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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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IN RE: PROPULSID PRODUCTS \* MDL 1355, Section L  
LIABILITY LITIGATION \*  
\* New Orleans, Louisiana  
\*  
\* June 25, 2004, 9:00 a.m.

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

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APPEARANCES:

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For the Plaintiffs: Herman, Mathis, Casey,  
Kitchens & Gerel  
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For the Defendants: Irwin Fritchie Urquhart  
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PROCEEDINGS

(June 25, 2004)

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3 THE DEPUTY CLERK: Everyone rise.  
4 THE COURT: Be seated. Call the case.  
5 THE DEPUTY CLERK: MDL 1355, In Re: Propulsid  
6 Products Liability Litigation.  
7 MR. IRWIN: Jim Irwin for defendants.  
8 MR. HERMAN: May it please the Court. Good morning,  
9 Your Honor. Russ Herman for plaintiffs.  
10 THE COURT: We are here today with the monthly status  
11 conference. I've been presented with the agenda. The first  
12 item on the agenda is "I. Update of Rolling Document  
13 Production and Electronic Document Production."  
14 MR. HERMAN: May it please the Court. There is no  
15 more scheduled production in the case. We are working on a  
16 joint order with regard to suspension of electronic  
17 preservation and we don't expect to have a problem with that at  
18 all.  
19 THE COURT: Next up is "II. State Liaison Counsel."  
20 MS. BARRIOS: Dawn Barrios for the state committee.  
21 Since the time of our last conference, I received a call from  
22 an attorney in Mississippi who had two death cases filed in  
23 state court and she asked if she could participate in the MDL  
24 settlement program. I spoke with Mr. Davis and Mr. Campion and  
25 we were advised that state cases could not participate in the

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1 MDL program, that there may be a state program that would come  
2 at a later date. I believe there is a market for that state  
3 program and we stand ready, willing, and able to begin that  
4 dialogue with the defendants.

5 THE COURT: Let me hear from the defendants.

6 MR. CAMPION: The subject is under active  
7 consideration with the client, but we have nothing to report to  
8 the Court at this time. We well understand the value of the  
9 state court program, which in some fashion is connected to the  
10 program that you have approved.

11 THE COURT: Okay. We have the MDL aspect of this  
12 working. While it's in pretty much final form, we expect some  
13 potential glitches. That may be best worked out first. I'll  
14 keep an eye on that. I will be meeting with the State Liaison  
15 Committee, the defendants, and the plaintiffs' committee, also.  
16 Anything further from the PLC on this issue?

17 MR. HERMAN: Yes. There is one clarification for the  
18 record. I don't know who the individual in Mississippi is with  
19 the death cases, but if those cases were on the tolling  
20 agreement, as well, before the February cutoff and the lawyer  
21 wants to move those cases into the MDL, potentially they do  
22 qualify under this settlement proposal we are working on  
23 because cases which were either filed or on the tolling  
24 agreement before the February 1 date potentially may qualify.  
25 I did want to make that clarification.

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1 THE COURT: In that connection, I have received  
2 recently a number of New Jersey cases that have been moved here  
3 in that same fashion. They were in state court and were moved  
4 into the MDL.

5 MR. HERMAN: There's another Mississippi pleading  
6 that involves numerous Mississippi state court cases that have  
7 now been filed and they're sitting with the MDL Panel here as  
8 tag-alongs.

9 THE COURT: Yes, I did get a copy of that and it  
10 looks like it's moving in. It's 1,400 plaintiffs. The third  
11 item is "III. Patient Profile Form and Authorization."

12 MR. IRWIN: Your Honor, the joint report describes  
13 the numbers involved, and it is our view that we should hold  
14 those in abeyance while the enrollment period is underway.

15 THE COURT: I'll do that. "IV. Service List of  
16 Attorneys," do we have that? We have some additional --

17 MR. IRWIN: I think that's correct. We have the  
18 current list for Ms. Lambert, the state committee, and  
19 Mr. Herman.

20 THE COURT: It looks like we have a couple more  
21 thousand cases, I think 1,400 from Mississippi and some from  
22 New Jersey.

23 MR. CAMPION: There's 15 or 20 from New Jersey.

24 THE COURT: "V. Motion on Class Certification."

25 MR. HERMAN: We haven't filed it yet. We have been

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1 actively moving to get the settlement proposal in place and,  
2 Your Honor, we would like to defer that matter indefinitely.

3 THE COURT: I think that's wise. Some of it may be  
4 moot, some of it may not be moot, but let's see where we go  
5 with the settlement since it's just about ready to be stepped  
6 out with gusto. "VI. Plaintiffs' and Defendants' Respective  
7 Requests for Production of Documents."

8 MR. HERMAN: Your Honor has ruled on the 803(6)  
9 documents. That's no longer at issue. There's a joint motion  
10 for entry of Pretrial Order No. 20 regarding electronic data.  
11 The Court has entered the order, so we have no issues under  
12 "VI."

13 THE COURT: With regard to the 803(6) documents,  
14 these were a group of documents that the parties could not  
15 agree upon as to their admissibility. The primary sticking  
16 point was the 803(6) provision of the Federal Rules of  
17 Evidence, namely the business record exception to the hearsay  
18 rule. In looking over the material, it became evident to me  
19 there was a potential for other Rules of Evidence to be  
20 applicable to these documents and it was to some extent  
21 contextual with regard to the applicability of those other  
22 Rules of Evidence. For example, whether or not they were prior  
23 statements, whether or not they could be used in  
24 cross-examination, whether or not they were admissions against  
25 interest under 801(d)(2), and things of that nature.

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1                   It seemed to me that it was not helpful for the  
2 Court to make decisions on the 803(6) provisions and leave all  
3 of those other issues outstanding. I couldn't rule on these  
4 other issues because they were really contextual. They may be  
5 used depending upon what the witness said on the stand or what  
6 the witness said in deposition or to cross-examine the witness  
7 on inconsistent statements, things of that sort. In my  
8 judgment, I held those documents and did not rule on them and  
9 feel that it's not appropriate for the MDL Court, the  
10 transferee court, to rule on them. It's more appropriate for  
11 the trial court to rule on those particular areas. I am  
12 therefore returning the documents back to the parties so that  
13 they can reurge the objections, if necessary, in the  
14 appropriate forum.

15                   MR. HERMAN: I just have one comment. It is the  
16 plaintiffs' legal committee's intent to have that group of  
17 documents, along with briefings from both sides, in the Court's  
18 order as part of the trial package in the event there are  
19 attorneys that wish to try their cases.

20                   THE COURT: The next item is "VII. Trust Account."

21                   MR. HERMAN: The trust account, as I understand it,  
22 is up-to-date in terms of deposits which have been made. The  
23 next item is "VIII. Mediation" and there have been no further  
24 mediations pending the settlement proposal.

25                   THE COURT: "IX. Trial Schedule."

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1           MR. HERMAN: We received a list of what state court  
2 trials are set. It would be better for the defense to address  
3 this.

4           MR. CAMPION: There are only a couple listed for  
5 trial for the balance of the year. That's all.

6           THE COURT: "X. Pharmacy Indemnity Agreements,"  
7 anything on that?

8           MR. IRWIN: Your Honor, we continue to furnish them  
9 as requested. I do not believe there have been any requests  
10 since our last report on this subject at last month's status  
11 conference.

12          THE COURT: The next item is "XI. MDL Mediation and  
13 Resolution Program."

14          MR. HERMAN: I'll try to take the issues in a  
15 bottom-line sort of way. We have agreed on the enrollment  
16 forms. We have agreed to place them on the Court's web site  
17 and asked the Court to do that. We have scheduled a meeting  
18 among plaintiffs' counsel that's either July 5 or 6 in Boston  
19 and all attorneys who have cases have been notified. It's our  
20 intention at that time to provide the final enrollment form and  
21 walk them through it to do that.

22                 The plaintiffs' depository has now been moved  
23 from Laplace to Place St. Charles in the CBD. We are set up  
24 and ready for processing. A location is being investigated for  
25 the housing of medical records and administrative processing in

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1 terms of the resolution. Plaintiff and defense counsel have  
2 interviewed potential administrators to assist the special  
3 master. The last round, as I understand it, is Monday. We do  
4 not anticipate a problem with the selection of a neutral  
5 administrator to assist the special master.

6           The parties have exchanged physician lists. The  
7 defendants have objected to one physician on the plaintiffs'  
8 list. The plaintiffs have not yet filed acceptance or  
9 objection, but are in the process of doing that. We believe  
10 that though three physicians from each side are potentially  
11 required, that we could begin the process with two physicians  
12 from each side and go forward with the selection of a third.  
13 The defendants have provided a list of all lawyers identified  
14 with clients whose cases qualify for enrollment determination  
15 on opt-out of the agreement. Basically, that's a synopsis of  
16 where we are. Jim may want to address these issues.

17           MR. IRWIN: Your Honor, we would only add to that  
18 that this morning after the conference my associate,  
19 Ms. Garsaud, will be in touch with Your Honor's law clerk to  
20 make sure that the Court does have the most current and  
21 accurate claims form and enrollment form. They are two  
22 discrete forms. They will be furnished in PDF form, which will  
23 be posted on the web site in this manner.

24           THE COURT: As I see it, it would be easier if the  
25 plaintiffs were able to fill in the form on line rather than in



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1 hard copy, but we are at that transition point in our use of  
2 that equipment where a lot of people feel that they need  
3 something in their hand to touch and feel and fill it out. So  
4 we are going to try to do it that way, as well as a hard copy,  
5 as well as any other way we can facilitate it. As I  
6 understand, the defendants are going to get a couple hundred or  
7 so forms printed and provide plaintiffs' counsel with those and  
8 they will be distributed along with the notice, of course, on  
9 the web site.

10           The next item is "XII. Global Application of  
11 Daubert."

12           MR. HERMAN: Your Honor, we recommend jointly that  
13 that matter be deferred.

14           THE COURT: I will defer it. I'll revisit it at the  
15 appropriate time because I do think there is some rational  
16 basis for the MDL Court to look at Daubert, at least in some  
17 aspects of it if not all aspects, rather than have it  
18 individually dealt with so that we can have at least some  
19 consistency. "XIII. Motions to Withdraw as Counsel of  
20 Record," anything there?

21           MR. HERMAN: The defendants have requested that the  
22 Court reserve ruling on those.

23           THE COURT: I'll do so. "XIV. Stipulation and  
24 Pretrial Order Providing for the Use at Trial of Depositions in  
25 State and Federal Courts."

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1 MR. HERMAN: We expect to have that stipulation  
2 entered into within a week or present alternatives to  
3 Your Honor for determination.

4 THE COURT: Let's do that. Let's try to get it  
5 stipulated between counsel, but if not then give me each side  
6 and I will do it. "XV. CIS NED-32 Deposition."

7 MR. HERMAN: Your Honor, that has been canceled  
8 without prejudice. We are going to defer that. In the event  
9 the settlement program comes to fruition through the enrollment  
10 requirements, then it's the plaintiffs' committee's position  
11 that we will not take that deposition, but we will have the  
12 notice and subpoena as part of the trial package that any  
13 attorney that wishes to try their case may go forward with that  
14 deposition in accord with whatever law applies to wherever that  
15 case is centered.

16 THE COURT: "XVI. Motion for Summary Judgment."

17 MR. HERMAN: We also ask that that matter be  
18 deferred.

19 THE COURT: I will defer ruling. "XVII. Motion to  
20 Dismiss for Failure to Exhaust Administrative Claims and Notice  
21 and Order to Substitute the United States as a Defendant."

22 MR. HERMAN: Your Honor has granted the motion to  
23 dismiss.

24 THE COURT: Right.

25 MR. HERMAN: That matter can be removed from the

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1 agenda.

2 THE COURT: "XVIII. Stipulation and Order Appointing  
3 Patrick Juneau as Special Master in Compliance with Rule 53."

4 MR. HERMAN: We now have reached agreement with  
5 regard to the special master and the parameters of the special  
6 master with regard to the program and will be submitting the  
7 stipulation.

8 THE COURT: Okay. As I mentioned before, Rule 53 has  
9 been amended in that the stipulation has to comply with what  
10 the parties have agreed and reached an agreement on, so that  
11 should be able to be worked out now. The new items, "XIX.  
12 Walgreen Louisiana Company, Inc.'s Motion for Summary  
13 Judgment."

14 MR. IRWIN: Your Honor, in view of the pending  
15 settlement program, we would request this be passed until the  
16 deadlines are determined.

17 THE COURT: I'll pass that motion. "XX. Motions for  
18 Summary Judgment as to Doctor Defendants Stephen A. Tramill,  
19 M.D. and Paul Varela, M.D."

20 MR. IRWIN: Yes, Your Honor. The Court recently  
21 granted a motion filed by Dr. Paul Varela on the basis that the  
22 plaintiff, Irene Cooley, agreed to the entry of the motion.  
23 Our concern with that motion related to the statement of  
24 undisputed facts in the motion and there were a couple of  
25 statements of undisputed facts that we think were incorrect.

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1 While on the one hand we don't have any objection to the  
2 granting of the motion, we are concerned that by implication  
3 there may be some adoption of these statement of facts.

4 THE COURT: I'll do a minute entry clarifying that so  
5 that there is no misinterpretation.

6 MR. IRWIN: That would satisfy our concern in that  
7 regard. By the same token, it is our impression that  
8 Dr. Tramill may be approaching the resolution of his motion in  
9 the same way. Again, we would not have any objection to it  
10 provided it did not incorporate those findings of fact.

11 THE COURT: I'll do so. The next item is "XXI.  
12 Pretrial Order listing MDL Plaintiffs."

13 MR. HERMAN: Your Honor, we have no controversy as  
14 regards that motion and order. I'm not certain that it's  
15 updated through today, but I don't think there's been any  
16 change. Am I correct about that?

17 MR. IRWIN: That's correct.

18 MR. HERMAN: We will accept the defendants'  
19 certification of that list as the list which will determine who  
20 qualifies time-wise for the February 2, 2004 deadline. We are  
21 not in a position to certify the list ourselves, but we are in  
22 a position to accept the certification of the defendants.

23 THE COURT: I understand. Just summarize for me  
24 where we are at this point. What's the next step to put this  
25 matter in --

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1           MR. HERMAN: Between now and July 5 and 6 the  
2 administrator will be selected. Mr. Juneau will be notified.  
3 There will be a meeting among Mr. Juneau, the administrator  
4 selected and, as I understand it, Mr. Clavier and plaintiff and  
5 defense counsel between now and July 5 or 6. I'm not sure of  
6 that date, but the plaintiffs' committee will meet with as many  
7 lawyers as wish to attend to learn how to fill out enrollment  
8 forms.

9           During that same timeframe, the defendants will  
10 provide a sufficient number of enrollment forms and claim forms  
11 that can be packaged before July 5, which we will add a form  
12 letter to clients and a list for each attorney who has said  
13 that they represent X and who qualifies from the list  
14 identified in "XXI." We will have a follow-up procedure. In  
15 addition to that, there will be discussions in order to make  
16 sure that it's possible to electronically fill these forms out,  
17 as well as those that wish to fill out hard copies can do it  
18 that way.

19           In addition to that, between now and July 5 the  
20 plaintiffs' committee will choose an alternative date in July  
21 and a date between the Democratic Convention and the Republican  
22 Convention for a three or four-day meeting in New Orleans where  
23 attorneys may fly in, meet with a member of the committee or  
24 members of the committee in order to assist them in filling out  
25 the forms. Also, between now and July 16 there will be -- I

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1 haven't confirmed this with defense counsel, but assuming their  
2 schedule and they're available, they will be meeting with a  
3 representative of Deutsche Bank and several vendors to get  
4 quotes from those vendors as to the actual tracking of claims  
5 payments and coordination with Mr. Clavier.

6 THE COURT: How about the cost for the  
7 administration; have you worked out that from the standpoint of  
8 the bank and the way you are going to deal with it, things of  
9 that nature?

10 MR. HERMAN: The administrative fund, we agree that  
11 whatever bank the defendants choose, that's where that fund  
12 will be placed. In terms of a cost approval, we have not had  
13 any problem in terms of the special master and staff and those  
14 costs, medical records costs, et cetera. As a depository for  
15 those records is found and as contracts are let for the special  
16 master staff, we expect there to be no problem with joint  
17 approval on things.

18 THE COURT: Get that worked out sometime.

19 MR. HERMAN: Your Honor, we will keep you abreast  
20 with an interim report with the administrative process and  
21 where we are, as well as these events that I have set forth  
22 that will occur between now and July 15.

23 THE COURT: Okay.

24 MR. HERMAN: If we may, if we could do that in letter  
25 form?

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1 THE COURT: That will be fine. If necessary, I will  
2 give you a call and talk about it. Give it to me in letter  
3 form.

4 MR. HERMAN: It may be productive, Your Honor -- I'm  
5 sorry, I don't have the calendar in my head, but sometime  
6 between Wednesday, July 7, and the following Monday Your Honor  
7 may want to have just a conference call to have a follow-up.

8 THE COURT: Let's get a date. The best I can do is  
9 the week of July 19.

10 MR. HERMAN: If Your Honor wants to just give us a  
11 date and a time, we'll make sure there's at least one  
12 representative of each side available. We'll report before  
13 that date to you by letter.

14 THE COURT: Monday, July 19 at 1:30. We'll initiate  
15 the call.

16 MR. CAMPION: Could it be July 22 or 23 instead?

17 THE COURT: July 22 at 9:00 in the morning. We'll  
18 initiate the call. Just let us know who needs to be on it.  
19 What about the next meeting?

20 MR. HERMAN: Well, I'm going to suggest that it be  
21 sometime between the Democratic Convention, which is the end of  
22 July, and the Republican Convention, which I believe is mid  
23 August. I think it's the third week in August without --

24 THE COURT: Plaintiff counsel won't know that.

25 MR. HERMAN: Your Honor, it has the same significance

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1 for plaintiff counsel that Halloween does.

2 THE COURT: When is the Democratic Convention?

3 MR. HERMAN: Last week in July, Your Honor.

4 THE COURT: What about the first week in August?

5 MR. HERMAN: That's fine.

6 THE COURT: Thursday or Friday? What's the best day  
7 for you?

8 MR. HERMAN: Friday.

9 THE COURT: Friday, August 6. Anything else from  
10 anybody? Anything else from the state committee? Well, just  
11 an announcement from our MDL 1355 family. We have been  
12 together now for nearly three years. We have had some  
13 unfortunate problems in the form of deaths or serious  
14 illnesses, but also we have had some happy occasions, births  
15 and marriages, and we have another one. Tom Campion's daughter  
16 got married, which we are delighted to hear. Hopefully she  
17 will stay in New Orleans. Chuck has had a new grandson, which  
18 we will welcome into the world.

19 MR. HERMAN: We were pleased to contribute, as  
20 plaintiffs, to the success of the wedding.

21 THE COURT: We'll stand in recess.

22 THE DEPUTY CLERK: Everyone rise.

23 (WHEREUPON, the Court was in recess.)

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CERTIFICATE

I, Toni Doyle Tusa, 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. This certification is valid only for a  
transcript accompanied by my original signature and seal on  
this page.

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Toni Doyle Tusa, CCR  
Official Court Reporter

