

ROUGH DRAFT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCT	MDL 1355
LIABILITY LITIGATION	Section "L"
	New Orleans, Louisiana
	Tuesday, October 15, 2002
	8:30 a.m.

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

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16 Proceedings recorded by mechanical stenography, transcript
17 produced by computer.
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3 P R O C E E D I N G S

4 (STATUS CONFERENCE)

5 (TUESDAY, OCTOBER 15, 2002)

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8 THE COURT: Be seated please. Call the case.

9 THE DEPUTY CLERK: In re: 1355, Propulsid Products
10 Liability Litigation.

11 THE COURT: Counsel make their appearance for the
12 record.

13 MR. HERMAN: Good morning, Judge Fallon, folks, Russ
14 Herman for the Plaintiffs Legal Committee.

15 MR. IRWIN: And Jim Irwin for defendants.

16 THE COURT: We're here today in connection with our
17 monthly status meeting in this matter. In addition to counsel
18 we have with us today the mediator Mr. Pat Juneau, who has been
19 working hard in this case, and the court appreciates it and I
20 know the litigants appreciate it.

21 Let's take the items up as I've been given them.
22 Update of Rolling Document Production and Electronic Document
23 Production.

24 MR. HERMAN: Approximately 50,000 documents of
25 electronic discovery have been produced, as ongoing production

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2 of another 70,000 documents. There have been some problems
3 mechanically and electronically with that production. We
4 anticipate meeting with Mr. Conour as soon as this conference,
5 this status conference is over. And Mr. Conour, I think, can
6 give us an update, just a very brief update on that right now,
7 if you'd like.

8 THE COURT: Mr. Conour, I appreciate your being with us
9 today. You have been referred to over time as the guru in this
10 area so we look to you to resolve this matter. Do you have any
11 comments?

12 MR. CONOUR: Your Honor, I've been working hard on
13 this. I appreciate the recognition. I think though that
14 plaintiffs should also share in the credit, they have some very
15 fine people on their side that can help us get through these
16 problems.

17 The respecting production should be completed next
18 month. The only thing that's left then is to go through the
19 errors or concerns that plaintiffs have. We have suggested
20 meetings with the original vendor from which the majority of
21 these problems stem. They're out on the west coast, which is
22 convenient for me, perhaps not too convenient for them, but we
23 would like to set up meetings in the next few weeks to solve
24 the remaining problem.

25 There are some difficult tasks ahead of us, but we

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2 think we have some approaches to have them soon resolved.

3 THE COURT: I appreciate your effort and I know that
4 these matters sometimes get technically baffling, but with
5 people like yourself who are very talented in this area and
6 have a positive spirit resolving problems rather than finding
7 problems, I know that can be done.

8 MR. CONOUR: Thank you.

9 MR. HERMAN: From our standpoint, I want to indicate
10 for the record that it's good to see Mr. Conour, we appreciate
11 what he has done and what he does do, and he is a top-notch
12 professional. So it's good to see you.

13 THE COURT: Does Mr. Becnel have anything on this
14 issue? He raised his hand.

15 MR. HERMAN: Excuse me just one second, your Honor.
16 Unfortunately I wasn't in the courtroom. I want to make sure
17 everyone signed the sign up list this morning. Everybody here
18 signed up?

19 MR. BECNEL: Your Honor, an issue developed, I believe
20 we attempted to call you, but because of the hurricanes.

21 THE COURT: Right.

22 MR. BECNEL: But an issue had developed on this dealing
23 with electronic calendars. I asked the defendants to produce
24 them, I asked the defendant if anybody had gotten them and they
25 said, no, they had erased them. I don't know where they lie in

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2 their hard drive or what happened to them, but this is critical
3 evidence for my cases on the 6th and 13th. This deals with
4 meetings that occurred by their supposed experts dealing with
5 the issues that I took the three depositions on.

6 And I don't know how we're going to address them,
7 but I don't want to come crying to this court because they have
8 not produced their calendars, either hard calendars nor
9 electronic calendars.

10 In addition, what they haven't done is most of
11 them have never seen the request for production of documents to
12 know what in the world they were complying with. Some of them
13 have testified that they didn't even know what the records
14 retention policy was in a drug case where they were directing
15 most of the information from Belgium. Now, I want to be ready
16 to try this case, but I expect truth and answers dealing with
17 the issues that we're trying to deal with.

18 THE COURT: Let me hear from counsel, either plaintiffs
19 or defendants.

20 MR. CAMPION: I'll speak to that. It's not on the
21 agenda, it's the first I'm hearing of it. I suspect Mr. Becnel
22 reduced this to writing. If it has something to do with the
23 depositions in Belgium, bring it to my attention, I'll see if
24 we can't resolve it. If we can't, I'll bring it to you.

25 THE COURT: In the past what we've tried to do when

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2 there are issues that crop up like this, is for counsel to
3 first talk about it among themselves. If the issue can't be
4 resolved at that level, then they bring it to me and I resolve
5 it. It's been my experience that for the most part if you
6 resolve it among yourselves, the solution is better for each of
7 you than if I have to resolve it.

8 So Mr. Becnel, get with Mr. Champion, see if it can
9 be worked out. If not bring it to me and I'll resolve it.

10 MR. BECNEL: I tried to work this out with three
11 different lawyers that they brought. They were supposed to get
12 this information to me, at least that's the commitment they
13 gave me.

14 Well, here we are today, I don't have it, we've
15 been back from Belgium for over ten days, and I have no
16 resolution and I just don't want to let it fester. You know, I
17 have a trial date with six or seven depositions going on every
18 other week.

19 THE COURT: I understand. Get with Mr. Champion today
20 and let me know by the end of the day whether it can be
21 resolved. If not, I'll resolve it.

22 MR. BECNEL: Thank you.

23 THE COURT: Anything further on the first item?

24 MR. HERMAN: No, your Honor.

25 THE COURT: Second, State Liaison Counsel.

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2 MR. HERMAN: Mr. Arsenault attended our regular meeting
3 last night. He may have something to report. And we had one
4 indication from Mr. Saul Weiss of Pennsylvania and New Jersey
5 that they were considering withdrawing from the state-federal
6 cooperation that's in effect and has been in effect for awhile.

7 We've heard nothing further about that and I've
8 received nothing in writing.

9 MR. ARSENAULT: Good morning, your Honor. We have not
10 heard anything from Mr. Weiss to that effect, but we'll call
11 him and see what the situation is.

12 THE COURT: This is New Jersey? Well, bring it to me
13 so that I can deal with that situation, because I'm
14 disappointed if people seek to withdraw. I thought we were
15 moving in the right direction, and I know that Judge Corodemus
16 and I were happy that the matter was working out. If it's not
17 working out, let me know so I can discuss it with the New
18 Jersey judge and any other judge. I have been trying to keep
19 in touch with the state judges to coordinate the matter. But
20 if something does crop up, let me know.

21 MR. HERMAN: Rather than avoid conflict with the MDL
22 and this court, I think it will be good if Mr. Arsenault, if
23 Richard, you would contact him directly and perhaps get a
24 better picture of what their concerns are and what problems
25 they're having.

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THE COURT: Yes. State Liaison Counsel have been doing a good job in keeping the court advised, and I've been very conscience of your problems and trying to help you solve your problems. So I do appreciate the work that you've done and just keep at it because if we keep the communication between states, I know a lot of our problems will be solved.

MR. ARSENAULT: And since our last status conference we have been continuing to work on a newsletter to disseminate to all of the state lawyers, and we did attend on September 17th the mediation and that was helpful as well.

THE COURT: Good, fine.

MR. HERMAN: Mr. Hill, who is a member of that committee, I'll contact immediately following this hearing with regard to his two cases, which are state cases.

THE COURT: Okay. Thank you. Anything further on the state?

The third is Plaintiff Profile Form and Authorization.

MR. IRWIN: Your Honor, the report articulates the status of the PPFs that have been collected, now that are overdue and becoming overdue. We have also following up on the hearing last month furnished to your Honor a 54(b) motion, which I believe was signed by the Court. We have not yet filed the motion where we ask for modest reimbursement of expenses

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2 for getting compliance with PTO No. 9, and we will do that
3 shortly, it's in preparation.

4 THE COURT: All right. Subpoena to the FDA.

5 MR. HERMAN: Your Honor, the Plaintiffs Legal Committee
6 believes that the FDA subpoenas have been satisfied. There was
7 some redaction issues which will become the subject of a future
8 motion, not only with respect to some FDA documents but also
9 some other documents. Of course we'll meet with defendants and
10 attempt to resolve beforehand, and if not, rather than burden
11 the court with four or five different motions, we are preparing
12 a master motion dealing with redactions.

13 THE COURT: I should say that I appreciate the help of
14 the FDA, we got off to a slow start, but they have come aboard
15 and the court does appreciate their cooperation.

16 Five is Service List of Attorneys.

17 MR. IRWIN: Your Honor, we have the current list, I'll
18 give a copy to Mr. Davis and to Ms. Lambert and to
19 Mr. Arsenault, your Honor, a current list.

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

22 MR. HERMAN: Your Honor, there are no issues we know
23 about.

24 We do with respect to the service of attorneys,
25 we've had a number of VeriLaw, I'm sorry, a number of e-mails

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2 returned to us because either the attorneys who originally
3 listed the e-mails under the order of this court have either
4 changed e-mail addresses or gone to another service, and we
5 would like -- we have prepared a general letter to go to every
6 attorney on the service list asking them to update their e-mail
7 addresses for VeriLaw and for contact with counsel and the
8 court.

9 THE COURT: Okay. Send a copy of that to me, because
10 I'll put it on our web site, and I'll highlight it with our
11 recent developments as an alert to counsel.

12 MR. HERMAN: Yes, your Honor.

13 MS. BARRIOS: Excuse me. I would appreciate it if you
14 would put it to the state court attorneys, too, because I have
15 that trouble when I send out the newsletter. So it is not only
16 the federal court attorneys but the state as well.

17 THE COURT: I'll do that on the web site for the state
18 as well.

19 MR. IRWIN: Your Honor, Mr. Davis has informed me that
20 they will send to us all of the new current e-mail information
21 that they get so we can update the list. We don't get, of
22 course, very many e-mail contacts with plaintiff counsel, so we
23 don't really know as well as they do that some of the e-mail
24 addresses become outdated.

25 THE COURT: Seven, Third Party Subpoena Duces Tecum.

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2 MR. HERMAN: Your Honor, the issues remaining to the
3 third party subpoenas have to do with certification by Covance,
4 which we're awaiting, and SmithKline Beecham, which we're
5 awaiting. The Defense Liaison has obtained certifications from
6 Dr. Herron and Parker, so that essentially the documents have
7 been produced, it's a certification that the documents are
8 complete and that they conform to what the subpoena requested,
9 which are outstanding. This has been an ongoing issue really
10 since late August, beginning of September. We do expect that
11 the defense will successfully obtain the certifications.

12 THE COURT: Two suggestions on that. One is just do a
13 30(b)(6) deposition to Covance, or whoever it is, calling upon
14 them to designate somebody who is able to certify those
15 documents; or in lieu thereof, send an affidavit to do so. But
16 we've got to move them on that.

17 The other suggestion is that if you give me the
18 name of somebody from Covance or whatever, I'll subpoena them
19 into court or order them to come into court to do it. They can
20 do it by certification, do it by 30(b)(6) or come to court and
21 do it verbally. But we've got to get that moving.

22 MR. IRWIN: Your Honor, I think I can round out a
23 little bit of the story on some of these certification
24 questions. With respect to Covance, it is my impression that
25 the responsive material has been produced and the most recent

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2 communication in September from Mr. Herman's office asked
3 whether two specific entities of Covance, whether the
4 responsive documents were limited to those two specific
5 entities.

6 And there are a number of entities that Covance
7 operates, and the court may recall that there was a question
8 about if we had gotten all of the documents from all of the
9 correct Covance locations, I think that slowed things down a
10 little bit this summer. We were able to track that down, I
11 believe we did. And now the final question is are we satisfied
12 that those two locations are the correct and complete
13 locations.

14 Mr. Conour has been in touch with the people at
15 Covance and I expect we're going to be able to say that
16 shortly. That's the Covance story.

17 Dr. Herron's documents have been delivered, an
18 attorney in Arkansas, Mr. Parker, worked with Dr. Herron, he
19 sent those documents to my office, my office prepared them and
20 sent them to Mr. Herman's office. And we are working with
21 Mr. Parker, the attorney for Dr. Herron, to get the
22 certification. We expect that that should be done short order.
23 We don't expect any problems on that.

24 THE COURT: What are we talking about in short order, a
25 week, ten days?

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MR. IRWIN: A week, yes, sir.

THE COURT: Let's do it within ten days then. Mr. Herman, if you don't receive it within ten days, bring it to my attention, please.

MR. HERMAN: Yes, your Honor.

MR. IRWIN: Finally, with respect to Quest we might have a miscommunication or misunderstanding, because it was my impression that Mr. Herman's office was getting the certification from Quest, they were working directly with Quest. So we probably need to talk about that.

THE COURT: Okay. What's the situation?

MR. HERMAN: We'll meet on that.

THE COURT: Mr. Conour, you were mentioned again. Who are you talking to at Covance?

MR. CONOUR: Your Honor, there is a gentleman by the name of Mark Genski (PHONETIC) who has been very helpful, and I think we can have this resolved by the end of the week, if not by the end of the next week.

THE COURT: Tell Mr. Genski I would look to him to do it within ten days; if not, I would like him to tell the court, to come talk to this court about it.

MR. CONOUR: I'm sure this will be the last of that issue.

THE COURT: Anything further on seven?

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2 MR. HERMAN: No, your Honor.

3 THE COURT: Eight, Motion for Class Certification.

4 MR. HERMAN: No, your Honor.

5 THE COURT: Nine, Plaintiffs' and Defendants'
6 Respective Requests for Production of Documents.

7 MR. HERMAN: We've got, we received responses from the
8 defendants on our request No. 5 and we're reviewing those
9 responses. We anticipate that there will be a conference, a
10 discovery conference among counsel with regard to those
11 responses.

12 I might add, and I apologize for not bringing this
13 to the court or defense counsel's attention, I'll put it on the
14 agenda for next time. Certain questions have been raised about
15 upcoming trials in terms of documents produced as to whether
16 they're going to have numerous requests for admissions
17 regarding whether these records are business records within the
18 hearsay exception.

19 And I know that there is a prior order that
20 relates to this, but I think at our next meeting this is an
21 issue that will deserve some discussion between counsel and
22 with the court.

23 THE COURT: Okay. All right.

24 MR. HERMAN: We just served in the last week some
25 "Merits" Request for Production of Documents and

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2 Interrogatories. And, of course, those responses are not due
3 yet. The Norcisapride issue has been an issue in terms of
4 whether it is, it meets discovery criteria in this case. Both
5 sides agreed to go forward with other discovery and to delay a
6 Norcisapride hearing specifically before this court until that
7 discovery, the other discovery is complete. But that issue is
8 still out there.

9 THE COURT: Let me hear from the defendants on Item 9.

10 MR. IRWIN: Your Honor, I think we're square on that,
11 on Item 9.

12 THE COURT: Shell/Morganroth Study, 10.

13 MR. HERMAN: Basically Mr. Irwin has requested
14 additional information from a Dr. Shell. We referred Mr. Irwin
15 to Mr. Peter Butler who represents Dr. Shell. I'm not sure
16 where that is, but I am advised that Dr. Shell's deposition has
17 been set in the cases that Mr. Becnel is preparing for trial.
18 And I believe that those depositions are set sometime before
19 the end of November. I may be in error as to that, and I'm
20 certain that Jim Irwin can speak better to this issue than I
21 can right now.

22 MR. IRWIN: Your Honor, the depositions of Dr. Shell
23 are scheduled in Los Angeles on November 4, 5 and 6 in the
24 three cases. The certification question has to do with the
25 recent information that we received from Mr. Herman's office,

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2 the Vincent EKG interpretations that the court may recall. And
3 we prepared a certification document, we sent it to Mr. Davis,
4 and he forwarded it to Mr. Butler for Mr. Butler's review and
5 Mr. Butler and I need to speak about that.

6 From my perspective, I think that we're close to
7 having this certification issue resolved.

8 THE COURT: Okay. What's the time frame on that in
9 your opinion?

10 MR. IRWIN: I would think within ten days, your Honor.
11 I don't have absolute control over it obviously, but from where
12 I sit right now I don't see any surmountable issues.

13 THE COURT: Who does have control over it?

14 MR. IRWIN: I think it's going to have to be a question
15 of Mr. Butler talking to Dr. Shell and Dr. Shell being
16 eventually comfortable with the language. The language that we
17 have in the certification is that same language we have in all
18 of the certifications. I haven't yet spoken with Mr. Butler.

19 THE COURT: When you do that just tell them that I'm
20 interested in trying to get this worked out, if not get me
21 involved in it.

22 MR. IRWIN: Yes, sir.

23 THE COURT: 30(b)(6) depositions.

24 MR. HERMAN: From the MDL's point of view, we will
25 facilitate trying to work this certification out.

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2 On 30(b)(6), basically it related to the 800 or so
3 studies, and when I met with Mr. Campion, and I believe we met
4 twice, once in New York and once here on this issue, it was
5 pointed out that it would take numerous 30(b)(6)
6 representatives to deal with this, could we agree on a database
7 which would satisfy for the most part a 30(b)(6).

8 We have agreed on a format for that database, the
9 defendants have retained an outside consultant or contractor to
10 take the information, put it in a database and provide it to
11 us. And that's the status of the 30(b)(6) regarding the
12 studies. Mr. Campion may have something to add.

13 MR. CAMPION: I can supplement it. The RFP process
14 brought us the Weinberg Group of Washington, D.C. I think they
15 are known to people, they are a very responsible organization.
16 They have promised us, subject to all of the what ifs and what
17 ifs that consultants do, a product within ten weeks of the
18 submission of the refined CDs. We have hundreds of CDs, we're
19 trying to get them to a dozen or so that would contain the
20 material that they need. So we hope to have something to
21 report positively next time.

22 THE COURT: Okay. Thank you. Trust Account.

23 MR. HERMAN: We provided defense counsel and the Court
24 with an opinion which we have received from our accountants,
25 outside accountants, and we hope to have the trust account

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2 issue worked out sometime within the next two weeks. And
3 basically I believe the court's been advised of it and defense
4 counsel has been advised of it.

5 THE COURT: Motion to Dismiss filed by Forshag's
6 Pharmacy.

7 MR. HERMAN: I understand there is an attorney here for
8 Forshag's that I was introduced to earlier today.

9 THE COURT: Yes, would you come forward, please. Make
10 your appearance for the record, please.

11 MS. KNOVER: Good morning, sir, Elizabeth Klover, I am
12 here on behalf of Forshag's Pharmacy. I apologize but we were
13 unaware that the motion was on the docket for today. I thought
14 that it was being taken under advisement. Am I incorrect?

15 THE COURT: What is the situation?

16 MR. IRWIN: If I may assist, I believe this particular
17 motion was ruled on by your Honor, and we included it on the
18 joint report this month merely as a housekeeping reminder that
19 it should probably be removed from the agenda.

20 THE COURT: I thought I took care of that two or three
21 weeks ago. I thought I did rule on that.

22 MS. KNOVER: Yes, sir, you did. Thank you.

23 THE COURT: Okay. Thank you.

24 15, Declassified Documents. I have met with
25 counsel in conference. This is a motion to restructure,

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2 reconsider, redraft the ruling that was issued on a motion
3 brought to me before. I think the appropriate thing to do is
4 just set this matter down for oral argument at a time
5 convenient with counsel and I'll deal with it.

6 Let me make a few comments about the way I saw the
7 issue on the first go around. I saw the issue was a
8 double-barrel issue. First, I understood that the plaintiffs
9 were asking that I remove the classification on all documents
10 in globo, and second, that I focus more specifically on the
11 Cisapride and perhaps even on the Shell/Morganroth studies. I
12 thought that that was the issue, I may be in error on it, but
13 in addressing that double-barrel issue I felt that it was
14 inappropriate to remove the classification in globo, but that I
15 did think that there was some concern that was a valid concern
16 expressed by plaintiffs regarding the Cisapride studies,
17 particularly with regard to experts who might be interested in
18 doing studies or writing articles or evaluating those studies
19 because this is a preliminary issue that affects Daubert, and
20 if the plaintiffs can't deal with some Daubert criteria, then
21 they're at a disadvantage.

22 But the way that this latter point was made to me
23 or put to me was more hypothetical than actual. It was "if
24 somebody is interested in doing this study they would not have
25 the material." I felt that it was more hypothetical than real,

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2 if somebody is in fact interested in the study, I thought that
3 it was more appropriate to file a motion showing the protocol
4 of the study, showing the interest of the study and outline of
5 the study, the intention of the study and then I would
6 specifically evaluate that particular request. I see the
7 Cisapride question as being different, in a different way than
8 the in globo removal of a classification.

9 I do believe, as I mentioned before, that the
10 public has a right to know, that distinguishes us in this
11 country from a lot of other countries, and I don't like to
12 classify documents and make them unavailable to the public.

13 However, having said that, I'm often called upon
14 to balance the public's right to know with litigants' right to
15 have a fair trial. And one of the necessary aspects of a fair
16 trial is open discovery. And as a practical matter sometimes
17 it's necessary to classify certain documents, classify certain
18 material, give the parties some temporary comfort so that they
19 can both share with each other various documents. But it's
20 often a temporary situation.

21 But the litigants right to a fair trial often
22 takes precedence over the public's right to know, unless the
23 public is in danger by that choice. I didn't feel that to be
24 the case here and so I'm interested in affording counsel a
25 right to a fair trial, open discovery. I see that as my

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2 primary goal.

3 And for that reason that's the basis of my ruling,
4 as I sought to explain in our last conference. But I will
5 listen to the parties at another time.

6 MR. HERMAN: Your Honor, on behalf of the plaintiffs we
7 appreciate the opportunity to do that, and we'll try to
8 articulate our position better in the next motion we file.

9 Your Honor, may I approach with Mr. Irwin on this
10 issue for one minute?

11 THE COURT: Right.

12 MR. HERMAN: Mr. Campion, you may want to join us.

13 (WHEREUPON, A DISCUSSION WAS HELD OFF THE RECORD.)

14 THE COURT: There is an issue that is intricately
15 involved in this question and that is presented in some state
16 court matters that have to do with certain material that was
17 classified but has gotten into the record in some way through
18 preliminary motions.

19 How do we deal with those issues, those documents
20 that have already gotten into the record? I know Judge
21 Corodemus is very sensitive to my orders, which I am obliged
22 for, and I'm interested in seeing if we can resolve this,
23 hopefully in an amicable manner.

24 MR. CAMPION: I believe the matter is subject to being
25 immediately resolved. An attorney through inadvertency in a

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2 New Jersey case filed some documents which were the subject of
3 an order here of confidentiality and a subsequent order that
4 they would not be declassified. I am convinced beyond any
5 argument that the filing was inadvertent. No intention to
6 violate your order.

7 I believe I can moot the point by withdrawing the
8 confidentiality designation for the documents that counsel has
9 filed and that then moots the point. However, we have every
10 expectation on the part of the defense on the ongoing basis
11 that if anyone is going to attempt to use documents which have
12 been marked confidential, which they have been subject to a
13 denial of declassification or otherwise, that they follow the
14 existing procedures that are in place by way of stipulation by
15 counsel in New Jersey by way of an order here. And I do not
16 foresee any ongoing problems in that area.

17 THE COURT: Do you have any comments with regard to the
18 documents that were inadvertently placed into the state court
19 record. The confidentiality has now been waived as to those
20 documents.

21 MR. SEEGER: This issue is now resolved. I would just
22 like to say just because we're here on the record today that I
23 would like the parties and your Honor to consider the
24 suggestion made about allowing trial court judges where cases
25 are going to be tried before those judges going toward to make

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2 these rulings now that we do have trial dates coming up across
3 the country. With respect to the New Jersey and these trials
4 coming up November 19th, pretty confident that Mr. Campion and
5 I can probably work these issues out and thanks for your
6 guidance.

7 THE COURT: Okay. Thank you.

8 MR. HERMAN: Your Honor, there is a correlative matter
9 but it's in the federal, it's in your court. As I understand
10 it there are reports due sometime in the next several days in
11 the cases that Mr. Becnel will try in this court. The experts
12 in those cases have relied very heavily on studies of
13 Cisapride, which are the subject to confidentiality. And as I
14 understand it the depositions are scheduled in November to go
15 forward.

16 So I anticipate that the question of studies is
17 going to be ongoing. And it might be helpful rather than
18 filing a bunch of motions and a lot of discussion and to just
19 get this issue out of the way now.

20 THE COURT: Sure. Let's deal with it right now.

21 MR. AMADEE: Good morning, your Honor, Roy Amadee. Two
22 of our experts have relied upon the Cisapride studies in their
23 analysis of the drug Propulsid, and I understand that they are
24 part of the confidentiality order. They're going to list them
25 as exhibits to their reports, rely upon them in their courtroom

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2 testimony, deposition testimony. So I think Mr. Herman is
3 right, rather than wait for a formal motion I would like --

4 THE COURT: What's the problem with that? I don't see
5 any problem with that, I thought that was appropriate?

6 MR. CAMPION: Covered by the order. All they have to
7 do is sign the stipulation, that's all they have to do.

8 MR. AMADEE: As to their authenticity and part of the
9 business records and all of that?

10 THE COURT: Do we have any problem with the business
11 record or authenticity?

12 MR. IRWIN: Your Honor, we have already stipulated to
13 the authenticity of all documents prepared by us and in our
14 files, those are already authentic.

15 THE COURT: That passes 901.

16 MR. IRWIN: Passes it with flying colors. I think, for
17 example, clinical studies which are clearly identified as
18 Janssen work products would satisfy 803(6) as well. And
19 Mr. Amadee and I have talked about our preparation of our
20 exhibit lists and we have in compliance with your orders and
21 statements to us that we could agree among ourselves that there
22 are certain extensions provided we documented those in writing.

23 We have made arrangements to exchange our witness
24 list and exhibit list. And we are talking about those very
25 things. I don't think that they're going to be 803(6) issues

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2 with documents such as clinical studies, for example,
3 Mr. Herman was referring to a minute ago. We're going to have
4 to get there, we're getting there soon. But I don't think we
5 are going to have big problems with that.

6 THE COURT: But if you do during the depositions, get
7 to me and I'll solve them right there.

8 Even in the event something is not admissible, an
9 expert can rely on it, it's a 703 situation. He can look at it
10 and base his opinion on it, even if it is not admissible. So I
11 don't see any problems with this. But they should be
12 admissible, they should pass 901, certainly 401, certainly 403,
13 ~~I don't~~ ^{and} 803(6), I think it's okay.

14 MR. AMADEE: The studies themselves I think we would
15 need to get into evidence.

16 THE COURT: Sure.

17 MR. BECNEL: Judge, there is one other study that we're
18 dealing with made reference to in the Belgium deposition, that
19 was CIS-NED-32, which they have completed all of the work, and
20 it's supposed to get us opinions. That was previously called
21 T-100.

22 The problem is we don't have the conclusions of
23 that study. They said they got them and they're going to get
24 them and so on and so forth, which may require us once they
25 come out -- they said they were going to get them within the

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2 next 30 days, but I don't know when that is. We may have to
3 supplement expert reports based on that study because that's a
4 critical study, and I know Mr. Herman and company have been
5 trying to get that for months.

6 THE COURT: I understand that if it has to be done it
7 has to be done. That's fine.

8 MR. BECNEL: And we asked for them in Belgium and
9 nobody could give them to us.

10 THE COURT: Let's again talk with Mr. Campion. If you
11 have a problem, bring it to me by the end of the day and I'll
12 resolve it.

13 MR. HERMAN: There is one other issue I understand that
14 defendants and plaintiffs who have cases set before your Honor
15 are discussing, that they're going to attempt to resolve and it
16 involves an expert by the name of Chen and some difficulty in
17 getting his report by deadline that's been set. And I think
18 the parties are discussing that and I just bring that to the
19 court's attention also because I know your Honor wants these
20 cases to move and et cetera. I don't know if, Jim, whether you
21 and Roy resolved that or where that stands.

22 MR. IRWIN: We have not yet, your Honor. Mr. Amadee
23 and Mr. Rebennack asked for a one day extension on two of the
24 expert reports. We have been in close discussion with them, I
25 am familiar with both of those experts. One was Dr. Shell, one

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2 was Dr. Eckberg, we agreed to that extension.

3 This morning we were asked to agree to a
4 different, a longer extension for another expert who I am not
5 familiar with. So we needed to talk about it. I expect we're
6 going to be able to work this out. But I wasn't able to give
7 them an answer this morning.

8 THE COURT: Okay.

9 MR. HERMAN: Just so that both sides are alerted, I
10 know that the expert is an expert by the name of Dr. Chen and I
11 know that defense counsel in California have noticed Dr. Chen's
12 deposition for November 15th in a California state case that's
13 pending, so I'm sure that within that time frame this issue of
14 Dr. Chen's report certainly can be worked out.

15 THE COURT: Okay. Motion to Withdraw Counsel of Record
16 Anthony Scott, that can be removed I understand?

17 MR. HERMAN: Yes, your Honor.

18 THE COURT: Mediation. As I mentioned, Mr. Juneau is
19 in the court. Any comments on mediation from the parties?

20 MR. HERMAN: Mr. Murray for the MDL Plaintiffs Steering
21 Committee will attend those mediations. I believe three days
22 have been set aside, at least nine cases are set for mediation.
23 I will contact Mr. Hill today about two of his case that may
24 additionally fall within the first three days set, and both the
25 firms who represent those individual clients and the MDL

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2 participants are ready, willing and able to go forward, as is
3 the defense.

4 We also want to thank publicly Mr. Juneau for the
5 sessions which we had with him, it was an all-day session and
6 from a plaintiffs point of view we believe it was productive in
7 setting forth our position.

8 THE COURT: Mr. Juneau is very experienced and a very
9 competent mediator. I know he will agree, however, that his
10 success will be in large part dependent upon the cooperation
11 that he receives from both sides. People have to go into this
12 with the view toward looking for commonalities and not
13 differences. If you focus on the differences you cannot move.
14 You have to focus on the commonalities.

15 We've all been there and done that. And
16 oftentimes at the beginning you feel that this is an impossible
17 task, but if you take it one step at a time the possibility
18 becomes doable and that's what you need to do. The court would
19 urge that you focus on the commonalities and not the
20 differences in the cases that you plan to discuss. Keep an
21 open mind and when you're finished with that process look for
22 other commonalities in other cases and let's see if we can get
23 through this.

24 I appreciate the work that Mr. Juneau has done on
25 the case, and I know with his guidance a lot can be

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2 accomplished and will be accomplished.

3 Mr. Juneau, do you have any comments?

4 MR. JUNEAU: No, sir, your Honor.

5 THE COURT: Trial schedule is the next one.

6 MR. IRWIN: Your Honor, I can report that we have
7 completed the depositions of the plaintiffs. All of the
8 depositions of the treating physicians are scheduled, the
9 depositions of two of the three experts for the plaintiffs are
10 scheduled, IME's have been schedule for our treating physician
11 or rather our experts.

12 And I want to take a moment to thank Mr. Amadee
13 and his office and Mr. Rebennack and his office. They have
14 been very responsive to working under this time frame, and
15 we'll do everything we can to respond as courteously as they
16 have.

17 THE COURT: I do urge both counsel to do that, because
18 I know it's a short time frame notwithstanding the fact that
19 some seven million or thereabout documents have been exchanged
20 and countless depositions have been taken. But when you get
21 down to trial you've got a lot of detail work to do. We all
22 know that and I know skilled counsel have the ability to focus
23 on issues that are critical to their case, and I expect them to
24 focus on those issues and do whatever they need to do to
25 protect their client.

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2 But there are also various matters that ought to
3 be agreed upon and gotten out of the way, and I look to you all
4 to cooperate and help each other prepare for trial of the case.
5 I've always felt that great counsel as yourselves have a
6 maximum of ten energy points, that's the top of the scale. If
7 you waste eight of them on fighting with each other on
8 insignificant matters, you only have two left for the case. So
9 let's get through the non-essential, distracting or little
10 things and devote the whole ten to your clients as opposed to
11 fighting with each other on insignificant matters. And I know
12 you will do that and I appreciate your work.

13 MR. BECNEL: Judge, can I ask you? In our cases how
14 we're going to handle, if at all, mediation or settlement
15 negotiations, if any are warranted, under your magistrate
16 program? I don't know where to go.

17 THE COURT: I will urge that you take that up with
18 Mr. Juneau, I think he is experienced in this particular case,
19 and if you get to the point in your preparations where some of
20 these cases ought to be resolved, give him a call and let's see
21 if you can get those worked out.

22 MR. BECNEL: Under the circumstances I didn't know how
23 you wanted it.

24 THE COURT: Let's do it that way, I think it's better
25 than having magistrates deal with it.

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The next, Pharmacy Indemnity Agreements.

MR. IRWIN: Your Honor, I just wrote a letter a few days ago, I think to either Mr. Davis or Mr. Herman, they had inquired about whether the indemnities were just with respect to the Louisiana plaintiffs. And we, of course, had given them all of the indemnity letters that your Honor ordered us to give to them.

I wrote them back and said, yes, I think it's just Louisiana plaintiffs, and I'm informed it may not be just Louisiana, it may be some more. So it didn't take me long to find out that my letter was incorrect. I will look into that today and give Mr. Herman and Mr. Davis a call and try to let them know where I am on that. But I may have to supplement that letter.

THE COURT: The only two motions that I have outstanding or really one motion outstanding is the motion to consider removal of the confidentiality designation for certain documents produced by the defendant. Are there any other motions that are before me that I have not ruled on?

MR. IRWIN: I do not think so, your Honor.

MR. HERMAN: There is one.

MR. IRWIN: Just Norcisapride which has been agreed to be deferred.

THE COURT: All right. The Norcisapride motion has

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2 been agreed upon as being continued.

3 Any opposition to the dismissal without prejudice
4 the motion by the plaintiff on 01-324, J. Bruce Gillespie? I
5 have a note that Ms. Garsaud will let us know whether
6 defendants plan to oppose the motion.

7 MS. GARSAUD: Your Honor, I cannot represent if we do
8 oppose or don't. We are looking into his claims right now.
9 But we will let you know by the end of the week.

10 MR. HERMAN: Your Honor, two requests, agenda requests,
11 and your Honor consider now what date would be available for us
12 to have, to reargue or reconsider the declassification issue
13 and we'll check with the court and Jim.

14 And I want to make it clear again on the record, I
15 had some inquiries from some state lawyers, as well as at least
16 one MDL lawyer, that the MDL is prepared to submit to the
17 defendants and Mr. Juneau for consideration any of their cases.

18 We also have a formula that we've used as to how
19 to brochure the cases so that the defendants have what they
20 need in order to evaluate them, and that's an ongoing process,
21 and we invite them to contact us or contact the defendants so
22 that other mediation can be scheduled.

23 There is somehow a misimpression that this is a
24 closed sort of mediation process, and it's not. It's wide
25 open. The cases that are prepared and ready to go are the ones

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2 being mediated. So I just wanted to make that clear on the
3 record.

4 THE COURT: Any comment from anybody in the court?

5 MR. BECNEL: Thus far I don't think it's been an open
6 situation. I think the only cases that have been brought to
7 bear are two of Barry Hill's and all of Mr. Herman's. This is
8 the first I'm hearing that this is totally open in the last
9 month or so.

10 MR. HERMAN: Mr. Becnel obviously has not been in court
11 on a number of occasions when the offer has been made. He is
12 not aware of the letters and newsletters that have been sent
13 out by the State Liaison Committee, has not requested a
14 brochure form, nor submitted any brochures. And I'm sorry that
15 he is not aware of the process that's ongoing.

16 But again, I reiterate, if his cases are ready and
17 he submits brochures they will be considered in due order.

18 THE COURT: That was my understanding that everybody
19 was, anybody who is interested in mediating their case was able
20 to do so. So let's pass that word out because that's
21 important.

22 Anything further from anybody?

23 The next meeting will be Friday, November the
24 22nd.

25 MR. HERMAN: Fine, your Honor.

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THE COURT: Is that convenient, is the defense okay with that?

MR. IRWIN: Yes.

THE COURT: All right. Thank you very much. Court will stand in recess.

THE DEPUTY CLERK: Everyone rise.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

REPORTER'S CERTIFICATE

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

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Karen A. Ibos, CCR, RPR

Official Court Reporter

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