. I felt that I was communicating with  
4 everyone expressing an interest in receiving a list of  
5 Louisiana cases that were ready for trial. Apparently I wasn't  
6 clear or wasn't perceived as being clear by counsel, and I got  
7 a list of cases all of the case that were filed in Louisiana.

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

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

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

ROUGH DRAFT

1  
2 Mr. Becnel indicated to me at the conference. And that's what  
3 we're talking about now, those trials. I set them in January,  
4 one per week, and we're scheduled to proceed with those trials.  
5 The names of two were given to the defendants by Mr. Becnel and  
6 he indicated he would name another on or before the upcoming  
7 meeting.

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

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

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

25           And certainly in this courthouse and the

ROUGH DRAFT

1  
2 courthouses of the state, Danny Becnel has never shied away  
3 from a trial date, he is a trial lawyer and he tries cases and  
4 he tries them well and he tries them with success. He's  
5 scheduled to take and agreed to take depositions in Belgium for  
6 a week or two in October.

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

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

ROUGH DRAFT

1  
2 even though there are Louisiana specific ruling on learned  
3 intermediary, rulings on summary judgment, motions to dismiss,  
4 learned intermediary, critical issues in the case, Daubert  
5 issues are transmitted from case to case, from jurisdiction to  
6 jurisdiction and venue to venue.

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

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

25           It's difficult to find a case in this country

ROUGH DRAFT

1  
2 where there's been an improper remand in the MDL and there has  
3 been a sanction assisted. They don't like it. I don't like  
4 it. The MDL doesn't like it. That is not true in Propulsid.  
5 We don't have that problem here. Lawyers complain that the  
6 discovery process is too slow and they're not brought  
7 up-to-date.

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

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

ROUGH DRAFT

1  
2 Old friend of mine that your Honor may be familiar  
3 with, Lanny Vines from Alabama once said in these cases, told  
4 me 20 years ago, said brother Russ, they bury the bone deep.  
5 If you want to get off the porch and run with the big dogs, you  
6 better be able to yelp and scream and you better have to have  
7 some teeth to go with the bark because they got great lawyers  
8 on the other side and a dog buries the bone deep.

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

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

ROUGH DRAFT

1  
2 which he says there is a problem, 15 percent of tore side death  
3 Zonder, Z-O-N-D-E-R, QT prolongation, we got that word  
4 interpreted, meant without, there is an abstract extract of a  
5 consultant meeting inside Propulsid in 1998 which is  
6 extraordinarily critical and says, you know, you could have  
7 handled this problem ten years ago but you didn't do the test.

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

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

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

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1  
2 rule is different there, but will be transported to the Second  
3 Circuit, the Eleventh Circuit, the First Circuit, the Ninth  
4 Circuit, the state houses all over this country, and they're  
5 going to be depositions taken by great defense lawyers and say  
6 wasn't your testimony excluded in a federal court in Louisiana  
7 because you couldn't meet the requisites. And the answer is  
8 going to be yes.

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

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

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

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1  
2 process argument where the defendants say we're entitled to due  
3 process but the consumers who have suffered personal injury are  
4 not. Now, it's not up to the courts to resolve that issue, and  
5 I don't criticize the courts for coming to that conclusion, but  
6 it is a fact.

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

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

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

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1  
2 case like an explosion where a committee can go out and do  
3 discovery in a year and provide the mechanism of causation, the  
4 liability and be prepared to try that case no matter how many  
5 cases there are arising out of an explosion.

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

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

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

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1  
2 they're redactions and now we're going to cross-reference them  
3 with a privilege list that we took for granted was accurate.

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

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

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

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

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1  
2 book. The MDL is committed to provide lawyers in the MDL with  
3 a trial product. Deposition excerpts, demonstrative evidence,  
4 precut videos and the key exhibits.

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

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

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

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1  
2 defendants control publication. I mean, they've got enough  
3 entries with these journals --

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

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

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

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

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

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1  
2 September. I know I'm almost certain the month of October was  
3 mentioned by your Honor at that time.

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

12 We then got to the point where we came to the July  
13 18th conference. And I remember at the July 18th conference  
14 that I met Mr. Rebennack for the first time, and we joked I  
15 guess we would be seeing a lot of you this fall and he said,  
16 yes, you will. Because he had 45 of the 67 cases that were, we  
17 were looking at. So I guess I was a little surprised later on  
18 to find out when we met the last time that Mr. Rebennack was  
19 not going to be putting his cases up for consideration.

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

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1  
2 so that we could process these cases in such a way to get some  
3 yield, some instruction out of it.

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

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

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

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

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1  
2 January 13. We still have not received the third case to be  
3 chosen, and they understand it's ordered that we will be  
4 receiving that today.

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

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

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

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1  
2 discover the cases. And in the discovering mode, the cases  
3 cover the whole spectrum. They go from A to Z with regard to  
4 liability. There are some cases that are ready for trial  
5 before other cases are ready for trial. But MDL counsel can't  
6 carve those cases out. MDL counsel have to continue discovery  
7 until the Z case, the last case on the spectrum is ready for  
8 trial. That's what their job is, that's what their fiduciary  
9 responsibility is.

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

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

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

3 THE COURT: Sure.

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

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

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

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

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1  
2 But I cannot in good conscience go forward. I would have to  
3 remove myself as attorney of record, go forward with this man's  
4 case when there is still electronic discovery, FDA discovery,  
5 additional depositions, there are no experts, it's  
6 preposterous.

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

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

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

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1  
2 burden for you to go forward with the cases.

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

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

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

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

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

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

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1  
2 new items on the agenda?

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

6 THE COURT: Certainly.

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

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

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

25 With regard to use of plaintiff's expert reports,

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1  
2 you will be presented an order very shortly that it will be  
3 suggested jointly by plaintiffs and defendants. As liaison  
4 counsel, your Honor, I know that you've spent a lot more time  
5 on these issues and you've been very indulgent with allowing  
6 counsel to express to you on behalf of the MDL and individually  
7 his remarks about these issues, and I greatly appreciate it.

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

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

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

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

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

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

7 THE COURT: The 27th is better?

8 MR. HERMAN: Yes, your Honor.

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

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

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

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

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

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

16           THE COURT: That's it.

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

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

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

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1  
2 Let me make some general comments about the issue in general.

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

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

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

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1  
2 That's what was done in this particular case with  
3 Pretrial Order No. 5. The purpose of Pretrial Order No. 5 was  
4 not to write in stone and not to put it to rest forever, but to  
5 recognize that in order to get free discovery and in order to  
6 get prompt discovery and in order to encourage both sides to  
7 produce and receive discovery that was necessary for the  
8 litigants, the litigants in this particular case, to agree,  
9 that the documents would be treated with confidentiality, with  
10 some degree of protection.

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

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

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

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1  
2 somebody, I represent this room, the room involves not only the  
3 public but the flag and all that it stands for. I seek and I  
4 try the best I can to first make sure that litigants who appear  
5 before me have a fair trial. Occasionally in order to  
6 accomplish this goal I have to put things under seal,  
7 occasionally I have to make things confidential, occasionally I  
8 have to lock the courtroom and allow only those litigants in  
9 it. It's not done willy-nilly. It's done because the first  
10 responsibility that I have is to make sure that the litigants  
11 who appear before me have a fair trial.

12 I am convinced that the pretrial order in this <sup>Cool</sup> on  
13 confidentiality is important to the litigants. I feel that a  
14 lot has been accomplished as a result of that order. We've  
15 only had one, perhaps two, motions to compel throughout the  
16 existence of this litigation.

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

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

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1  
2 plaintiff, you are getting now to things that because of the  
3 past discovery seems to take on more meaning now.

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

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

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

ROUGH DRAFT

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

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

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

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

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

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ROUGH DRAFT

1  
2 when the litigants have no longer any interest in obtaining  
3 information and they will reap no benefit from any  
4 confidentiality designation. At that particular point the  
5 public's right to know may predominate and the public's right  
6 to know may express itself by altering the Pretrial Order No. 5  
7 or the abolition of Pretrial Order No. 5.

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

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

19 THE DEPUTY CLERK: Everyone rise.

20 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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22 \* \* \* \* \*

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

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Karen A. Ibos, CCR, RPR  
Official Court Reporter

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