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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

2 CHAMBERS OF  
3 U.S. DISTRICT JUDGE  
ELDON E. FALLON \*\*\*\*\*

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IN RE: PROPULSID PRODUCTS  
LIABILITY LITIGATION

Docket No. MDL 1355  
New Orleans, Louisiana  
Tuesday, April 26, 2005

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

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

(APRIL 26, 2005)

(MONTHLY STATUS CONFERENCE)

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6 THE COURT: Be seated, please, ladies and gentlemen.

7 THE DEPUTY CLERK: MDL 1355, in re: Propulsid.

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

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

12 MR. HERMAN: May it please the court, good morning, your  
13 Honor, Russ Herman for the plaintiffs.

14 THE COURT: We are here today for our monthly status  
15 conference. I've received the joint report from liaison counsel.  
16 The first item has to do with the state matters. Last time I talked  
17 with the State Liaison Counsel and also the defendant's counsel and  
18 suggested that they begin getting together and seeing if they could  
19 put together some program for the state claimants benefit. Anything  
20 on that?

21 MR. ARSENAULT: We do have several things to report, your  
22 Honor. First of all, we've continued to engage in dialogue with all  
23 of the state attorneys that we're aware of. We think we've made  
24 some at least preliminary contact with all of those, and we've  
25 identified about 357 claimants in that universe. The defendants

1 have been doing the same thing and they've identified approximately  
2 557 plaintiffs, state plaintiffs that might be eligible for  
3 Propulsid MDL 2.

4 The total universe as far as the defendants are aware of  
5 right now would be something just shy of 9,000. That would be just  
6 shy of 2,000 federal plaintiffs, about 6,300 that were subject to  
7 tolling agreements, and about 557 state plaintiffs. But we've  
8 shared with them our list and our matrix of who we have been in  
9 touch with and as much of the demographics associated with that as  
10 we have. They have shared with us their list. So we are moving to  
11 try to get an accurate and comprehensive census of what's out there.

12 Additionally, your Honor, there has been the remand issue  
13 associated with Mr. Pennock's cases, he is here today, we met with  
14 him this morning and he is going to engage I understand in a  
15 dialogue with Mr. Champion following this conference with regard to  
16 some of the issues associated with the remand.

17 MR. HILL: We just got this list from the defendants and  
18 that 9,000 figure is, I can see right away that it's way, way less  
19 than that because I see 1,500 in here from me, all of which are gone  
20 and we've taken care of them. I see other lawyers in here who I  
21 know personally who I know don't have these cases anymore. So I  
22 think in a fairly short amount of time we can get this 9,000 number  
23 way, way down. I don't think it's anything close to that.

24 THE COURT: Okay. All right.

25 MS. BARRIOS: Excuse me, your Honor, Dawn Barrios. In

1 addition to the information that Mr. Arsenault provided to the  
2 court, we've also been in touch with state attorneys who have cases  
3 set for trial. Mr. Campion and I have been able to intervene in at  
4 least one of those cases and the plaintiffs counsel have agreed to a  
5 stay order pending Propulsid 2. So we've been able to put the  
6 brakes on some state court trials because of Propulsid 2.

7 THE COURT: I think we need to now close in on it a little  
8 bit. I am going to ask Mr. Arsenault and Ms. Barrios to speak for  
9 the state claimants, and I want Mr. Zimmerman and Mr. Levin to be  
10 the interface with the Plaintiff Liaison Counsel and with the  
11 defendants. And I would like to meet with you all after this  
12 meeting, and let's see if we can get some program together, meeting  
13 program so that you can get down to the nitty-gritty.

14 It's taken a longer time with the primary case and we've  
15 got to be able to utilize the process, what has gone before to  
16 streamline your program so that we ought to be able to do yours in  
17 less than 5 percent of the time that it took the other ones. I'll  
18 meet with you and give you some thoughts on that.

19 Service list of attorneys.

20 MR. IRWIN: Your Honor, we have two lists today, we have  
21 the traditional service list, we also have the pro se list. I don't  
22 think the service list at this point requires much explanation. But  
23 I will try to give a little explanation with respect to the pro se  
24 list.

25 THE COURT: Okay.

1 MR. IRWIN: Our best count is, Judge, that we have 477 pro  
2 ses, but there are a couple of permutations here. Our office  
3 doesn't quite agree with Mr. Preuss' office, and his data are  
4 probably better than ours, maybe, but we are trying to work it out.  
5 The list that we have here actually totals 558. That is because  
6 some names are duplicated because they're represented by multiple  
7 plaintiff counsel in Achord, that is the explanation. But this is  
8 going to take some further refinement, but it's going to be in the  
9 400 to 500 range.

10 THE COURT: Now, the pro se cases it seems to me fall into  
11 two categories: First, the pro ses that nobody has heard from,  
12 attorneys haven't received any response from, or either can't  
13 contact them because they've moved, or they've lost interest in the  
14 litigation, those individuals; Second, another group may be pro ses  
15 who are interested in pursuing their case but want to do it by  
16 themselves.

17 Do we have any breakdown, does the 477 or 500 include both  
18 of those numbers?

19 MR. IRWIN: It does, your Honor. I think it's close to  
20 50-50. Mr. Preuss may have a better handle on that.

21 MR. PREUSS: Your Honor, I think most of the pro se  
22 plaintiffs have come as a result of the MDL settlement program, but  
23 there are I'd say a dozen to 25 that have been pro ses for a period  
24 of time during the course of the litigation. We've had occasional  
25 communications from time to time, but nobody on a steady basis.

1           THE COURT: I am going to need to eventually make certain  
2 we cull those out because what I think needs to be done, I have to  
3 give notice to all of the pro ses to show cause why their case  
4 should not be dismissed. I would like to put that notice on a web  
5 site, I would like to notify them at the last known address. I  
6 intend to direct the liaison counsel to post my order to show cause  
7 in various newspapers where they live.

8           I'll give enough time so that they will have an  
9 opportunity to read the notice and understand it or do something  
10 about it. If they don't show up to show cause why their case should  
11 not be dismissed, I'll dismiss the case. Then those cases in which  
12 I get some response that they're interested in pursuing it, that  
13 they're interested in dealing with their case, I'll give them an  
14 opportunity to handle their case.

15           I'll set those cases for status conferences, and we'll do  
16 a pretrial order, we'll do preparation for trial and we'll try the  
17 case. I don't know in my own mind yet the order of trial or whether  
18 I can group them and take a sample case for each group, but I need  
19 you to be thinking about a method and mechanism for dealing with  
20 those cases, give it some thought.

21           Another thought is to sever liability from quantum and try  
22 quantum first, let's see whether or not there's causation and  
23 quantum; and then if there is no causation or no quantum, then  
24 liability is moot. If there is causation and quantum, then perhaps  
25 we go into Phase 2 and try liability.

1 I am not sure in my own mind how to do that, but those are  
2 some thoughts that are at least jumping around in my mind.

3 MR. IRWIN: We plan on engaging with the Plaintiffs  
4 Steering Committee on that dialogue, your Honor, and exploring  
5 solutions.

6 THE COURT: I give you those ideas so that you can at  
7 least think about them and give me your input.

8 Trial schedule, anything further on that? Any cases that  
9 are set for trial?

10 MR. IRWIN: Your Honor, there have been no changes on that  
11 since our last report to the court.

12 THE COURT: Anything on indemnity agreements?

13 MR. IRWIN: Likewise, your Honor, that has been static.

14 THE COURT: Mediation and resolution program. We have  
15 with us today Mr. Pat Juneau, the Special Master that the court has  
16 appointed. I'll hear from him.

17 MR. JUNEAU: Yes, your Honor. We have been receiving  
18 through the claims office a tremendous amount of paper and material.  
19 All of that is being inventoried now, that's been the progress.  
20 We've engaged in addition to and will serve as a conduit to some of  
21 the attorneys, I see Mr. Ingram is here, I talked to him earlier,  
22 about some of the problems having to do with disqualification, so we  
23 are going to see if we can facilitate those matters for him and set  
24 up a meeting.

25 Additionally, we're working with the counsel insofar as

1 facilitating the process about the reviews of these various  
2 materials. But the material level has picked up substantially here  
3 in the past month, and that'll continue over the next two months.

4 THE COURT: Do you see any particular roadblocks that you  
5 care to comment on?

6 MR. JUNEAU: No, sir. It's been rather smooth, it's just  
7 a process now. I don't see any particular problems.

8 THE COURT: I appreciate your work on it and the work of  
9 your staff, too. I know that you've got the ball now, so I am  
10 confident that you will be able to handle it.

11 What about the government's participation? I am  
12 interested in getting them involved.

13 MR. JUNEAU: I have engaged and talked to the appropriate  
14 people at the government. I think through the efforts of the court  
15 they understand that we don't want this matter to delay these  
16 proceedings, delay any payments to be made in this matter. They  
17 have committed to me that they will participate. There is obviously  
18 a wealth of information they need to make their analysis. I have a  
19 handle on what that is, but we are not at the stage to tell what  
20 those bulk of cases are.

21 I have committed once we have determined what those cases  
22 are to give them the information they need to analyze those cases,  
23 which they can do they have assured me rapidly. I have told them  
24 that once we reach that stage I thought it was appropriate that we  
25 engage in the court with the government in a status conference

1 before the court. So we are way ahead of schedule in dealing with  
2 the government. And it's an obstacle which has been an obstacle in  
3 other cases, I don't anticipate that being the case here.

4 THE COURT: Keep me in the loop and I would like to meet  
5 with the government when you get the information that you feel that  
6 that's what they need, let me know, I'll set a status conference. I  
7 would like to meet with you and the government. I'd like to share  
8 with both of you some thoughts that I have on how we can streamline  
9 the process.

10 MR. JUNEAU: I will do that, your Honor. Thank you.

11 THE COURT: Anything on Daubert or summary judgments?

12 MR. HERMAN: No. The parties have the same positions that  
13 they've stated previously, your Honor.

14 THE COURT: Verilaw/Lexis Propulsid, anything there?

15 MR. HERMAN: Yes. We have one problem with the migration  
16 from Verilaw to Lexis, and we will contact the Lexis people to meet  
17 with your Honor at your Honor's convenience.

18 THE COURT: I'd like to meet with them, let's get them  
19 down and I'll have a status conference with Lexis and liaison  
20 committee.

21 Remand motions, anything on remand?

22 MR. CAMPION: Mr. Pennock is here.

23 MR. PENNOCK: Good morning, your Honor.

24 THE COURT: Good morning, you can come forward. I  
25 appreciate you being here, Mr. Pennock.

1 MR. CAMPION: We have begun a discussion between us, we  
2 know each other from sometime and we may be able to come to some  
3 accommodations. But a discussion has started on a good note, I  
4 don't believe there is any formal business that has to be done today  
5 before your Honor, but we may be able to report something more  
6 satisfactory at the next conference.

7 THE COURT: Two things that I wanted to get your input on,  
8 both of you, is the oppositions have now been filed and there is an  
9 indication that you want to hear these next status conference; is  
10 that what your wish is?

11 MR. PENNOCK: I met with Mr. Arsenault and Ms. Barrios  
12 this morning at breakfast and discussed some issues, as I mentioned  
13 to Tom just before the conference. We may consider withdrawing the  
14 motions at this point in light of some of these discussions, and I  
15 was going to talk to Tom hopefully after this conference and try and  
16 hammer some things out.

17 THE COURT: How about the motions for summary judgment,  
18 too, are they on hold?

19 MR. PENNOCK: Your Honor, I only saw one of these motions.  
20 I came in Friday night, the others were apparently received last  
21 night after I had already flown down here and I can't speak to any  
22 of those in a substantive nature.

23 THE COURT: Take a look at it and if you can't deal with  
24 it, give me some input as to how much time you need and I'll set it  
25 in that regard.

1 MR. PENNOCK: Thank you, Judge.

2 MR. CAMPION: Thank you, Judge.

3 MR. HERMAN: May it please the court. Your Honor,  
4 although it's not calendared, I do have a report to make that I'd  
5 like to make to the court and I'd like it reflected in the minutes  
6 of this status conference, which are published on the web site.

7 \$72,300,000 has been deposited with Deutsche's Bank and  
8 invested in the Black Rock Fund. This is the settlement fund that  
9 will pay claims. I want to thank Mr. Campion's office, we've been  
10 in negotiations with Deutsche's Bank over an escrow agreement now  
11 for some months and were able to get it done on Friday so that the  
12 funds could be deposited Monday of this week.

13 I also want to thank all counsel because we exceeded the  
14 minimum needed by almost \$3 million, which indicates that many more  
15 people enrolled in this program than was originally envisioned. The  
16 \$15 million fund, administrative fund has been in escrow and  
17 invested for sometime now, and bills are being paid regularly from  
18 that fund subject to the Special Master and the court appointed  
19 distribution agents review or request.

20 There is one other fund under the terms of the settlement,  
21 it's 22,500,000 in common benefit, attorney's fees, costs. By a  
22 term sheet we're to discuss that issue first with the Special Master  
23 and we will, we intend to present a motion and a brief to the court  
24 within the next ten days, and would ask that that matter be  
25 calendared for the next hearing that your Honor selects.

1 I also want to report that there were three investment  
2 funds, these are basically AAA T-bill funds, the Evergreen Fund, the  
3 Fidelity Fund, the Black Rock Fund. J&J's financial advisors  
4 selected the Black Rock Fund based upon their appreciation of the  
5 flexibility of the fund, the investment of the fund, the costs and  
6 all of the other considerations, and we agreed to the investment of  
7 a settlement fund in the same Black Rock Fund that J&J's folks had  
8 designated.

9 In the event that any attorney or claimant wishes to  
10 review the Black Rock prospectus, they can contact either liaison  
11 counsel or the depository and we will find a way to put it on line  
12 so that we can review that.

13 That's the only other report that I had, your Honor.

14 THE COURT: All right. It looks like that in this  
15 litigation we're coming to the point where everybody ought to be on  
16 the same page and pulling the same oar. In litigation, the  
17 adversary system serves us well to have each side take a position  
18 and out of that conflict comes an answer.

19 But that has been done and now we have an answer, and at  
20 this point seems to me that all counsel ought to be at the same  
21 point in wanting to complete this process. So everybody ought to be  
22 rowing in the same direction, if not with the same oar, and I would  
23 be remiss if I didn't take the opportunity to again thank counsel  
24 for their work in this process.

25 I've lived in these vineyards for nearly 40 years now and

1 most of my time over three decades was in the shoes that many of you  
2 all occupy; and I know the last ten years I've seen it from a  
3 different vantage point, but I know it's harder to handle a case as  
4 a lawyer than it is as a judge. You do the work. Occasionally the  
5 court may get the credit, but I know from having been there that  
6 it's your work and not the court's.

7           You've made it happen and the thing that is helpful in  
8 cases of this sort is a quality and professionalism of the  
9 attorneys, and I've seen it in this particular case and it is to  
10 your credit that this has been done.

11           Our next meeting will be, we have two possibilities with  
12 May 26 or 27th. What's a good date?

13           MR. CAMPION: Your Honor, the defense would suggest  
14 instead that the next meeting be held in the week of June 6 because  
15 of concerns with -- June 13th, I stand corrected.

16           THE COURT: The 16th or the 17th? What about the latter  
17 part of that week, 16th or 17th; is that a problem?

18           MR. HERMAN: Your Honor, I am going to be out of the  
19 country renewing my soul, needs some serious renewal, from the 14th  
20 to the 24th of June.

21           THE COURT: I will give you all an opportunity to think  
22 about it and give me some dates.

23           Anything further on this meeting? I will see the folks in  
24 the office in a minute. The court will stand in recess.

25           MR. HERMAN: Your Honor, if I might --

1 THE COURT: Yes.

2 MR. HERMAN: We need a short plaintiffs meeting if we  
3 could use this room, the jury room.

4 THE COURT: You can use the jury room.

5 MR. HERMAN: Thank you, Judge.

6 THE COURT: The court will stand in recess.

7 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

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Karen A. Ibos, CCR, RPR

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Official Court Reporter

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