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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCT MDL 1355
LIABILITY LITIGATION Section "L"
New Orleans, Louisiana
Monday, November 25, 2002
9:00 a.m.

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

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Proceedings recorded by mechanical stenography, transcript
produced by computer.

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P R O C E E D I N G S

(STATUS CONFERENCE)

(FRIDAY, AUGUST 23, 2002)

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

THE DEPUTY CLERK: Civil action 00-1355, in re:
Propulsid Products Liability Litigation.

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

MR. HERMAN: Please the court, good morning, Judge, Russ Herman for the Plaintiffs Committee. With me is a Lenny Davis. And the court will note that Mr. Murray has now removed himself from counsel's table to sit in the jury box.

THE COURT: Sitting with the good guys, huh.

MR. IRWIN: Good morning, your Honor, Jim Irwin for defendants.

THE COURT: We're here today for our monthly meeting. The parties in advance have provided me with an agenda. The first item on the agenda is Update of Rolling Document Production and Electronic Document Production.

MR. HERMAN: There have been some conferences with Mr. Buchanan and Mr. Davis, Mr. Conour about the remaining electronic production, and they're working to have that production completed, your Honor, and hopefully in the next two

ROUGH DRAFT

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2 to three months we will have it completed, the electronic
3 production.

4 THE COURT: What's the time frame on that, why three
5 months, that seems awfully long?

6 MR. IRWIN: Judge, I think we're looking at January,
7 not three months. There is a conference that's going to take
8 place tomorrow, I believe, with Ken Conour and Dave Buchanan
9 and ADI, so I think it's January, mid January, hopefully, your
10 Honor.

11 THE COURT: Let's look to finish it by the end of
12 January, if not plaintiffs have to bring that to my attention.

13 MR. HERMAN: Yes, your Honor.

14 THE COURT: State Liaison Counsel.

15 MR. HERMAN: We have had no activity. The liaison
16 counsel did send out a newsletter between the last meeting and
17 this one advising the status of the case, as well as inviting
18 folks that if they wanted to mediate their cases to mediate
19 their cases.

20 I see Ms. Barrios is here from the State Liaison
21 Committee.

22 THE COURT: Ms. Barrios, do you have anything to
23 report?

24 MS. BARRIOS: Yes, your Honor. In addition to the
25 newsletter we sent out, Mr. Arsenault had contacted Mr. Sol

ROUGH DRAFT

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2 Weiss per your request at the last status conference. I had
3 spoken with Mr. Weiss myself on two occasions inviting him to
4 talk with us about it, and I understand that he sent a motion
5 in and it's on the agenda set for today with the intention of
6 Philadelphia withdrawing from the cooperative agreement.

7 MR. HERMAN: Mr. Weiss hasn't filed that motion and
8 we're not certain whether he will file it or not, but we will
9 be in contact with him.

10 THE COURT: And if I can talk with Mr. Weiss or if it
11 would help if I talked with Mr. Weiss I will do so. He needs
12 to know I would appreciate talking with him before filing any
13 motion so I understand what the substance of the motion is to
14 see whether or not it can be resolved in another form or
15 fashion.

16 I do want to again take the opportunity to thank
17 the State Liaison Counsel. This matter has been proceeding and
18 it's been proceeding in an efficient unfettered manner, largely
19 through your efforts and I do appreciate your work. I want to
20 make sure that the attorneys proceeding in states get all of
21 the information that they need to analyze their case, to
22 participate in settlement discussions in their case and to try
23 their case if they need to try their case.

24 Mr. Becnel, you need to say something.

25 MR. BECNEL: Mr. Arsenault apologizes for not being

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here, but we were in Minnesota over the last few days and he was mock trying some mock trials in another MDL and that's why he couldn't possibly get a flight to get back here.

THE COURT: I understand. He is well represented. Anything further on that matter?

MR. HERMAN: No, your Honor.

THE COURT: The Patient Profile Form and Authorization.

MR. IRWIN: Your Honor, we have given the court the numbers set forth in the joint report as to the present status of the patient profile forms. We're near the end of this and we thought we would wait to let these remaining numbers accumulate, probably a little bit more till February with the court's permission, we will get through the January trials and address this in February, hopefully it will be the last time we need to bring such a motion.

THE COURT: Subpoena to the FDA.

MR. HERMAN: That issue may be removed from the agenda now, it is fully satisfied. And we have no outstanding issues with regard to it.

THE COURT: All right. I do want to go on the record to express my appreciation to the FDA, they were a little slow in getting started, but when they got started they followed through with just some minor problems, I appreciate the effort that they put forth.

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Service List of Attorneys.

MR. IRWIN: Yes, your Honor. I have the list current as of this month for Ms. Lambert.

THE COURT: The next item on the agenda, Ongoing Studies/Subpoena to BevGlen.

MR. HERMAN: We had three third-party subpoenas outstanding for certification. The Dr. Herron's certification has been received, SmithKline Beecham certification has been received. We received the Covance certification on November 21st, and we're reviewing that presently and expect that we can report in a couple of days that that's been satisfied.

I understand that, I don't know whether I should take it up here or -- I just want to report that we did send a certification requested by the defendants to Dr. Shell. Dr. Shell indicated that he would make a certification. We have not received it back yet, but we do understand Dr. Shell has it.

THE COURT: That's the Shell/Morganroth study on the agenda?

MR. HERMAN: That's correct, your Honor. It looks like I skipped ahead and I'm sorry.

THE COURT: That's all right.

MR. IRWIN: Yes, that's correct, your Honor. We would be most grateful if the court would set a deadline.

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THE COURT: What's a reasonable deadline on that?

MR. HERMAN: Well, he is not a -- Dr. Shell is an expert witness in some of the cases that you have set before you, and we facilitated sending the certification but I'm not in a posture where I can answer for Dr. Shell.

THE COURT: When do you need them?

MR. IRWIN: Your Honor, ten days would be satisfactory.

THE COURT: Let's get them in no later than two weeks. If Dr. Shell doesn't perform within two weeks he is not going to be able to come to this court for any reason and testify for anything.

MR. HERMAN: We'll report that to Dr. Shell and I'm certain his attorneys will also be advised. Mr. Butler has withdrawn as I understand no longer represents him, but I do know that he is a witness in several cases set before your Honor.

THE COURT: Motion for Class Certification.

MR. HERMAN: Your Honor, that matter has not been reset, and we ask that it be deferred at this point. The plaintiffs have served sometime ago requests for production of documents regarding minutes. I understand this morning from Mr. Campion that he is going to take a look at that and he will facilitate getting those to us.

THE COURT: When can we do that, Mr. Campion?

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MR. CAMPION: Two weeks, your Honor.

THE COURT: No later than two weeks. If it's not done, plaintiffs have to bring that to my attention.

MR. HERMAN: Your Honor, we had served previously 30(b)(6) deposition notices on the defendants regarding their studies. We have met once in New York and once here regarding a database that the defendants were to provide us with, which we had hoped would be in lieu of 30(b)(6) depositions, which would be voluminous, and we really need a report from the defendants as to how that's going to take place because time is passing and we believe the studies are the meat of the coconut in this case.

THE COURT: Let me hear from the defendant.

MR. CAMPION: I believe I reported it would take a couple of months, the Weinberg Group is a well-known group that does work of this type, we pay them a lot of money. Data collection has been done, the inputting is being done. We are unable to give me an evaluation as to exactly when it will be finished, but they are working on the task. There is no delay there.

THE COURT: We have to get some deadlines though. What's reasonable from the plaintiff's standpoint?

MR. HERMAN: We certainly need it before the end of the year, your Honor. I mean, I think we met on this issue in

ROUGH DRAFT

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2 June.

3 THE COURT: Let's tell them that they need it by the
4 end of the year. If not, they have to have somebody come
5 before the court and explain why they haven't done it, and the
6 person in charge of it needs to be here and tell me why he
7 cannot do it.

8 MR. CAMPION: Yes, your Honor.

9 MR. HERMAN: There are no cases set before your Honor
10 before the end of the year; is that right?

11 THE COURT: That's correct.

12 MR. HERMAN: Because I'd certainly think it would be
13 important to have that material before in enough time to review
14 it before those cases move.

15 Trust Account, I'm going to ask Mr. Davis to address
16 that if I may.

17 THE COURT: And I asked Ms. Loretta Whytte, our Clerk
18 of Court, to be present at the meeting. She has met with
19 counsel to discuss it with them.

20 MR. DAVIS: Good morning, your Honor. I met with
21 Ms. Whytte, Denny Descant and Lee Navarre on Friday. We met
22 for a considerable amount of time and discussed the method in
23 which these funds could be placed into the registry of the
24 court.

25 I've also communicated with Jim Irwin, and I

ROUGH DRAFT

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2 believe that a lot of input from the clerk's office we should
3 be successful in getting an order prepared that I believe will
4 be a model order for this court how procedures such as this can
5 take place. And I expect to get a draft order over to
6 Ms. Whytte this week and hopefully get some feedback and be
7 able to circulate.

8 THE COURT: If we can't get it in pristine shape, let's
9 recognize that occasionally we have to get it started. So I
10 don't have any problem tweaking it if the later empirically
11 indicates that we need to do something differently.

12 So let's get something to her so we can begin the
13 process with the understanding that if we need to sharpen it or
14 change it in some form or fashion we have a flexibility to do
15 that.

16
17 MR. DAVIS: Will do.

18 THE COURT: While I'm on that subject, too, I know that
19 some cases have been mediated and successfully resolved and
20 you're in the process now of getting the funds and also getting
21 the documentation to allow receipt of the funds. Let's take
22 advantage either of that account or another account to get the
23 funds from the defendants to that account.

24 I understand the documents have to be prepared,
25 but I think from the plaintiff's standpoint, the litigants'

ROUGH DRAFT

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2 standpoint they're more comfortable understanding that the
3 funds are some place other than in the defendant's coffers
4 while they're working on their documentation. That it is not
5 the defendant's fault that they are being delayed from
6 receiving the funds, it's just happenstance of the various
7 documentation problems. So let's focus on that a little bit,
8 too.

Classification of Documents.

9
10 MR. HERMAN: We reported to your Honor our intention in
11 the state cases to move forward, and that's the only thing that
12 I have to report right now.

13 MR. IRWIN: Your Honor, the only thing that I would add
14 to that is at our last conference, actually it was at the
15 separate hearing we had on the motion to reconsider the
16 declassification, your Honor requested that the defendants
17 deliver to the plaintiffs a specific response as to those
18 documents that were attached to the depositions that we thought
19 should be remained confidential and those that we thought
20 should be declassified.

21 We did that and we presented lists to the other
22 side, I have them here, for example, there is a three page list
23 of documents that we thought should be maintained confidential
24 which we gave to Mr. Herman's office. This list lists the
25 deponent's name, it lists the exhibit number and the Bates

ROUGH DRAFT

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2 range of the exhibit number, it's about 150 exhibits that we
3 thought should be maintained confidential. We gave them a
4 similar list of exhibits using the same format that we thought
5 should be declassified. That is a 14 page list, it's about 750
6 that we thought should be declassified. We understand that
7 they are now looking at that.

8 THE COURT: All right. Thank you.

9 The next item is Mediation.

10 MR. HERMAN: We received a letter from Mr. Irwin that
11 they want to mediate three cases, I believe that they are Diez
12 cases set for mediation on December 18th.

13 MR. IRWIN: It is tentatively set for December 18th.
14 But we wanted to see what we could do this morning when we have
15 everybody here is try to move the date up earlier. Mr. Amedee
16 and I spoke about that on Saturday. While we're altogether
17 we're going to try to see what we can do it schedule an earlier
18 date.

19 THE COURT: That would be helpful if you could do that
20 earlier, Mr. Amedee so we can see where we are.

21 MR. HERMAN: Mr. Wright signaled that he had a case
22 that he wanted mediated. And we understand from him he is
23 ready for mediation and awaiting a date. We have provided the
24 defendants with 70 brochures and we're waiting to hear back
25 from them.

ROUGH DRAFT

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2 I have had no other indication from any plaintiffs
3 that they would like to go to mediation, other than a plaintiff
4 in a state case. And we've asked them, we've asked that lawyer
5 to communicate directly with Mr. Juneau so he can fill the
6 lawyer in on what the mediation process is and to send
7 Mr. Irwin a brochure and a letter indicating that he wants to
8 mediate.

9 THE COURT: Okay. I understand the issues with the
10 mediation, there are a number of cases that are subject to
11 mediation. There are a group of cases that the defendants feel
12 they are interested in mediating and there are a group of cases
13 that they feel presently they're not able to mediate.

14 As I see it, it's sort of like circles. You draw
15 one circle and then you draw the other circle and they
16 intersect in some areas. So those areas in which they
17 intersect or overlap on really ought to be your focus. Don't
18 focus on the portion outside of the areas. Once those are
19 resolved, we'll look at it again and draw those circles again
20 and see whether or not we can get some more overlap in those
21 areas.

22 But let's not fight on the areas over which there
23 is no interest presently. Do we have any dates scheduled with
24 the mediator?

25 MR. IRWIN: We do not at this point, your Honor. And

ROUGH DRAFT

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2 we are interested in trying to discuss that. I know that
3 Mr. Preuss is heading that up for us and needs to be the person
4 who actually discusses the scheduling with Mr. Juneau.

5 THE COURT: I will call Mr. Juneau today and ask him to
6 get in touch with Mr. Preuss and Plaintiff's Liaison Counsel.

7 MR. BECNEL: Your Honor, I was with Mr. Ramon Lopez
8 this week and he advised that most of the California cases, at
9 least in his inventory, had been resolved with Mr. Preuss. I
10 was wondering what kind of mediation method are they using that
11 might be different from what we're doing? That's the first I
12 heard --

13 THE COURT: Mr. Preuss, is that an accurate statement?

14 MR. PREUSS: That is an accurate statement and we
15 negotiated one on one.

16 THE COURT: Okay. You never used a mediator out there?

17 MR. PREUSS: That's correct.

18 MR. BECNEL: Your Honor, and that's why I'm bringing it
19 up is why in state cases in California they go one-on-one with
20 the lawyers and in this case a year later, I mean, it was just
21 about a few weeks ago that Mr. Herman finally settled his first
22 few cases. It seems to be there is a double standard here and
23 I'm concerned about it.

24 THE COURT: All right. Any comment on that one way or
25 the other, Mr. Preuss?

ROUGH DRAFT

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2 MR. PREUSS: I don't believe there is any double
3 standard. If I do it either way, if I can do it one-on-one I
4 do it that way, if I need a mediator or the parties feel a
5 mediator would be more Facilitating then we go that route.

6 THE COURT: Okay.

7 MR. HERMAN: I do want to report that Mr. Zimmerman of
8 Zimmerman & Reed who is a member of the court appointed
9 committee, has also furnished some brochures to the defendants
10 for mediation purposes. The only concern I have about
11 mediation is it's a mighty slow turtle that doesn't look like
12 it's crossing the line, and there is hundreds and hundreds of
13 cases out there. And it may be at some point, your Honor,
14 we're going to have to go to triple or tracking.

15 I think there is some reticence from what I
16 understand from a number of lawyers out there to mediate
17 because they don't have the confidence that these things are
18 moving. And I say that without any feeling whatsoever one way
19 or the other, just reporting to the court.

20 THE COURT: Everybody has to be heads up on that,
21 because we have to keep moving these matters forward. If they
22 are not moving then that's a problem.

23 While on that subject, I do want to, and I
24 mentioned it to counsel in our advanced meeting, I do want to
25 move these cases and I do expect them to be resolved. The

ROUGH DRAFT

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2 whole matter, the whole MDL I would like to be resolved by next
3 year. We'll finish the cases by next year either mediating,
4 either trying or sending them back.

5 You have had enough time now to discover the
6 matter. We need a representative from each side to focus on
7 the end game and you need to get together on the end game and
8 talk about it. By January or February I would like to have
9 your input on deadlines for finishing discovery and the motions
10 and the cut off dates for the resolution one way or the other
11 of this MDL.

12 So I do want to have an end in sight. We're
13 getting to the point now where it's realistic to have an end in
14 sight.

15 MR. HERMAN: I think as I indicated to your Honor, the
16 PFC wants to conclude discovery as soon as possible and move
17 into the trial phase. We're hopeful that can be done in the
18 first quarter of the new year.

19 THE COURT: Does that game plan sound reasonable from
20 your standpoint to finish up the cases by next year?

21 MR. HERMAN: Your Honor, it sounds infinitely
22 reasonable from my standpoint. I think that most of the
23 discovery has been done. We have some depositions that have to
24 be scheduled, we have electronic discovery that has to be
25 produced and then, your Honor, we certainly will come back with

ROUGH DRAFT

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2 another motion to declassify, when it's appropriate, and then I
3 think we can either try cases or get them sent back. I don't
4 see that process taking long.

5 I don't believe, and I say this frankly, that
6 mediation at its current pace and scheduling is going to work.
7 I say that we may get a few cases settled. But in the next six
8 weeks there are only three cases that I know about, Diez, Reed
9 and Brock that have potential mediation dates, and those aren't
10 written in stone. That's just not -- we have thousands of
11 cases out there, it's just not going to do it.

12 THE COURT: Let me hear from the defendants on that.

13 MR. IRWIN: Your Honor, we are at this point only
14 interested in mediating the Diez case and we had informed
15 Mr. Becnel and Mr. Rebennack about that that we were not
16 interested in mediating the Brock or the Reed cases. So we are
17 scheduled to do Diez but not the other two.

18 With respect to a general approach to try to
19 mediate a larger number of cases, we have received the
20 brochures, we are reviewing them. We have received a letter
21 recently from Mr. Wright about three of his cases and we have
22 most of the medicals on those three cases, they happen to be
23 cases that were subject to discovery, one of them before the
24 MDL was created, so we have a good deal of medical on those
25 cases. We're trying to determine now which ones of those fall

ROUGH DRAFT

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2 within the intersecting circles.

3 We have also spoken, we did at the last mediation
4 session with Mr. Murray, I think each of us, Mr. Murray and our
5 side stressed an interest in trying to stage his cases for
6 presentation to the mediator as well. So it needs to be
7 getting going and we do want to get it going and we do want to
8 focus on those cases that fall within the intersecting circles.

9 THE COURT: All right. All of us know that when you
10 begin mediating cases of this magnitude, meaning numbers, there
11 is a certain amount of momentum that you have to start, and you
12 can't generate this momentum by considering only one case
13 because you do not get the momentum that's necessary to carry
14 large numbers to fruition. We have got to get it moving faster
15 and have several tracks proceeding at the same time.

16 The plaintiffs now know what the area, what the
17 requirements are from the defendants to peak their interest in
18 the mediation process. Plaintiffs should give Defendants a
19 list of those cases and then let's set the mediation dates on
20 all of those cases.

21 MR. HERMAN: Your Honor, I'm not sure I know what the
22 parameters are. I thought it was a 72 hour parameter.

23 THE COURT: That's what I thought it was. What are we
24 talking about now, has that changed? I thought it was 72
25 hours.

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2 MR. HERMAN: It's one of the reasons I walked out of
3 mediation.

4 MR. CAMPION: Three kinds of cases, death cases, tort
5 side cases and serious ventricular arrhythmia cases. If
6 Propulsid was in the body 72 hours, those are the ones we'll
7 consider. It doesn't mean we will pay money, we will look at
8 them. We found in some of those cases there is a completely
9 different explanation for the event beyond Propulsid.

10 MR. HERMAN: Your Honor, with all due respect to
11 defense counsel, not to advise us of that in advance, to have
12 us contact referring counsel, to have authority from our
13 clients saying we are going to mediate your case and go to a
14 mediation and then be told, well, your case is within the
15 parameters but we're not willing to mediate that case is not
16 acceptable.

17 And I feel that I was disadvantaged, I don't feel
18 that the defendants were in good faith. We have now told them
19 if we send you brochures and you feel that you should not pay
20 money in these cases, tell us in advance. Don't let us hang
21 out there with referring counsel and with our clients. It's
22 unprofessional, it's embarrassing, and frankly it completely
23 erodes the integrity of the process. I'm still very distraught
24 by it.

25 And what we have done, I don't want to hear

ROUGH DRAFT

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2 parameters, we'll send you the brochures. You just tell us
3 which ones you will to mediate. But when we go there we go
4 there to mediate, we don't go there to be told we're not paying
5 in this case. It's just not fair and it's not right.

6 THE COURT: Does everybody on the same page at this
7 time, we understand that?

8 MR. CAMPION: Yes, sir.

9 THE COURT: Let's get the brochures, those that you
10 can't discuss tell them because I think that's a legitimate
11 concern. When they have their clients, when they have the
12 litigants there and their lawyers and then they're told that
13 notwithstanding the fact that they were advised that you wanted
14 to mediate you're not going to mediate now. That has a
15 chilling effect on everybody. So let's not have that happen
16 again.

17 MR. IRWIN: Judge, that won't happen again. I prefer
18 to chalk that up to growing pains, it was our first mediation
19 session. I respectfully take exception to the suggestion that
20 we were not in good faith, we were in good faith. I can assure
21 the court of that.

22 THE COURT: Let's just assume that there was
23 miscommunication, but let's not let that happen again for
24 whatever reason it happens.

25 Mr. Becnel is standing.

ROUGH DRAFT

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2 MR. BECNEL: Your Honor, what I'm concerned about what
3 I heard from Mr. Lopez of how he did it, he didn't spend one
4 dime on medical reports, he didn't take depositions, he didn't
5 do discovery, now they're interested in maybe mediating the
6 Diez and not the other two, after we've spent over \$100,000
7 trying to get that case ready to go to trial. You see the
8 disparity between the two methods?

9 THE COURT: I don't know whether it's a disparity
10 between the two methods or maybe it's a difference in the
11 cases, maybe the cases that they resolved fell into that
12 category and they were willing to resolve those cases.

13 MR. BECNEL: Well, he took out of his whole inventory,
14 I don't think that's exactly correct either, your Honor.

15 THE COURT: Well, that's a problem that you have to
16 live with. That's just that type of situation you're faced
17 with when you're dealing with a national situation. So I will
18 tell the defendants that they have to have some consistency,
19 otherwise it's going to be interpreted as some inconsistency or
20 inequity or something of that sort. So let's be conscious of
21 that.

22 Let's move on, folks. The next item on the agenda
23 is the Trial Schedule.

24 Before we get to that. Tell me about VeriLaw
25 first.

ROUGH DRAFT

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2 MR. IRWIN: Your Honor, I can speak briefly to this.
3 VeriLaw has notified us with respect to pricing changes, and
4 Mr. Davis and I intend to have a meeting with them to resolve
5 the question of any pricing changes, if any. The service is
6 still functioning effectively, and we want to maintain its
7 functionality.

8 THE COURT: Okay. What about the Pharmacy Indemnity
9 Agreements, anything there?

10 MR. IRWIN: I do not think there is anything there,
11 your Honor. Originally at some point maybe two months ago when
12 this came up I was under the impression that we had executed
13 pharmacy indemnity agreements only for Louisiana cases. I went
14 back later and discovered there might have been some agreements
15 in Mississippi, I'm not sure exactly what additional states
16 there were, but I did send them all to Mr. Herman's office. I
17 think that matter is concluded.

18 THE COURT: And last is the State Federal Coordination.
19 Did we talk about that?

20 MR. HERMAN: Yes, your Honor.

21 THE COURT: And the last item is the Trial Schedule.
22 Those are the three trials, Mr. Amedee you would like to speak
23 to that. The court has a motion to continue the trial set in
24 this matter. The trials of three that were set in January,
25 three of them in January.

ROUGH DRAFT

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2 MR. AMEDEE: Good morning, your Honor, Roy Amedee for
3 plaintiffs Richard Diez, Marc Diez, Tricia Diez, Samantha Reed
4 and I'm going to speak on behalf of Ernestine Brock, I think
5 because of the importance of this motion. Mr. Rebennack might
6 want to get up and say some words about this also.

7 Back in early September when your Honor set these
8 days for trial it was very obvious that you wanted to move
9 forward, as you've said today; and I have to commend the court
10 for doing so, because in the few MDL's I have been involved in,
11 one with Mr. Irwin, couldn't get the court to do that, we
12 couldn't get the court to try cases. And I think it's
13 excellent that we're going to do so in this MDL.

14 So with this in mind, my peers and I embarked upon
15 a very rigorous, ambitious and almost Herculean effort to do
16 so. But despite this effort, given the fact that we've only
17 had three months, plaintiffs find themselves in a position
18 where they have not been able to adequately prepare these cases
19 for trial, there is so much work left to be done and we don't
20 feel we are going to be able to do so in six weeks.

21 I'm sure the court has read the memo, I'm not
22 going to belabor the points, but I would like to cover a few
23 things, especially things brought up by the defendants.

24 At the time we filed for the continuous two weeks
25 ago we were fully aware of the fact that Dr. Zipes because of a

ROUGH DRAFT

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2 travel schedule would not be giving us his report until
3 tomorrow and that his deposition couldn't be taken until after
4 the Daubert motions are scheduled to be filed. Since then a
5 new expert has appeared and doctor pharmacy, and likewise even
6 though we've gotten his report, he is not available at least
7 until the 12th of December and we can't make that date, I'm
8 going to be traveling that day. And it looks like he is going
9 to be taking the week of the 16th.

10 In addition, there is a gastroenterologist whose
11 report I have not received, and by agreement with counsel I
12 told them pending the results of the arguments today and the
13 motions today don't give me that report, because I didn't want
14 to have a gastro report from them if the court were going to
15 allow some relief in that area. Dr. Roden who say has been
16 deposed but I haven't had a chance to look at his report
17 either, so there is a possibility that four out of the five
18 experts named by the defendant I will not have a chance to
19 depose prior to the time that Daubert motions are to be filed.

20 And this is not a one-way street. They said,
21 well, let's push them further back. Well, your Honor, we have
22 done so on two occasions already. But there is just not enough
23 time left to push back the Daubert motions and go to trial on
24 those dates.

25 Trial package, and the lack of one from the PLC.

ROUGH DRAFT

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2 The defendants say, well, attorneys from New Orleans who have
3 been somewhat in communication with the PLC don't need a trial
4 package, but it's my position if you're PLC member, a local
5 lawyer or a lawyer from state of Washington, you need an
6 organized trial package to go to trial in a case of this
7 magnitude where you have to rely upon deposition testimony.
8 You have to edit, we have to edit films, edit the transcripts.
9 We can't get ten witnesses here -- because I have ten witnesses
10 I want to call, either employees, former employees or
11 consultants to these defendants.

12 Now, I don't want the court at any time to think
13 that the PLC has not opened their doors to me, they have made
14 documents available, depositions available and have even
15 allowed me to participate in some science committee conference
16 calls. But the fact of the matter is Mr. Rebennack and I have
17 had to start from scratch in organizing and putting together a
18 trial package on the various aspects of this case.

19 Once again, we haven't had time to do so. And
20 there is absolutely no way we're going to be able to do this by
21 January 6th. I would also like to go back, I forgot to do so
22 to the Daubert motions themselves. In the time allotted to
23 respond to these Daubert motions, namely ten days. That is
24 obviously the normal response time of normal motion practice.
25 But in litigation of this magnitude where the experts that are

ROUGH DRAFT

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2 being offered in these first trials, namely Dr. Shell, Dr.
3 Eckberg, Dr. Chen are probably going to be utilized by
4 virtually all of the plaintiffs in the future in this MDL.

5 A ten-day period to respond to Daubert motions
6 that these defendants have probably been working on for months
7 is just woefully inadequate and it's going to require, require
8 probably days of testimony by these experts here in court. I
9 did speak about this necessity for trial testimony, of
10 testimony with the defendants a couple of weeks ago and they
11 agreed with it, now they're basically saying they don't think
12 it's necessary. But a period of 30 days to respond to Daubert
13 motions for experts that are going to have an impact on this
14 thing for that year or so to come that your Honor is talking
15 about is much more appropriate.

16 Now, with regard to the gastroenterologist issue
17 which I feel is an important issue here, when we went to the
18 PLC and asked them what experts they had developed in this
19 particular litigation they gave us the name of five, four or
20 five cardiologists, a pharmacist, but when I asked them about a
21 gastroenterologist they said we haven't developed one.

22 So in addition to having to develop the other
23 aspects of the case, Mr. Rebennack and I sought out someone who
24 would come forward and testify on behalf of the plaintiffs in
25 this litigation in our three cases, and we found one. But we

ROUGH DRAFT

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2 found him a little late, we found him just after the deadlines
3 for submitting a report had come and gone. I approached the
4 defendants with this particular problem and they did not want
5 to -- we made a lot of compromises and we worked well together,
6 but on this particular issue they are not interested in doing
7 so.

8 So consequently we're now being faced with having
9 to go to trial with three people who are at a supreme
10 disadvantage because the rest of the MDL, every other plaintiff
11 in this litigation will have the benefit of this
12 gastroenterologist who is willing to testify about plaintiffs
13 about the efficacy of this drug, except for these three
14 plaintiffs, that's fundamentally unfair, inequitable and
15 supreme prejudice.

16 They should not be punished just because of the
17 fact that of a timing thing. 60 or 75 days is not going to
18 make or break whether or not these cases are ultimately
19 resolved. And it seems to me that in setting these cases for
20 trial your Honor wants to flush out and address the issues, and
21 all of the issues. This is a pretty big issue. And not to
22 address this issue would be contrary to the main purpose for
23 setting these trials in the first place.

24 With regard to the statute, I did raise the issue
25 of the statute and the proper procedure for getting cases to

ROUGH DRAFT

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2 trial in an MDL. The defendants say I've waived this argument.
3 I don't think I have. I think that with the thought in mind
4 that your Honor wanted to go forward with these cases, I didn't
5 raise it early on.

6 We tried to make a good faith effort to have these
7 cases prepared properly, but the fact of the matter is we've
8 fallen a little short, we really are, not by a lot but just a
9 little. I have to say mission accomplished though, your
10 setting these trials has put this whole litigation on the track
11 that is four or five times faster than it's ever been and
12 ultimately is going to hasten the resolution.

13 But we ask for a continuance, we feel that if the
14 court grants us this, allows us to name this additional expert,
15 the trials that we will have in late February, March, whatever
16 the court, I mean, even 45 days. But we just need a little
17 more briefing room here, will have more meaning and have more
18 effect on resolving this litigation completely down the line.

19 THE COURT: Let me hear from the defendant. Before
20 that, let me tell you the way I saw it and see it.

21 I mentioned in, and you can check the transcripts,
22 I mentioned in June and maybe even in March of this year of
23 this concern that I had about MDL proceedings in general, and
24 the concern was precipitated by what I had been reading and
25 hearing discussed at various seminars and literature; a concern

ROUGH DRAFT

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2 that litigants and their lawyers had primarily who were not on
3 the committee. They felt that they were being MDL'd, so to
4 speak, which they felt was inconsistent with their
5 responsibilities and duties to their client. They felt that
6 they were being dragged from places throughout the country,
7 Iowa, Philadelphia, Texas, wherever and brought in to another
8 state, in this case, New Orleans, Louisiana. And this was
9 essentially a black hole for them. They were taken from state
10 court, moved to federal court on a removal and then transferred
11 all the way down to another state, and they never heard
12 anything more from anyone other than periodically from the MDL
13 committee who advised them of the present status of their case.

14 Of course in this case we have a lot of
15 communication from the MDL and also from state liaison.

16 But in any event, there is a legitimate concern
17 and is a legitimate concern in MDL proceedings that those
18 litigants get transferred to another state and they lose
19 control of their case. They may want to try their case more
20 quickly than others.

21 All of us know that in cases of this nature there
22 are some cases that you can get ready for trial before other
23 cases can be ready for trial, simply because of the facts of
24 the situation. Maybe the individual who died while he was seen
25 taking the drug without any prior problems or whatever

ROUGH DRAFT

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2 symptoms. That may be a different case than someone who has
3 never had any difficulty ever but is concerned that they might
4 have difficulty in the future. I'm not saying one way or the
5 other how those cases wash out, but the facts of those two
6 cases may well be different. The first may be ready for trial
7 very shortly, the latter ready for trial at a different time.

8 Recognizing that, it seems to me that those cases
9 that are ready for trial ought not to be deprived of a trial
10 waiting for the cases that will take more development, more
11 discovery, more involvement, more resources and so forth. And
12 it's understandable that those individuals may have a concern
13 about participating in the expense of all of those other cases
14 when they are ready for trial at an earlier period of time.

15 Recognizing that I started mentioning my concern
16 in June or April, May, June of this year to communicate that
17 feeling to you. And I told the plaintiffs and defendant the
18 way I read Lexicon is that I'm able to try the cases that are
19 filed in the Eastern District of Louisiana because I'm not the
20 transferee judge, I'm the judge, the trial judge in those
21 cases.

22 So I told the plaintiffs committee to talk to the
23 lawyers in those cases, if they were not the lawyer for those
24 cases, and find out which of those cases are ready for trial.
25 I put the burden on you, and I didn't pick those cases, I said

ROUGH DRAFT

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2 you pick them because it was consistent with my view. Some
3 cases are ready for trial, some cases are not ready for trial
4 and you should know which is which. By virtue of the facts
5 that's all.

6 I was given a list of 67 cases that were filed in
7 Louisiana, and apparently my communication was misunderstood or
8 I was not clear, whatever it is, those were all of the cases
9 that were filed in Louisiana and not simply the cases that were
10 ready for trial. So we regrouped. I made my statement clearer
11 or the parties understood me better this time. And we got two
12 or three cases, three cases or so that I was advised were ready
13 for trial. I was advised they were ready for trial.

14 I met with the attorneys, I met with Mr. Becnel
15 and the attorneys for the defendant and I think a
16 representative from the MDL. But in any event I know
17 Mr. Becnel was there and we picked a date. I was looking to
18 try the cases in October, but because of his calendar he said
19 he couldn't try them in October but he could try them in
20 January. Defendants objected, they were ready to try them in
21 October, I moved the cases to January because it seemed to me
22 that that was the fair thing to do. We set them for January.

23 But these were cases that were picked by the
24 plaintiffs that were ready for trial, I was advised that these
25 cases were ready for trial.

ROUGH DRAFT

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2 Discovery has now proceeded for over two years, 8
3 million documents have been produced. Millions of dollars have
4 gone into it. So all of that discovery and the opportunity to
5 pick the cases that were ready for trial were given to you, you
6 picked them, you gave them to me. I worked them into your
7 schedules so that you could get ready for them.

8 And so I'm disappointed to hear at this point that
9 you're not ready, you picked the cases and I picked the date
10 that you told me were good for you.

11 MR. AMEDEE: Judge, it's a difference between the cases
12 being ready for trial and the trial packages, the hidden
13 pitfalls. We were receiving as recent as two days ago expert
14 reports from plaintiff's experts on echocardiogram tapes that
15 despite good efforts by both sides were not made available
16 until just a week or so ago. I mean, it's amazing how you can,
17 you have to literally, you can go personally to a hospital,
18 pull the file and not get all of the records. And, you know,
19 there were numerous instances of that.

20 But the fact of the matter is we have made an
21 effort, the cases were, in fact, probably as ready for trial as
22 any of the cases. But there was just no way to meet the
23 deadlines. Now we are faced with these really important issues
24 of these three cases being supremely prejudiced from a Daubert
25 standpoint, a gastro standpoint. It's not like we're asking

ROUGH DRAFT

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2 for six months. This is the first request for a continuance
3 and we're only asking for 60 days, even 45.

4 THE COURT: Let me hear from the defendants.

5 MR. BECNEL: Judge, I would like to address that.

6 THE COURT: You want to rebut the defendants?

7 MR. BECNEL: Let me address it first off. May it
8 please the court, Daniel Becnel. I stand here mainly because I
9 think Mr. Bob Wright and Mr. Herman and I filed the first case
10 in the country. After those cases were filed by us virtually
11 everybody else picked up on what we were doing and filed cases.

12 As you know, our case was originally the Zeno case
13 was originally set in May with Mr. Amedee and I who represented
14 Ms. Zeno and others and we were going forward with
15 certification and then Mr. Zimmerman picked up a case in
16 Minnesota, and the MDL was formed.

17 The problem we have here is twofold, and I'll make
18 some comparisons for the court. I think I'm one of the biggest
19 critics of MDL's that take a case, i.e. Phen-Fen, and I filed
20 the first cases there, five and a half years ago and I have yet
21 to get the first case remanded back after 500 individual
22 depositions on 40 cases. So that's my complaint about MDL's.

23 I think this court took some of those complaints,
24 as I discussed with the court at seminars and other things very
25 seriously. I think the one fallacy that we all undertook here

ROUGH DRAFT

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2 is probably because of all of our past experience, the complex
3 case can be managed by 8, 9, 10 lawyers. That's just simply
4 impossible anymore. You know, and each judge that gets one,
5 for example, this court worked very closely I understand with
6 Judge Michael Davis in the Bake-Hall litigation, but we knew
7 how many documents, and I don't care how many lawyers we all
8 put up in that document depository.

9 When you're dealing with that amount of documents,
10 and there has been a Herculean effort by eight or nine law
11 firms, ten law firms that have put three and four people over
12 there virtually all the time. The problem is that documents
13 are so overwhelming it pushes back depositions or you're taking
14 depositions without the ability to have all of the documents.
15 And so we've all moved forward.

16 Mr. Amedee and I, Mr. Rebennack on the individual
17 cases have been flying around the world and around the country
18 virtually nonstop. A week or so ago I was in Chicago with Dr.
19 Chen the pharmacologist, Mr. Amedee and Mr. Rebennack were in
20 California, Mr. Duhe and I spent ten days in Brussels. But
21 when you're discovering all of this and you have a limited
22 number of "firms" on the plaintiff's committee as opposed to
23 like in Bake-Hall where we have like 25 people on the
24 committee, things move a lot quicker because you have more
25 bodies.

ROUGH DRAFT

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2 This case, and it's no fault of the leadership of
3 Mr. Herman or any of the members of the PLC, we have just been
4 so overwhelmed with the amount of work with the number of firms
5 here we can't get everything done.

6 THE COURT: You just need to expend it and get more
7 people then. That's the facility, that's what the MDL
8 committees do, if they need more bodies they simply ring the
9 bell and other people come in and you give them an opportunity
10 to work on the case. The limited number of people on the
11 committee simply makes it leadership wise, more easily handled.
12 It doesn't mean that that's the only people who can do the
13 work.

14 And it's my understanding that that has been
15 what's been happening. Plaintiffs Committee has subcommittees
16 going on that are outside of the committee. In fact, I
17 remember Plaintiff Liaison Counsel saying on numerous
18 occasions, and it's in the transcripts on many occasions, that
19 anybody who wants to work in the case, they don't need to be on
20 the MDL, he is interested in having them work on the case. All
21 they have to do is hold up their hand.

22 MR. BECNEL: And he has done that and he has done that
23 as well as possible.

24 I will tell you the practicality is unless you're
25 on the committee and have a seat at the table to determine time

ROUGH DRAFT

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2 and charges and hours and where you're directing, people don't
3 want to come in. And that's what's happened. We've gotten
4 some people to come in, mainly from Louisiana, but people don't
5 come in.

6 For example, let me give you the difference
7 between the two. As the court recalls, I wanted to have 25
8 people on the committee. The court decided 8 was sufficient, 9
9 was sufficient. That in effect sent some people away to do
10 their own thing. Let me give you the difference between
11 Bake-Hall and this case --

12 THE COURT: Speak to me about the issues at hand
13 though, Mr. Becnel, because we're over that now. My decision
14 on the eight I felt was a good one because I think that the
15 problem that I see with 25 or 100 or 200 people is you can't
16 get them together. You don't have any leadership or direction
17 in an oversized committee; it is unwieldy. You have more of a
18 convention as opposed to a committee at that point.

19 And the committee has to be a group of people who
20 are leaders but who lead the litigation and who are willing to
21 have other people perform work that's to the advantage of
22 everyone as opposed to 25 or 30 people on the committee. I
23 don't know how you run a committee that way. The only way of
24 doing it is to have subcommittees of those 25 and you get to
25 the point where nobody is there because you can't get everybody

ROUGH DRAFT

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2 in one room every time when you're dealing with that number of
3 people. It's just unweilding. Look at the defendants. They
4 have four.

5 MR. BECNEL: Judge, if you would see the army of people
6 that they have behind them.

7 THE COURT: But you have the opportunity to have the
8 army though the same way.

9 MR. BECNEL: I'll just tell you the practicality, we
10 haven't been able to mock try this because we haven't finished
11 the depositions. Bake-Hall has been mock tried five times
12 because of the large number of people. Mr. Murray and I in
13 Bake-Hall have led the settlement team. We sat weekend after
14 weekend negotiating parameters with the defendants, now we have
15 in effect a grid type thing to get those cases. We have
16 settled 200 of them.

17 But let's talk about this. For example, I've had
18 to file a motion in this case for production of documents that
19 I thought were going to be produced, kept waiting and waiting
20 and waiting. And I filed it before the magistrate and I'm not
21 sure whether you want these motions.

22 THE COURT: I have them set for December 11th and I
23 will be ruling either December 11th or December the 12th.

24 MR. BECNEL: I didn't know if the magistrate had to be
25 involved or not.

ROUGH DRAFT

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2 But I mean those are critical issues to where
3 people are, because you take the U.S. people and they say it's
4 the people in Belgium. You take the people in Belgium, they
5 say, oh, no, it's over in the U.S. and they're responsible.
6 It's a catch-22, then they say but we don't have our documents
7 to prove where we were and who we were meeting with because
8 everything is electronic and they all went away.

9 THE COURT: Okay. I understand. Mr. Herman, since
10 there was some comments made about the structure of the
11 committee, I want to just afford you an opportunity to respond,
12 if you need to respond.

13 MR. HERMAN: I don't need to say anything, your Honor,
14 I know the committee is functioned the way it was envisioned
15 and am satisfied that people appointed to the committee have
16 done the work, including Mr. Becnel. And it's just a big case,
17 it's just a lot of documents and it's taken us almost two years
18 to run through the process of document production. The
19 problems are there but we have about 20 computers and screens
20 in the depository that generally fill four, five six days a
21 week. So I really don't have any comment, except to say that
22 the issues in these three cases that Mr. Amedee raises I think
23 are legitimate issues, insofar as the inability to complete the
24 major discovery to get to the experts that are needed; and
25 secondly, the question of Daubert hearings is serious because

ROUGH DRAFT

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2 if a witness who we believe in the MDL is an excellent witness
3 and should be allowed to testify goes to Daubert hearing before
4 the witness is fully prepared, it could effect the rest of the
5 cases out there.

6 But I know that Mr. Amedee from the contact that
7 I've had with him and the contact at the depository that he and
8 Mr. Rebennack and Mr. Becnel have been pursuing preparation in
9 this case on a daily basis since the trial date was set and
10 while I'm not an advocate for those clients, I am an advocate
11 for the plaintiff's bar and the MDL and I think that were it my
12 case I would make the same arguments that Mr. Amedee has made
13 and I would add that these lawyers are lawyers who are
14 conscientious, they have client rights to protect, that no
15 matter how many committees or how many people we have on an MDL
16 the practicality of practicing law is that we will never match
17 the defense because all their client has to do is go out and
18 buy more bodies and more bodies dedicated to a single case.

19 We don't have that luxury but I'm very proud of
20 the lawyers in this box and the lawyers on this committee. I
21 think they've had a very, very challenging job. They've been
22 faced with one of the most skilled defense teams that I've seen
23 in 36 years and it's like any other case I've ever been in.
24 The first slip and fall case, the defense will hide the bone,
25 will bury the bone until the last document, and I think it's

ROUGH DRAFT

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2 unfortunat e that we don't have a dump rule where parties just
3 come in and dump everything down, they Bates stamp them and
4 dump them down immediately.

5 I don't know if that would work, we'd still be
6 faced with having to read them, categorize them. The only
7 thing that I can say is that I fully support the arguments
8 Mr. Amedee made. I'd make them if they were my clients, and
9 never believe that this case was at a time where I felt
10 confident discovery was complete. I think that, when you read
11 the depositions and you have witnesses that have designated you
12 were and you spend the money and time to go over there and
13 those witnesses say, well, it's not us. It's someone else.
14 It's typical law practice, it's frustrating but what it does is
15 it causes delay.

16 I think that Mr. Amedee is correct, I think that
17 we do have in the MDL on the plaintiff's side an ethical and
18 fiduciary duty to afford a trial practice to lawyers who want
19 to try cases. I can't try or prepare their cases individually.
20 But they're entitled to a package and I don't know how you put
21 that together when the chief executive officers of the
22 defendants haven't been taken yet. How do you hire a
23 gastroenterologist on efficacy when all of the efficacy
24 documents have not been produced and read and the e-mails are
25 where we have found the material as to those issues. So I

ROUGH DRAFT

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2 probably said too much.

3 THE COURT: Let me hear from the defendants.

4 MR. IRWIN: Your Honor, what we can agree on is with
5 respect to the Zipes deposition and additional time to file a
6 motion that the plaintiffs might want to address on Daubert
7 issues with respect to Dr. Zipes, I think we put that in our
8 brief that we would be prepared to agree to an extension to do
9 that. I think the court knows that Dr. Zipes was used in the
10 class certification process, he has been deposed, once, may be
11 twice, before at the MDL. So we can agree to that, we do agree
12 to that.

13 With respect to the gastroenterologist and our
14 inability to agree to their request now for a
15 gastroenterologist. When they have requested in the past that
16 we agree to extensions for the delivery of expert reports, we
17 did it every time they asked for an extension, we agreed to
18 their extensions.

19 And our problem with agreeing to their request now
20 is that it comes late, it comes after the deadline. Had they
21 requested it earlier that might be different. But now after we
22 have taken depositions, after we have prepared our expert
23 reports, they now ask for permission, our agreement to file a
24 gastroenterologist expert report. We think it comes too late,
25 the timing number one; and number two, we think it's very

ROUGH DRAFT

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2 clear, and they agree it's clear, that they knew all along that
3 they had the obligation to deliver a gastroenterology expert
4 report and they say that they have been unable to find one
5 until recently.

6 And that is why, they do not contend that they've
7 not known that they had that obligation, they do not contend
8 that they do not realize that it was their burden, they just
9 said that they could not locate a gastroenterologist. And our
10 view now is that it comes too late and we cannot agree to it
11 because it would prejudice us at this time.

12 We think that when one comes to an end to litigate
13 in an MDL one has to bring the necessary resources and apply
14 the necessary resources to litigate in an MDL. In my 29 years
15 I've never been going up to trial when I did not feel
16 pressured, did not feel stressed, did not feel I could use some
17 more time, that will always be the case. It's probably
18 magnified in the MDL setting but I think it's a very fair
19 statement to say that when you decide you're going to file a
20 number of cases in the MDL, you need to apply the necessary
21 resources to get them to trial, to get the job done.

22 So we think we should maintain these cases on the
23 trial calendar, we think scheduling things can be worked out.
24 We think that the request for a gastroenterology expert now
25 comes too late.

ROUGH DRAFT

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2 MR. CAPRETZ: Your Honor, may be I heard, Jim Capretz
3 for the State Liaison Committee. While I certainly do
4 understand and appreciate the court's desire to have an early
5 trial in the court's attempt to work on the papers and the
6 management ability of the Plaintiffs Steering Committee, I
7 think, your Honor, you weigh the equities of the situation who
8 is most likely to be prejudiced by not granting the short
9 extension requested by Mr. Amedee.

10 It's the lawyers out in the field in the state
11 court cases that are going to be prejudiced if a bad precedent
12 is set here in this court because proper experts could not
13 testify at the time of the trial. So I'd ask the court to
14 consider the prejudice that might be created versus the
15 non-harm to the defendants in this circumstance.

16 THE COURT: All right. Okay. I'm going to consider
17 this matter. It's a significant matter.

18 MR. REBENNACK: May I address the court very briefly,
19 your Honor.

20 THE COURT: Yes.

21 MR. REBENNACK: I just want to say it's a pleasure
22 being before the court. Mr. Amedee, myself and Mr. Becnel, we
23 have been more than diligent in having this matter prepared.
24 As they've testified, we have gone some different states taken
25 many different depositions and subpoenaed a lot of court, and

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2 counsel for state of California. I am concerned if this matter
3 is tried and has an adverse verdict against the plaintiff, I am
4 concerned the precedent that it's going to set. The only thing
5 I would add in addition, we are concerned about our three
6 clients, I appreciate and respect the MDL and all of the issues
7 of the MDL. We want to make sure the due process is afforded
8 to our three clients before the court.

9 THE COURT: I appreciate the comments and treat this as
10 a significant matter not only for the three cases but the other
11 cases. So I see those issues and I'll give it some further
12 thought.

13 The next meeting is January 28th. Anything
14 further, any new business before the court?

15 MR. HERMAN: We wish the court and its functionaries
16 and learned counsel opposite a happy and healthy Thanksgiving.

17 THE COURT: Same to all of you.

18 MR. HERMAN: Hope everybody stays safe.

19 THE COURT: The court will stand in recess.

20 THE DEPUTY CLERK: Everyone rise.

21 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)
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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.

Karen A. Ibos, CCR, RPR
Official Court Reporter