

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

	:	MDL NO. 1355
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION	:	SECTION: L
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	:	JUDGE FALLON
	:	MAG. JUDGE AFRICK
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THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER NO. 2

Following the initial pretrial conference held on Thursday, September 28, 2000, the following order is issued:

I. INTRODUCTION:

It is not yet known how many attorneys will eventually join this litigation, but we can assume it will be a large number. As attorneys involved in a multidistrict case, you will probably be laboring together for some time in the future with work progressively becoming more complicated and exacting. Some of you know each other and some are complete strangers. Undoubtedly each has a different style and personality. It is likely that during the course of this litigation your working relationship will occasionally be strained, communication derailed, and mutual trust questioned. The just and efficient resolution of this litigation will depend in large measure on the way you as attorneys comport yourselves and overcome the temptations and trepidations inherent in a case of this magnitude.

Prominent in MCL 3d at Section 20.21 is the following reference to courtesy and professionalism:

The added demands and burdens of complex litigation place a premium on professionalism. An attitude by counsel of cooperation, professional courtesy, and acceptance of the obligations owed as officers of the court is critical to the successful management of the litigation.

The Court expects, indeed insists, that these two words – "Courtesy" and "Professionalism" – permeate this proceeding from now until this litigation is concluded. The Court record should never be the repository of ill chosen words arising out of a sense of frustration over real or imagined issues. Because of the high level of competence and experience displayed by the attorneys who attended the initial conference the Court is confident that this objective will be achieved without judicial intervention.

II. FILING OF PRE-TRIAL ORDER No. 2

A copy of this Order shall be filed in each case transferred to this District and shall apply to all such cases removed to or transferred to this Court. In cases subsequently filed, a copy will be provided by the Clerk to each Plaintiff at the time of filing the complaint. In cases subsequently removed or transferred to this Court, a copy will be provided by the Clerk to each new party upon removal or transfer.

III. MOTIONS

A. Notice of Substantive Motions

Except for unusual circumstances as determined by the Court or when a ruling is required on a shortened basis, substantive motions shall not be brought for hearing at any time other than

a regularly scheduled status conference, to be set from time to time by the Court. A substantive motion is one which involves legal issues and is outcome determinative, such as a motion for summary judgment or class certification, etc.

B. Length of Briefs

Briefs in support of, or in opposition to, any motions may not exceed twenty (20) pages without leave of Court. Reply briefs shall be limited to fifteen (15) pages without leave of Court.

C. Briefing Schedule

Absent an Order of the Court, briefs in response to motions shall be filed twenty-one (21) days after the date of service. Any replies thereto shall be filed within ten (10) days after service of the response.

In order to be heard at a regularly scheduled status conference, motions must be fully briefed at least one week before the conference.

D. Telephone Status Conferences

Status Conferences may be conducted by telephone at the Court's discretion by prior arrangement with the Court's chambers, provided that all interested parties are available and receive at least forty-eight (48) hours notice. In an emergency, the Court may shorten the notice requirement. Telephone conference calls will often serve as an efficient substitute for Court appearances, as for example, where counsel desire to present short arguments and obtain an immediate ruling. The Court itself may initiate conference calls on procedural or scheduling matters.

IV. SERVICE OF DOCUMENTS

A. Orders

Henceforth, the Clerk of Court shall forward only to Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel a copy of each order or other document normally served by the Clerk. Service on Liaison Counsel shall be considered service on all parties.

B. Pleadings, Motions, and Other Documents

A party filing a pleading, motion, or other document shall provide five (5) copies to Plaintiffs' Liaison Counsel and five (5) copies to Defendants' Liaison Counsel. A copy of the document shall also be submitted to Liaison Counsel on a disc or CD-ROM in either WordPerfect format or Microsoft Word. Service on Plaintiffs' Liaison Counsel constitutes service on all Plaintiffs' Counsel and Plaintiffs who are unrepresented. Service on Liaison Counsel for the pharmaceutical Defendants constitutes service on Johnson & Johnson and Janssen Pharmaceutica. Service and distribution by Liaison Counsel to other attorneys of record shall be by overnight courier service or telecopier, reserving to any receiving counsel the right to waive, in writing, such receipt.

C. Electronic Service / Web Site / Virtual Depository

Plaintiffs and Defendants are to confer as to whether electronic service of documents is appropriate in these actions and/or whether a web site and virtual depository would be helpful and advance the course of this litigation. At the appropriate time, counsel for the parties through their representatives shall report to the Court regarding these matters.

V. ORGANIZATION OF COUNSEL

A. Plaintiffs' Liaison Counsel

The Court designates Russ Herman to be Plaintiffs' Liaison Counsel.

The responsibilities of Plaintiffs' Liaison Counsel shall be the following:

1. to serve as the recipient for all Court orders;
2. to coordinate service and filings;
3. to maintain and distribute to co-counsel and to Defendants' Liaison Counsel an up-to-date service list;
4. to receive and distribute pleadings, orders, and motions by overnight courier service or telecopier within two days after receipt, unless such service has been waived, in writing, by a receiving counsel.
5. to establish and maintain a document depository to be available to all plaintiffs counsel;
6. to maintain and make available to all plaintiffs counsel of record at reasonable hours a complete file of all documents served by or upon each party (except such documents as may be available at a document depository);
7. to carry out such other duties as the Court may order.

Liaison Counsel shall be entitled to seek reimbursement for costs expended at the time and in a manner approved by the Court.

B. Plaintiffs' Steering Committee

1. Formation

It is the Court's intent to appoint a Plaintiffs' Steering Committee ("PSC") to conduct and coordinate the discovery stage of this litigation with the Defendants' representatives. Applications/nominations for the PSC positions must be filed as an original and one copy with the Clerk's Office on or before October 10, 2000. A copy must also be served upon counsel

named in the attached list on the day of filing. The main criteria for membership in the PSC will be: (a) willingness and availability to commit to a time consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation.

Applications/nominations should succinctly address each of the criteria below as well any other relevant matters. No submissions longer than three (3) pages will be considered. The Court will only consider attorneys who have filed a civil action in this litigation.

Objections may be made to the appointment of a proposed applicant/nominee. Nevertheless, the Court will entertain only written objections to any application/nomination. These must be filed with the Clerk in an original and one copy on or before October 17, 2000. The objections, if there be any, must be short, yet thorough, and must be supported by necessary documentation. As with the application/nomination, any objection must be served on all counsel appearing on the attached list on the day of filing.

2. Responsibilities

The PSC will have the following responsibilities:

a. Discovery

- (1) Initiate, coordinate, and conduct all pretrial discovery on behalf of all Plaintiffs who file civil actions which are consolidated with the instant multidistrict litigation known as "MDL-1355, *In re Propulsid Products Liability Litigation.*"
- (2) Develop and propose to the Court schedules for the commencement, execution, and completion of all discovery

on behalf of all Plaintiffs.

(3) Cause to be issued in the name of all Plaintiffs the necessary discovery requests, motions, and subpoenas pertaining to any witnesses and documents needed to properly prepare for the pretrial of relevant issues found in the pleadings of this litigation. Similar requests, notices, and subpoenas may be caused to be issued by the PSC upon written request by an individual attorney in order to assist him/her in the preparation of the pretrial stages of his/her client's particular claims.

(4) Conduct all discovery in a coordinated and consolidated manner on behalf of and for the benefit of all Plaintiffs. With regard to depositions, only two members of the PSC, or counsel duly authorized by them, may question each Deponent, provided that the second questioner is not repetitious. No attorney for Plaintiffs may be excluded from attending the examination of witnesses and other proceedings. Such attorney may suggest questions to be posed to Deponents through the designated PSC members provided that such questions are not repetitious.

b. Hearings and Meetings

(1) Call meetings of counsel for Plaintiffs for any appropriate

purpose, including coordinated responses to questions of other parties or of the Court. Initiate proposals, suggestions, schedules, or joint briefs, and for any other appropriate matter(s) pertaining to pretrial proceedings.

- (2) Examine witnesses and introduce evidence at hearings on behalf of Plaintiffs.
- (3) Act as spokesperson for all plaintiffs at pretrial proceedings and in response to any inquiries by the Court, subject of course to the right of any Plaintiff's counsel to present non-repetitive individual or different positions.

c. Miscellaneous

- (1) Submit and argue any verbal or written motions presented to the Court or Magistrate on behalf of the PSC as well as oppose when necessary any motions submitted by the Defendants or other parties which involve matters within the sphere of the responsibilities of the PSC.
- (2) Negotiate and enter into stipulations with Defendants regarding this litigation. All stipulations entered into by the PSC, except for strictly administrative details such as scheduling, must be submitted for Court approval and will not be binding until the Court has ratified the stipulation. Any attorney not in agreement with a non-administrative

stipulation shall file with the Court a written objection thereto within ten (10) days after he/she knows or should have reasonably become aware of the stipulation. Failure to object within the term allowed shall be deemed a waiver and the stipulation will automatically be binding on that party.

- (3) Explore, develop, and pursue all settlement options pertaining to any claim or portion thereof of any case filed in this litigation.
- (4) Maintain adequate files of all pretrial matters and have them available, under reasonable terms and conditions, for examination by Plaintiffs or their attorneys.
- (5) Prepare periodic status reports summarizing the PSC's work and progress. These reports shall be submitted to the Plaintiffs' Liaison Counsel who will promptly distribute copies to the other Plaintiffs' attorneys. The periodic status and progress reports must be forwarded to all Plaintiffs' attorneys at intervals of no fewer than sixty (60) days commencing from October 1, 2000, and more frequently in the event of significant matters appropriate for communication.
- (6) Perform any tasks necessary and proper for the PSC to

accomplish its responsibilities as defined by the Court's orders.

- (7) Perform such other functions as may be expressly authorized by further orders of this Court.
- (8) Reimbursement for costs and/or fees for services will be set at a time and in a manner established by the Court after due notice to all counsel and after a hearing.

C. Defendants Liaison and Lead Counsel

The Court hereby designates Thomas F. Campion and Charles F. Preuss as Defendants' Co-Lead Counsel, and James B. Irwin, V, as Liaison Counsel for the pharmaceutical Defendants. Defendants' Liaison Counsel will have the responsibilities described in Section V(A) 1 - 7 of this Order as it pertains to his respective group.

VI. PLEADINGS AND MOTIONS SCHEDULE

A. Certification of Class Action

At the appropriate time, the parties are to establish a schedule, or request the Court to establish a schedule, for the filing of any class certification motions.

B. Pleadings and Motions Schedule

The parties through their respective representatives are to confer to propose a schedule for filing Rule 12 motions, a Master Complaint, and any motions for summary judgment.

VII. DISCOVERY – SCHEDULE

A. Document Production Schedule

1. By November 15, 2000, Defendants will produce a copy of the NDA on disk. If the NDA is not available on disk by that date, Defendants will make a copy of it available for inspection and examination beginning on that date.

2. Production of all other documents will occur on a rolling basis on dates to be set by the Court.

B. Document Production Status Report

Three days in advance of the next regularly scheduled Status Conference, the parties shall submit to the Court a written report on the status of the document production, including documents located overseas, a projected schedule for completion of discovery, and a preliminary proposal scheduling the disclosure of fact witnesses, the conduct of fact witness depositions, and any other matters which will advance the course of the litigation.

VIII. DISCOVERY – DOCUMENT REQUESTS AND INTERROGATORIES – GENERAL RULES

A. Attempt to Resolve Disputes

To avoid unnecessary litigation concerning discovery disputes, counsel are directed to meet and confer before filing a discovery motion. In any motion filed, counsel for the moving party must certify that a good faith effort was made to resolve the dispute. Discovery motions shall be presented to the Magistrate for resolution.

B. Preservation of Evidence

1. Preservation

Each party and its respective officers, agents, servants, employees, subsidiaries and attorneys shall preserve all devices, tangible things, documents, and other records.

Preservation includes the obligation not to alter any such thing as to its form, content or manner of filing. Each party shall notify in writing (which in this context excludes e-mail) its respective officers, agents, servants, employees, subsidiaries and attorneys of their obligation to preserve documents in accordance with this Order.

Before any devices, tangible things, documents, and other records which are reasonably calculated to lead to admissible evidence are destroyed, altered, or erased, counsel shall confer to resolve questions as to whether the information should be preserved. If counsel are unable to agree, any party may apply to the Court for clarification or relief from this Order upon reasonable notice.

2. Scope

The scope of this Order is limited to tangible things and documents containing information potentially relevant to the subject matter of this litigation. Any tangible thing, document, or information described or referred to in any request or response made during this litigation shall, from the time of the request or response be treated for purposes of this Order as containing potentially relevant information unless and until the Court rules such information to be irrelevant.

Counsel are directed to confer to resolve questions as to what documents are outside the scope of this Order or otherwise need not be preserved. They should also confer

regarding the possibility of an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the Court for clarification of or relief from this Order upon reasonable notice. A party failing to object in writing within forty-five (45) days after receiving written notice from another party that specified documents will be destroyed or otherwise altered pursuant to routine policies and programs shall be deemed to have agreed to such destruction.

"Document" shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape record, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained, including but not limited to: notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, e-mail, computer storage tapes, computer storage cards or discs, books, journals, ledgers, statements, reports, invoices, bills, vouchers, worksheets, jottings, notes, letters, abstracts, audits, charts, checks, diagrams, drafts, recordings, instructions, lists, logs, orders, recitals, transcripts, telegram messages, telephone bills and logs, resumes, summaries, compilations, computations, and other formal and informal writings or tangible preservations of information.

Notwithstanding any other provisions of this Order, as of the date of this Order, persons may generate documents in the future without preserving dictation, drafts, interim versions, or other temporary compilations of information if such documents would not have been preserved in the ordinary course of business.

C. Confidentiality

The parties are to confer to establish procedures for managing materials for which they

intend to seek restrictions on access.

D. Inadvertent Disclosures

The inadvertent production or disclosure of any privileged, confidential or otherwise protected document shall not be deemed either a general waiver of privilege, confidentiality or work product protection as to the document inadvertently produced or disclosed. In the event of inadvertent disclosure of any document, promptly upon discovery of such inadvertent disclosure the producing party may notify any party receiving the document that production was inadvertent, and that the producing party intends to move the Court for a protective order with respect thereto. Upon receipt of such notification, the receiving party shall treat the document as confidential, and shall not disclose the document to any other person or use the document for any purpose in this litigation. Upon finding that the document is privileged, confidential, or otherwise protected and that its production was inadvertent, the Court may direct the return of the document and all copies thereof to the producing party, preclude the use of the document and any information contained therein for any purpose in this litigation, and order such other relief as the Court deems necessary and appropriate. Before making application to the Court for such relief, the producing party shall confer with the receiving party in an attempt to resolve informally any dispute regarding the inadvertent production.

E. Document Depositories

Each side may establish a document depository. Within twenty (20) days after the initial conference, each side shall identify to the other the location and mailing address of any depository which it has established. Each side shall bear the cost and administer its own depository. All documents disclosed and produced pursuant to this Order shall be produced to

the appropriate document depository. Each side shall develop and submit to the Court a protocol for maintaining its depository which shall address the location, filing system, access, copying, logs, and inventory records.

F. Numbering System and Indexing of Documents

The parties are to confer to establish a system for identifying by a unique number or symbol each document produced or referred to during the course of this litigation.

G. Legibility of Documents

Each producing party shall take reasonable steps to assure that the copies of the documents it produces are legible. To the extent a producing party cannot or does not produce a legible copy, it shall make the original document(s) available for inspection and copying.

H. Authentication

The parties are to confer to establish procedures for authenticating documents.

IX. DISCOVERY – DISCLOSURES

The parties are to confer regarding the production of materials contemplated by Fed. R. Civ. P. 26(a).

The specific items, documents, witnesses, and dates not otherwise provided for in this Order will be addressed by discovery plans or schedules issued by the Court after conferring with counsel.

X. DISCOVERY – INTERROGATORIES AND DOCUMENT REQUESTS

A. Master Set

On or before thirty (30) days after the Defendants' initial disclosures:

1. Plaintiffs may propound a single master set of interrogatories and document requests addressed to the Defendants; and
2. The Defendants may propound a single master set of interrogatories and document requests to the Plaintiffs.

Responses and answers shall be served and made within thirty (30) days after receipt of the discovery requests.

While the parties may be asked to identify potential fact witnesses relating to liability, they are not to be asked contention interrogatories at this time. For purposes of these and any subsequent interrogatories, the limitations on the number of interrogatories of Fed. R. Civ. P. 33(a) shall not apply. Nevertheless, each party has the right to file a motion for a protective order if they believe the master sets of interrogatories and requests for production are overly burdensome or duplicative.

B. Additional Document Requests

The parties are to confer, and attempt in good faith to agree on any additional document requests not described above. In the absence of agreement, no further document requests may be propounded to Plaintiffs or Defendants without an order of the Court.

C. Supplementation of Responses

The supplementation of responses required by Fed. R. Civ. P. 26(e) shall be made by the parties sixty (60) days from the date of their initial disclosures, and every sixty (60) days

thereafter.

D. Document Subpoenas to Non-Parties

Commencing upon entry of this Order, any party may serve subpoenas on non-parties for the production of documents without testimony pursuant to Fed. R. Civ. P. 45.

E. Plaintiffs' Fact Sheets

Plaintiffs and Defendants through their respective representatives are to confer regarding a suggested Plaintiff Fact Sheet and agree on a proposed procedure for obtaining timely responses.

XI. DISCOVERY – DOCUMENT PRODUCTION PROTOCOLS

The parties are to confer to establish guidelines for the production of documents in hard copy and in electronic format.

XII. DISCOVERY – DEPOSITIONS

The parties are to confer to suggest guidelines for the conduct, noticing and scheduling of depositions. Disputes arising during the taking of depositions that cannot be resolved by agreement among counsel, and that if not immediately resolved will disrupt the discovery schedule significantly or require a rescheduling of the deposition, may be presented by telephone to the Magistrate. The submission of the issue and the Court's corresponding ruling will be recorded as part of the deposition.

XIII. DISCOVERY – ASSERTION OF PRIVILEGE IN RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

A party who, relying on any privilege or the work product doctrine, does not produce all

relevant or requested documents in response to a request for production of documents or a subpoena, must state that it is invoking a privilege. A party who invokes a privilege must specify which privilege or doctrine it is invoking and supply to the court a privilege log describing the documents to which a privilege is asserted. The parties are to confer to determine the format of and timing for production of privilege logs.

XIV. DISCOVERY – FAILURE TO DISCLOSE

A party's failure to either produce or identify as withheld pursuant to privilege a relevant document may be viewed by the Court as an infraction of its orders, justifying appropriate sanctions. Upon learning that there are any additional relevant documents which have not been produced or identified, a party is under an obligation to promptly make known the existence of the documents, including the reason for its failure, and submit the documents to the opposing party, or if withheld under a claim of privilege or protection, identify the documents and the corresponding privilege.

XV. “MEET AND CONFER” ISSUES

The parties are to report to the Court within three (3) days of the next Status Conference as to the status of all “meet and confer” issues referenced herein. Two(2) days before each status conference the parties are to submit to the court a proposed agenda for the conference.

New Orleans, Louisiana, this 2nd day of October, 2000.

 /s/ Eldon E. Fallon
ELDON E. FALLON
UNITED STATES DISTRICT JUDGE