

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID * Docket MDL NO. 1355-L
PRODUCTS LIABILITY LITIGATION *
* December 19, 2006
*
* New Orleans, Louisiana
* * * * *

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

APPEARANCES:

Liaison Counsel for Plaintiffs: Herman, Mathis, Casey,
Kitchens & Gerel
BY: RUSS M. HERMAN, ESQ.
LEONARD A. DAVIS, ESQ.
820 O'Keefe Avenue
New Orleans, Louisiana 70113

Neblett, Beard & Arsenault
BY: RICHARD J. ARSENAULT, ESQ.
2220 Bonaventure Court
Post Office Box 1190
Alexandria, Louisiana 71309

Hartley, O'Brien, Parsons,
Thompson & Hill
BY: BARRY HILL, ESQ.
2001 Main Street, Suite 600
Wheeling, West Virginia 26003

1 APPEARANCES:

2 Levin, Fishbein, Sedran & Berman
3 BY: ARNOLD LEVIN, ESQ.
4 510 Walnut Street, Suite 500
5 Philadelphia, Pennsylvania 19106

6 Capretz & Associates
7 BY: JAMES CAPRETZ, ESQ.
8 t5000 Birch Street
9 Suite 2500
10 New Port Beach, California 92660

11 Zimmerman, Reed, P.L.L.P
12 BY: CHARLES ZIMMERMAN, ESQ.
13 901 North Third Street
14 Suite 100
15 Minneapolis, Minnesota 55401

16 Barrios, Kingsdorf & Casteix
17 BY: DAWN M. BARRIOS, ESQ.
18 701 Poydras Street, Suite 3650
19 New Orleans, Louisiana 70139

20 For Defendants:

21 Irwin, Fritchie, Urquhart
22 & Moore
23 BY: MONIQUE GARSAUD, ESQ.
24 400 Poydras Street, Suite 2700
25 New Orleans, Louisiana 70130

Drinker, Biddle & Shanley
BY: THOMAS F. CAMPION, ESQ.
TRACIE MILITANO, ESQ.
500 Campus Drive
Florham Park, New Jersey 07932

Preuss, Shanagher, Zvoleff &
Zimmer
BY: CHARLES F. PREUSS, ESQ.
225 Bush Street
15th Floor
San Francisco, California 94104

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Official Court Reporter: Jodi Simcox, RMR
500 Poydras Street, Room HB-406
New Orleans, Louisiana 70130
(504) 589-7780

Proceedings recorded by mechanical stenography, transcript
produced by computer.

PROCEEDINGS

(December 19, 2006)

1 **THE DEPUTY CLERK:** All rise.

2 **THE COURT:** Be seated, please. Good morning, ladies
3 and gentlemen. Call the case.

4 **THE DEPUTY CLERK:** MDL 1355 in re: Propulsid.

5 **THE COURT:** Counsel, make your appearance for the
6 record, please.

7 **MR. HERMAN:** May it please the Court, good morning,
8 Your Honor. On behalf of all counsel, we wish, Your Honor, and
9 your staff a Merry Christmas and a Happy New Year.

10 Russ Herman appearing for the PSC. We have the
11 state liaison committee and members of the PSC present,
12 Mr. Arsenault, Mr. Capretz, Ms. Barrios, Mr. Hill from the
13 state liaison committee; Mr. Levin, Mr. Zimmerman and
14 Leonard Davis with me for the plaintiffs, Your Honor.

15 **THE COURT:** Okay. Anybody for the defense?

16 **MR. PREUSS:** Your Honor, Chuck Preuss appearing on
17 behalf of the defendants, along with Tom Campion and
18 Monique Garsaud. And I would like to introduce to the Court
19 and counsel, Tracy Militano, who is the brains behind
20 everything here and keeping us straight on the numbers and
21 working with Pat's office and trying to keep these things
22 moving along.

23 **THE COURT:** All right. Well, welcome to the court.
24
25

1 I appreciate all of your work.

2 **MS. MILITANO:** Thank you.

3 **THE COURT:** This is a meeting. It's the 51st joint
4 meeting of the parties and I received a joint report from the
5 parties and defense from liaison counsel in advance of the
6 meeting.

7 I'll take the items in the form and fashion
8 which they have been brought up. First is state liaison
9 counsel MDL Resolution II program.

10 **MR. HERMAN:** May it please the Court, in a moment
11 I'll ask Ms. Barrios for comment. I want to compliment
12 Ms. Barrios and Mr. Capretz, Mr. Arsenault and Mr. Hill for the
13 job that they've done marshalling in Propulsid II.

14 I want to thank Mr. Hill for his efforts with
15 defense counsel, Mr. Campion and Mr. Preuss, in attempting to
16 work through some issues that have come up regarding
17 Propulsid I, which may bear on Propulsid II.

18 With respect to Propulsid II, I'll just call on
19 Ms. Barrios for any comment she has at this time.

20 **THE COURT:** Okay. While she's coming up to the
21 podium, Propulsid II is a collection of the state court cases.
22 Propulsid I is the cases that were sent to this court under the
23 MDL program; that is to say, cases that were filed in either
24 state or federal courts but then have been removed to the
25 federal court and transferred under the MDL concept 1407 to

1 this court to be held.

2 That case proceeded. During the process, we had
3 liaison counsel the court appointed to keep in touch with the
4 litigation. And I told state liaison counsel that I would do
5 what I could from my vantage point to encourage and work with
6 them in handling the state court cases, both in preparation as
7 well as in ultimate resolution, if that was appropriate or a
8 possibility.

9 With that in mind, the state liaison counsel
10 kept in touch with the Court and with this litigation,
11 furnished invaluable ideas and contributed to the overall
12 working of Propulsid I, and then we're presently at the
13 Propulsid II stage. I'll hear from Ms. Barrios now.

14 **MS. BARRIOS:** Thank you, Your Honor. I, too, would
15 like to add my note of appreciation. Were it not for Jane
16 Oxhandler of Richard Arsenault's office and Mary Williams of
17 Barry Hill's office, we wouldn't be standing here today telling
18 you that enrollment has been met.

19 From the defense side, I would also like to
20 welcome Tracie Militano and thank her because she's been our
21 conduit on getting the actual numbers necessary to be met.

22 Your Honor, when we first started talking about
23 Propulsid II, I was personally thrilled to be able to discuss
24 with the state attorneys that we had a resolution program in
25 mind. They were very interested in knowing what would happen

1 to their Propulsid cases.

2 So from the standpoint of the state's attorney,
3 having an alternate method of resolution has been a terrific
4 idea, and they're very happy about that. When we met in
5 Jackson, we were hit with some questions about the overall
6 process of Propulsid I. We had explained that issues were
7 under discussion, and I understand that they are still under
8 discussion.

9 I'd also like to thank, for the record, and I've
10 failed to it before, is Mr. Ingram. He was very instrumental
11 at our Jackson meeting in standing up and speaking with most of
12 the Mississippi attorneys on the process and on why they should
13 enroll their cases in Propulsid II.

14 So with that said, Your Honor, we are very
15 pleased to say that the enrollment has been reached with the
16 hard work of all those people that I've mentioned. And I
17 understand that there are ongoing discussions about resolution
18 issues of different matters with regard to the process, and we
19 stand ready, willing and able to assist in any regard.

20 **THE COURT:** Okay.

21 **MS. BARRIOS:** Thank you, Your Honor.

22 **THE COURT:** Anything from the defense on the
23 Propulsid II? Chuck, do you have any comments?

24 **MR. PREUSS:** Yes, Your Honor. Dawn and her committee
25 certainly are to be commended on all the hard work in getting

1 enrollment minimums reached. They have been reached.

2 **THE COURT:** Where do they come from, Chuck, mostly?

3 **MR. PREUSS:** Mainly from Mississippi. They are some
4 left over federal ones and there are some tolling claimants
5 that didn't sign up on MDL I that have come in on MDL II. And
6 the requirement was if you came in at all, then you had to
7 bring everything in, which was slightly different from MDL I.

8 But we do have a joint notice prepared. We
9 think it's important to get that posted so we can get started
10 and give notice to individuals as to when their claim forms are
11 due. And we have submitted that and we'd like to get it posted
12 on the Web site, Your Honor.

13 **THE COURT:** Any comment on that? Richard?

14 **MR. ARSENAULT:** Judge, this is kind of a creative
15 exit strategy that we've employed in Propulsid I. I think
16 jurists, and lawyers, and pharmaceutical companies, and
17 defendants around the country are trying to get their arms
18 around exit strategies and resolution and everything from
19 dealing with class actions to other creative ways to try to
20 resolve cases.

21 And Propulsid I, I think, was very creative.
22 And I know for a fact that it's being considered as a model in
23 many other pieces of litigation, other MDLs. And with anything
24 that's new, there are going to be issues, apparently, and
25 things that may or may not be considered.

1 And we just want to, I think, be careful with
2 Propulsid II; that if there's anything to learn from Propulsid
3 I, that where we tighten things up, expedite the process, or
4 learn from that, that we should do that to the extent that it's
5 possible.

6 **THE COURT:** What about the notice; is there any harm
7 in having the notice out?

8 **MR. ARSENAULT:** Well, I think there's no harm in
9 waiting for a short period. If there are any issues that can
10 be resolved with regard to Propulsid I, that would be a benefit
11 to us in Propulsid II.

12 It seems to me that waiting a few weeks is of no
13 moment at the end of the day when balanced against the
14 potential gain that we can realize from any improvements in
15 Propulsid I that might be acceptable to all the parties and
16 Your Honor.

17 **MS. BARRIOS:** Excuse me, Your Honor. The notice, as
18 I understand, will set various deadlines for plaintiffs counsel
19 to meet. And if when the Court and parties are re-examining
20 the issues with Propulsid I, if any of that process has
21 changed, those deadlines may go by the way side or the
22 requirements that you have to do by the deadline may go by the
23 way side.

24 So I would also urge that the Court consider
25 waiting about 30 days to post anything.

1 **THE COURT:** Chuck, do you have any response to that?

2 **MR. PREUSS:** No, Your Honor. The joint notice has
3 been signed off by everybody and the minimum dates were reached
4 on October 31. So under the terms of the agreement, that's six
5 months they stay open, claim forms are due 120 days after
6 enrollment or after October 31, whichever occurs later.

7 And so the time that is -- if it's not useful to
8 give notice on the Web site, it cuts down the time in which
9 people will have to make their decisions to join as of April,
10 so that's the reason.

11 **THE COURT:** All right. Mr. Herman?

12 **MR. HERMAN:** With great respect for Mr. Preuss, it's
13 a very rigid position, considering that deadlines have been
14 extended in the past.

15 We are concerned that, one way or the other, any
16 motions or briefings we might file under seal regarding the
17 Propulsid I process, one way or the other, will impact
18 Propulsid II. Our office, as liaison counsel, has monitored
19 daily the process and progress of Propulsid II.

20 And the matters are so well integrated that
21 issuing a notice at this time might in some way serve as, in
22 the general sense, not in the legal sense, an estoppel if some
23 process revisions came about to Propulsid I. We believe they
24 ought to be incorporated into Propulsid II, and our motion
25 under seal and our briefing under seal will so indicate.

1 So we do not think a 30-day extension of all
2 deadlines, including the filing of notice, will do violence to
3 the agreements.

4 **THE COURT:** Okay.

5 **MR. CAPRETZ:** Your Honor, if I may, let me add that
6 the -- I think it's the unanimous opinion of the Court, state
7 liaison committee, that we delay it a reasonable period of time
8 to see if we can work out the misunderstandings that we have in
9 the process.

10 **THE DEPUTY CLERK:** Would you give your appearance,
11 please, sir?

12 **MR. CAPRETZ:** James Capretz.

13 **THE COURT:** Okay.

14 **MR. HERMAN:** He's been gone from Louisiana for a
15 while we used to say *Capretz*.

16 **THE COURT:** Just give it to me, Chuck, I'll take a
17 look at it, and I'll deal with it in time. The trust account
18 is Item 2.

19 **MR. HERMAN:** Yes, Your Honor. We have made a report
20 to the Court. And, in addition to the court trust account,
21 we're pleased to indicate that at this juncture the total
22 dividends on the various funds are as follows:

23 On the administration fund -- I'll round these
24 off -- \$495,000; on the settlement fund, \$3,142,000; and on the
25 attorney's fee fund, \$320,000.

1 The investment vehicle jointly agreed to by the
2 parties has worked out very well, particularly under the
3 circumstances of the economy the last two or three years. And
4 we appreciate very much the way in which the special master,
5 Mr. Juneau, has seen to the administration and coordination
6 between Deutsche Bank, the court-appointed paid master, and
7 with the parties involved.

8 And in that regard, we also jointly wish
9 Mr. Juneau and his staff a Merry Christmas and a Happy New
10 Year, and we appreciate very much the way in which they have
11 performed their duties. Certainly, any discussion that we have
12 regarding process is not in any way related to the performance
13 of Mr. Juneau or his staff, because they have been outstanding.
14 They've been cooperative. Daily, we receive information from
15 them.

16 And I can say it's a pleasure for us and our
17 staff to work with them.

18 **THE COURT:** All right. Trial schedule is the next
19 item on the agenda. There was one trial set, but my
20 understanding it's been --

21 **MR. PREUSS:** It's still on the calendar.

22 **THE COURT:** Okay. And another item is MDL mediation
23 resolution program. Let me hear from the special master in
24 that regard.

25 **MR. JUNEAU:** Your Honor, for the record, Patrick

1 Juneau, the special master. Just so we'll have up-to-date
2 information: As of this morning, there are 113 claims that are
3 actually being submitted to the medical panel. Obviously, some
4 of these are still in the review process, because more than one
5 doctor examines the file.

6 We have and will meet today, Your Honor -- I
7 have signed almost 150 motions in order, but they're individual
8 because of the HIPPA laws and so forth. And we're going to
9 meet with the representative defendant, your staff, and the
10 plaintiffs and try to work out, mechanically, how do we get the
11 order attached.

12 It's strictly an administrative matter. But in
13 view of the electronic filing requirements under the law, we
14 need to comply with that. We're going to do that today.

15 The other thing that I will mention, Your Honor,
16 that there are a significant number of claims that we
17 anticipate receiving in fairly short order because of what the
18 stepped-up procedure we instituted about two conferences ago.
19 That's expedited a receipt of the information from the special
20 master's office so we can turn it over to the panel.

21 I might add, Your Honor, that once the
22 information is received by our office, the required information
23 under the program, within one week that matter goes to the
24 panel. So that process is fully activated.

25 **THE COURT:** How long does the panel generally take?

1 **MR. JUNEAU:** You know how these doctors are, Your
2 Honor. But they usually -- it looks like we're dealing with
3 about a two-week period, because just coordinating these two
4 doctors to get it. But that really has not been a problem.

5 In the totality of the process we're talking
6 about, once everything's done according to the protocol that
7 was developed in this case, it hits our office and everything
8 is submitted that's supposed to be submitted. Things happen
9 quick.

10 So what we've done is try to look at the back
11 side of the process to try to expedite the things that need to
12 be done in terms of briefing under the protocol that's set
13 forth in the term sheet according to the records and have to be
14 submitted deficiencies. That's the thing we're really working
15 on getting cleared up, and we've made substantial progress in
16 that regard.

17 I guess the ultimate point I'm driving at here,
18 Your Honor, because institution of those processes, I think
19 you're going to see, in short order, a lot quicker matters
20 being submitted to the panel. But the panel is not the problem
21 insofar as getting it to the panel and them having to make the
22 decision. They've been very, very productive in that regard.

23 **THE COURT:** So you have 113 claims that have been
24 submitted to the panel thus far?

25 **MR. JUNEAU:** Yes, sir.

1 **THE COURT:** How many of those were found for the
2 plaintiff and how many found for the defendant?

3 **MR. JUNEAU:** Here are the numbers in that regard.
4 The breakdown is as follows: There were six claims determined
5 to be eligible; there were 79 declared not to be eligible; and
6 28 are in panel review as we speak.

7 **THE COURT:** How many in review, 29?

8 **MR. JUNEAU:** 28.

9 **THE COURT:** 28?

10 **MR. JUNEAU:** Yes, sir. And one last number, Your
11 Honor, there are 195 cases that have totally cleared any
12 deficiencies, information's being submitted and we're waiting
13 on the brief that is required on the term sheet from the
14 defendants. As soon as those are received, those 195 are ready
15 for submission to the panel.

16 **THE COURT:** So that's in addition to the 113?

17 **MR. JUNEAU:** That's in addition to the 113.

18 **THE COURT:** Now, how many of the ones that are
19 eligible, not eligible were there -- they need unanimity and
20 then when there's no unanimity, then a third person was brought
21 in? How many of those were there?

22 **MR. JUNEAU:** There were ten cases that resulted in
23 tie votes, if you will.

24 **THE COURT:** Uh-huh.

25 **MR. JUNEAU:** And of those ten, four were declared to

1 be eligible. So if you look at the totality of those numbers,
2 that's four that came from those split decisions. I've already
3 indicated to the Court that six were declared eligible.

4 That would mean there were four that came from
5 the split decisions were declared eligible; and there were two
6 that didn't have any splits, we just took in totality declared
7 to be eligible. That's how the six is arrived at.

8 **THE COURT:** Okay. How many total do you feel that
9 we're going to be dealing with?

10 **MR. JUNEAU:** Well, we have 696 death claims, Your
11 Honor. And of the personal injury claims received as Tier
12 II and III, those not specified, that's 3,674.

13 One of the procedural problems is this, Your
14 Honor: A lot of these claims, even though they're listed like
15 that -- and this is just my observation -- really would fall in
16 an administrative claim category.

17 But the way they're submitted is not an
18 expedited form. It's the full claim form. And if they submit
19 them like that, we are obliged to have those cases actually
20 totally reviewed, report the deficiency, if there are
21 deficiencies, whatever the deficiencies are, and then submit
22 that to an actual medical panel, because that's what they're
23 asking be done.

24 What that really does is when you do that, it
25 extends the process, you know, of the reviews. It just takes

1 time to do that, and that's just one of the inherent processes
2 matters that we've attempted to address. We've attempted to
3 address that, Your Honor.

4 We brought this up, I think, last time or before
5 in some matters where we thought it was just obviously was
6 clearly without any question, undoubtedly, you could just look
7 at the pure submission, was purely an administrative claim.

8 And in an effort to try to address those, from
9 our standpoint, but not waive anyone's right for a medical
10 review and so forth, at least it triggered those, and at least
11 the defendant at that point, then it has the option of getting
12 a reduced briefing schedule, because that's really all that
13 would be required under that circumstance. And they have done
14 that, and we're in the throws of dealing with that now.

15 That's that group of cases that I told you I
16 think there's going to be a thrust of cases hitting us. We've
17 dealt with Tracie on those, and that seems to be working fairly
18 well.

19 All of that's designed to get the ultimate, the
20 things that we've got to get addressed. More specifically,
21 these death claims and personal injury claims that have got all
22 the information, we want to get to those cases. We don't want
23 to hold up those cases in the process. And that's,
24 essentially, what's going on.

25 **THE COURT:** Okay. Any comment from anybody on

1 statistics? Everybody agrees with those statistics?

2 **MR. HERMAN:** Yes, Your Honor.

3 **THE COURT:** All right. Anything further on the
4 mediation resolution program?

5 **MR. HERMAN:** Not from plaintiffs, Your Honor.

6 **THE COURT:** Okay.

7 **MR. PREUSS:** No, Your Honor.

8 **THE COURT:** What about pro se, the next item on the
9 agenda?

10 **MR. HERMAN:** There will be a hearing, as I
11 understand, already set on dismissing the number of pro se
12 claimants on January 3rd, 2007. The curator, Attorney Robert
13 Johnston, has signed the order -- excuse me -- provided notice
14 of the court-signed order to all pro se plaintiffs.

15 **THE COURT:** Any input on that process? Is this
16 working, not working, needs to be something done with it, or is
17 it working?

18 **MR. HERMAN:** I spoke with Bob Johnston about ten days
19 ago. He was not in, but I spoke to the person in his office
20 who is handling it and they have had really no problems. It
21 seems to be going along fine.

22 **THE COURT:** Anything from the defendants on that?
23 Any problem that you see?

24 **MR. IRWIN:** No, Your Honor. I think they're all
25 reasonably working them out.

1 **MR. JUNEAU:** And, Your Honor, Patrick Juneau, for the
2 record. Mr. Johnston's office has been a participant and
3 regularly speaks with all of us on our weekly calls on
4 Thursday. So he's up to date on everything that we're talking
5 about here.

6 **THE COURT:** An emergency motion for attorney's fees
7 is still -- that's --

8 **MR. HERMAN:** Still continuing.

9 **THE COURT:** Okay. We'll continue those.

10 Anything more on the agenda that anybody needs
11 to talk about?

12 **MR. HERMAN:** No, Your Honor.

13 **THE DEPUTY CLERK:** Thursday, February the 8th.

14 **THE COURT:** How about Thursday, February 8th?

15 **THE DEPUTY CLERK:** 8:30 and 9:30.

16 **THE COURT:** It doesn't matter. Either call in or in
17 court. Do we need to be in court or call in?

18 **MR. HERMAN:** Your Honor, we'll confer --

19 **THE COURT:** Why don't you discuss it, confer and then
20 let me know.

21 **MR. HERMAN:** -- about the motion.

22 As far as February 8th is concerned, that's fine
23 with plaintiffs.

24 **THE COURT:** What about call in or in person, does
25 anybody have any feelings on that?

1 **MR. HERMAN:** Your Honor, my feeling is it depends on
2 when Your Honor wants to hear whatever motions we file under
3 seal and the response time necessary for defendants to respond.

4 **THE COURT:** Okay.

5 **MR. PREUSS:** The 7th would work better, if that's
6 possible.

7 **MR. HERMAN:** I'm not available on the 6th or the 7th.

8 **MR. PREUSS:** Well, I can make it work.

9 **THE COURT:** Make it work, okay. All right.

10 What I'll do is I'll put it in person. Call me
11 if we need to change it to a telephone conversation.

12 **MR. HERMAN:** Thank you, Your Honor.

13 **THE COURT:** All right. Thank you all. And, again,
14 from the Court's standpoint, I wish all of you and your
15 families Happy Holidays.

16 **MR. HERMAN:** May I approach on another matter?

17 **THE COURT:** Sure, sure.

18 **(WHEREUPON, the Court was adjourned.)**

19

20

21

22

23

24

25

CERTIFICATE

I, Jodi Simcox, RMR, Official Court Reporter for the 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.

Jodi Simcox, RMR
Official Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25