

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

IN RE: : MDL 1355 "L"
:
PROPULSID PRODUCT LIABILITY : New Orleans, Louisiana
LITIGATION : Thursday, January 18, 2001
:
2:40 p.m.
:.....:

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

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Proceedings recorded by mechanical stenography; transcript produced by dictation.

1 reasonable access fee can be arranged with the provider and
2 approved by the Court and guaranteeing that those lawyers
3 before they get access agree to the confidentiality order
4 which is in place in the MDL so that the defendants feel
5 secure that the confidentiality is maintained as is directed
6 by previous orders.

7 To that end the plaintiffs' legal committee would
8 accept from the defendants' side any reasonable restrictions
9 which they feel they need in order that the virtual depository
10 comply with the Court's, with the joint order which we have
11 submitted to the Court and which is in effect.

12 We have some concern about placing depositions in
13 the virtual depository as well as subjective work product. I
14 believe that we have filed a motion with the Court, and that
15 motion may be set by Your Honor to be heard.

16 I believe that the expert who will testify to that
17 issue can briefly in five minutes illustrate the security
18 problems attendant to virtual depositories. In sum, we would
19 like to move forward with it. We intend to move forward with
20 it. The defendants need some protection, and I will ask them
21 to address the issue.

22 THE COURT: Let me hear from defense.

23 MR. CAMPION: Thomas Campion speaking on behalf of
24 the defendants on this point. Your Honor, you asked us to
25 give reconsideration to our position which was not favorable

1 to us. We have done so and that is reflected in our letter to
2 you of January 16th in which the subject of appropriate
3 security and some other issues which I do not think would be
4 in dispute, and we are prepared to accept whatever costs of
5 depository is.

6 We believe that Mr. Herman and his colleagues were
7 moving in good faith in that direction, and the primary
8 concern now seems to be not as between plaintiffs and the
9 defendants but whether the security systems can be put in
10 place by the company which would manage the interrogatories in
11 a satisfactory manner.

12 THE COURT: I see this as an opportunity for you to
13 get into it, if a decision has to be made as to what is posted
14 in the virtual depository. You can fine tune it later. I
15 understand that we have to re-evaluate as to what is posted,
16 or how it is posted. But I don't see any reason not to go
17 forward with it.

18 Let me give you an article that I found helpful on
19 the use of depositories on the Internet in large-scale
20 litigation.

21 It is at 27 William Mitchell Law Review 615 (2000).
22 The article discusses some potential problems, some things you
23 want to be heads up about, some security concerns and that
24 sort of matter. Hopefully, it will be of help to you.

25 Where do we go with this then if the plaintiffs have

1 the ball? Where do we go with it?

2 MR. CAMPION: At the present time we have turned
3 over in CD form approximately 48,000 pages. We have turned
4 over in hard copy another 12,000 or so pages in connection
5 with next week's deposition.

6 And we have duly marked all the pages in the CD
7 material as to what is non-confidential so that the plaintiffs
8 are in position to do that.

9 We provided an index on the CD form. So these
10 materials are not available to the plaintiff. I suggest that
11 plaintiffs' group and the defendants meet with the vendors to
12 see who can best system this and that we find something that
13 is satisfactory.

14 THE COURT: It would seem to me to be, particularly
15 helpful from the defendants' standpoint; if there are two or
16 three state court proceedings that are functioning outside of
17 the MDL, it would not seem cost effective to have to produce
18 two or three copies of the same four million documents rather
19 than to produce CD ROMS or electronic copies one time. At
20 least that's what I'm seeing as a potential savings for the
21 defense. For both sides there is a great advantage to have
22 ready and meaningful access to the information.

23 MR. CAMPION: The defense agrees, Your Honor.

24 THE COURT: Okay, thank you.

25 MR. HERMAN: In that vein, Your Honor, under the

1 same subject more or less, we have a joint motion from
2 plaintiffs and the defendants regarding production of hard-
3 copy documents that the defense and plaintiffs have signed off
4 on.

5 I have the original for you, and if I may present
6 that.

7 THE COURT: Sure.

8 (Counsel Herman hands document to the Court.)

9 MR. IRWIN: Your Honor, Jim Irwin for defendants.
10 That joint motion would be referenced as Item 12 in the joint
11 report.

12 THE COURT: Okay.

13 Let's go to the second item, plaintiffs' profile
14 forms authorizations. Does the defendant want to speak on
15 that?

16 MR. IRWIN: Yes, Your Honor. Jim Irwin again.

17 I'm pleased to report to the Court that we have an
18 agreement on that. The last two issues had to do with the
19 timing and some language involving securing psychiatric
20 records. We have worked out an agreement on that.

21 Any time there is an issue about psychiatric
22 records, we will submit them, submit that request to the
23 plaintiffs first. And if they feel that they cannot for
24 whatever reason authorize us to seek production of psychiatric
25 records, we will then come to Your Honor or to Magistrate

1 Africk to address the issue.

2 I assume we have agreed on 45 days, and the order
3 that we submit to you will request that the plaintiffs whose
4 cases are currently docketed in this court respond to the
5 patient profile form within 45 days.

6 And thereafter any cases that are docketed 45 days
7 after the consolidation order is issued, that would be the
8 timing we would suggest to Your Honor.

9 THE COURT: Okay, is that consistent with
10 plaintiffs' view?

11 MR. HERMAN: Yes, Your Honor, we have made that
12 agreement.

13 I would request the Court consider when we present
14 the order for patients' fact forms that it be placed on the
15 web site. All of our mailing we are citing every lawyer,
16 every communication electronically to the Court's web site.

17 And I think the order regarding the patient fact
18 form is of such gravity that Your Honor may wish to consider
19 posting it.

20 THE COURT: Yes, give that to me because that's
21 important. I think people ought to have that immediately.

22 Let me go to the third point then, the master
23 complaint and answer.

24 MR. HERMAN: Yes, Your Honor, we had a drafting and
25 generic research committee meeting last week, plaintiffs did.

1 And every lawyer on that committee, and we represent some
2 dozen states -- when I say states, they have several cases
3 but there are a dozen states.

4 The Lexicon case, which now mandates us, and Your
5 Honor is familiar with that, and all cases go back to the
6 ethicasy of a master complaint to such an extent that we do
7 not feel that we should be required to file one.

8 THE COURT: Has anybody any input on the
9 legislation which supposedly is going to be introduced, or has
10 it already been introduced.

11 MR. IRWIN: Yes, Judge. We have studied that
12 recently.

13 There was the multi-state, multi-jurisdiction
14 format. There was also the fairness, the class action
15 fairness legislation during the Clinton administration.

16 Both of those bills did not make it through either
17 one side or the other side of Congress.

18 THE COURT: The House but not the Senate, I think.

19 MR. IRWIN: Yes sir. And the indication from the
20 President was that he was inclined to veto them. Whether they
21 are revived or not is anyone's guess.

22 And if one of those bills, multi-forum/multi-
23 jurisdiction bill with some definitions of a mass tort would
24 provide or would give to the transferee court original
25 jurisdiction to try on the merits, we feel, however, that

1 there are still great benefits to be gained from a master
2 answer, and we would be very interested in a master complaint.
3 We would be very interested in pursuing and continuing to
4 explore that.

5 Even before the Lexicon decision, most cases held
6 that the transferee court still retained jurisdiction in the
7 cases, had to be remanded back on the merits to the transferee
8 court under 1407.

9 Yet, the man for complex litigation has for many
10 years recommended the use of a master complaint.

11 We feel that when the time comes for motions to be
12 presented to the Court, that the parties' efforts in trying to
13 craft a master complaint will not have been wasted.

14 And while we don't necessarily feel it has to be
15 done right now, we think it is a worthy effort, and we would
16 like to see continued, we would like to continue to work on
17 that.

18 MR. HERMAN: I would add that the reasoning that we
19 bring this issue before you is that the plaintiffs' act with
20 trepidation on the master complaint.

21 The defendants do not. Particularly where the
22 individuals on the MDL are charged with drafting that
23 complaint, it is to take into consideration now the laws of
24 the 50 states and comply, because these are diversity cases
25 with every issue from the statute of limitations to preemption

1 to special issues in drafting a master complaint.

2 At one time you could draft a master complaint and
3 it would be so general in nature that at the end of the case
4 it would go back if it ever went back and it would be an
5 opportunity for revision.

6 But in the meantime now with Lexicon we would suffer
7 motions to dismiss based on causes of actions that we assert
8 for 50 states.

9 And when that case gets back, it may be or
10 conceivably could be or could go back gutted.

11 We will endeavor to work on a master complaint. But
12 Lexicon really does cause us some problems.

13 Now, I don't have any special intelligence of where
14 the U.S. Senate is. But historically I am very aware of why
15 the bill did not pass.

16 And the bill I will predict will not pass if there
17 is a total peremption of state class actions inherent in that
18 bill. That was the sticking point.

19 There were certain issues in which all class actions
20 were going to have original jurisdiction in federal court
21 presumably under the commerce clause, and we would be fighting
22 for ten years on due process questions and whether the
23 commerce clause was sufficient to preemptorily stall state
24 class actions.

25 So I don't see anything happening right now on the

1 horizon. At least that is my view.

2 I believe that if we were giving additional time --
3 for example, I don't have the figures of how many cases are on
4 the way -- there are 538 MDL plaintiffs; there are 49
5 federal cases; there are 64 state cases.

6 Every day we are getting a MDL transfer from another
7 state which is a diversity-based complaint. I would think at
8 least if the Court feels it is within its discretion to
9 promote economy, et cetera, then at least we not be required
10 to submit a master complaint for 60 days.

11 THE COURT: How does that time frame meet with the
12 defendants?

13 MR. IRWIN: I think that's acceptable, Your Honor.

14 MR. HERMAN: And we will attempt to revisit it
15 before then.

16 And also I call for the Court's attention for our
17 brothers across the aisle that there are several class
18 certification complaints filed in the MDL. We will be looking
19 at those and are looking at those now, and we would expect
20 that since those are class certification complaints that where
21 they can be consolidated into a complaint that they will be.
22 Where they can't, we will just call the Court's attention to
23 that.

24 THE COURT: It would seem to me that consolidation
25 by state would be doable. I can't think of a reason not to

1 have them consolidated by state or perhaps even be region
2 depending on the similarity of the applicable law.

3 MR. HERMAN: We will put our best efforts forward
4 and report back to you.

5 THE COURT: All right, we will pass that for 60
6 days then.

7 Third is the update of the document production --
8 fourth, I mean update of the document production.

9 MR. PREUSS: Chuck Preuss, Your Honor, for the
10 defendants. It is much as Tom Campion stated a moment ago: To
11 date, we have produced roughly 460,000 documents. We produced
12 them in CD ROM form with objective codings. We have been able
13 to work out those issues successfully with the plaintiffs'
14 side.

15 We have also produced hard copies in connection with
16 the depositions next week to make sure that that goes as
17 smoothly as possible, and we are producing with various states
18 simultaneously which we have produced here to the various
19 states because there have been document requests to try to
20 spread that out as quickly as possible. That's the current
21 status, Your Honor.

22 THE COURT: Okay, anything from the plaintiffs on
23 production?

24 MR. HERMAN: No, Your Honor. We understand that
25 the defendants will provide us with their objections to our

1 initial request for production by January 31st. And at that
2 time we will have more discussions with the defendants about
3 sequencing of the production of documents.

4 THE COURT: Let's go to the next one, the Veri-Law
5 Electronic Service.

6 MR. HERMAN: Veri-Law is up and running. We have
7 asked that all the lawyers, we have sent out the additional
8 order that they provide us with e-mail addresses. There have
9 been very few problems with it. And between Veri-Law and web
10 site, Your Honor has placed in the new electronic access to
11 the district courthouse, and we have not heard of any
12 particular problem.

13 THE COURT: We have a link on our web site to Veri-
14 Law, but I don't think we have it in place yet, at least the
15 specifics of it. I will ask my staff to contact and
16 coordinate that.

17 MR. HERMAN: Yes, Your Honor.

18 THE COURT: Okay, counsel, I'm sorry, you have
19 something?

20 MR. IRWIN: Yes, I wanted to mention one other
21 thing in connection with Veri-Law: They did ask us, and Mr.
22 Davis and I concurred with them in this request, that we
23 submit to Your Honor a supplemental order requiring that any
24 registered user get an e-mail address.

25 So we have agreed on that language, and we will be

1 submitting it to the Court.

2 THE COURT: Okay, do you see any problem with
3 this from the standpoint of any of the people just not having
4 it?

5 MR. IRWIN: The problem we had, and I hope I am
6 answering your question, is that a number of people selected
7 fax delivery. And while that functionality is available, it
8 is substantially more expensive than pushing an e-mail
9 button.

10 So in order to provide the uniformity of electronic
11 service and after all that electronic service application in
12 Veri-Law, you asked that we submit this order to Your Honor.
13 We looked at it. It was the same order that is in the
14 Vitamins Anti Trust litigation and that is why we are doing
15 it.

16 THE COURT: All right, let's hear about state
17 liaison counsel.

18 MR. HERMAN: Yes, Your Honor. I would like to
19 introduce to you the members of the liaison committee:
20 Richard Arsenault from Alabama; Walter Dumas from Baton Rouge.
21 We have made a joint recommendation that Dawn Barrios from New
22 Orleans be added; Mr. Isaac Byrd from Mississippi and his
23 partner, Hiawatha Worthington; Mr. Barry Hill from West
24 Virginia and Chris Seeger from New Jersey.

25 And we understand that as of today Judge Cardenas

1 has accepted Your Honor's invitation and will name David
2 Jacoby to this committee.

3 THE COURT: Well, I'm glad to have each of you
4 aboard. I appreciate your willingness to serve, and I assure
5 you that my intention is to give you access, to look upon you
6 as a full-blown member of the litigation team.

7 I want to hear from you. If you have any comment,
8 any ideas, any suggestions, give them to me. I am sensitive
9 to your concerns. I also appreciate the fact that you
10 sometimes have difficulty in coordinating various aspects of
11 this litigation.

12 You speak not only for yourself but for other people
13 who are not here. So some of your comments might be more in a
14 representative capacity than in a personal capacity.

15 I am aware and sensitive to it. But I do look to
16 you for input. As I have said, if you have any ideas, give
17 them to me. I want to hear from you.

18 MR. HERMAN: There are, Your Honor, beginning on
19 January 23rd, MIS depositions noticed in New Jersey and cross
20 noticed here in the MDL Mr. Palkanon (phonetically) and Mr.
21 Davis from the MDL with our expert consult will attend those
22 depositions.

23 We understand that we will be operating under MDL
24 guidelines. I do not intend to duplicate questions. We have
25 an agreement with the defendants that should we need to go

1 further than those depositions allowed, we will be able to
2 notice them and take those depositions in the MDL. There are
3 depositions noticed in New Jersey and in a Texas state court
4 action for January 30th and January 31st.

5 The MDL has reserved its right, and we will attend
6 that deposition but not participate. We want time to review
7 documents and consult with our expert.

8 Some of us will attend because we also have state
9 cases but will not actively participate unless we reach some
10 stipulation or agreement with defense counsel in the mean-
11 time.

12 As I reported to the Court, I will be meeting with
13 Mr. Plastalla (phonetically) Saturday morning who is liaison
14 counsel in the New Jersey state case, and Pat Croft on January
15 23rd here in New Orleans and hope to resolve any participation
16 problems in those depositions.

17 THE COURT: One of the challenges, in this type
18 litigation *is coordination.*

19 And a lot of effort is put on coordination. And
20 there are peculiar problems with coordination. Egos get
21 involved; turf battles occur, and expenses creep in.

22 But everyone knows who has been there that that's
23 the tail and not the dog. If you are consumed by those
24 problems, you waste effort, material resources and other
25 resources, and nobody gets to the real substance of the case.

1 These matters are important. They have to be tied
2 up, but they really have to be tied up early on because if
3 they continue to plague you it is like running a race with 100
4 pounds on each leg. It just slows you down and nobody wins.

5 So I think just a word to the wise. It is helpful
6 if not essential to get these out of the way so that you can
7 direct your resources on really significant matters and don't
8 get distracted by initial comments or whatever.

9 MR. HERMAN: Your Honor, I already have so many
10 pounds on each leg I'm going to take your remarks to heart.

11 And I just want to say we are confident because the
12 defense counsel has acted with us in good faith, and we have a
13 reservation of rights.

14 We will move on with these and get through them and
15 hope we will reach something that will work for the whole
16 case.

17 THE COURT: Thank you.

18 Any comments from defense?

19 MR. IRWIN: I think Russ looks great, Your Honor.

20 THE COURT: Okay.

21 MR. HERMAN: I think you look great.

22 THE COURT: What do we have here? Let's proceed to
23 number nine: electronic document production.

24 MR. HERMAN: We have a difference on this. We will
25 file our motion. I think we filed a brief. We hoped that the

1 defendants would respond by February 5th.

2 We have submitted also an affidavit from an expert
3 and an expert CV with a motion and would like to get a hearing
4 early in the early stages on this, because we believe after
5 spending a full day with a consultant that the electronic
6 production is an extremely important issue.

7 I think the defendants' position -- and I will let
8 them state it -- I think that -- well, I will let you
9 state your position.

10 MR. IRWIN: Judge, we alluded to it a little bit
11 the last time we were here on December 20th. They have filed
12 their motion, and we are now looking at these depositions next
13 week which we believe will be very helpful in creating a
14 record as to what compusystems is like, what is available,
15 what is feasible.

16 And we understand that the dates have been suggested
17 to the Court, and we would only suggest that we try to be
18 flexible with those dates. Everyone wants to move the case
19 along.

20 We have a tentative date of a hearing to address
21 this on February 15th, the next monthly status conference.
22 That's makeable and that's fine.

23 We feel that if the record that is developed as a
24 result of these depositions will allow us an opportunity to
25 meet with Mr. Herman and his group and talk about specific

1 areas that we might be able to agree on, then it may be very
2 productive to try to do that.

3 And so we would only say to the Court that let's see
4 how these depositions go. Let's see if we can work out some
5 of this. And we would ask the Court to consider our position
6 flexible.

7 THE COURT: All right, let's move the date. I will
8 be flexible or at least understanding of the problem.

9 Let me give you some citations which I have found to
10 be somewhat helpful. A lot of the material now being
11 generated at least in 1999/2000 law reviews deal with these
12 issues.

13 One in the 2000 federal court law review two is
14 entitled: Computer-based federal court law review discovery
15 in Federal Litigation. I think this is a good article.

16 Another is, Allocating Discovery Costs in the
17 Computer Age found in 57 Washington and Lee Law Review 257.
18 This is an interesting approach. Another is Discovery of
19 Electronic Documents found in 29 Sum Brief 64.

20 And finally Electronic Evidence: To Produce or Not
21 To Produce, That is the Question. 21 Whittier Law Review 463.

22 These are the primary ones that I have looked at
23 that at least circle the wagons on these issues. I suggest
24 you look them over. When we get to talking about it, let me
25 hear from you on the various relevant aspects raised in those articles.

1 Next, 30(b)(6) depositions?

2 MR. HERMAN: Plaintiff and defense counsel met
3 before the hearing today. We are going to attempt to -- we
4 have searched, we have provided in advance but not served a
5 30(b)(6) deposition.

6 We will meet with defense counsel, and we will begin
7 scheduling those depositions with defense counsel. And
8 hopefully we can begin scheduling those this February. I
9 think that we have a basic understanding that it is plaintiff
10 and MDL and defense counsel on the 30(b)(6). I don't think
11 there is any matter right now for Your Honor to resolve.

12 The status of the response objections to document
13 requests to defendants: We asked defendants, and then they
14 will be able to respond by January 31st.

15 Once they do, we will meet and confer and see what
16 we can resolve. And what we can't we will put on the agenda
17 for the next meeting, Your Honor.

18 The proposal to the Court on MDL state coordination,
19 we had several discussions with defense counsel, but I think
20 in light of the telephone conference today and upcoming
21 meetings that I recommend that I make a report to the Court
22 and defense counsel jointly should be able to do that on the
23 afternoon of the 23rd of January. And that may afford Your
24 Honor who will direct us, and we will hope to submit something
25 jointly to you.

1 THE COURT: All right, I understand you have some
2 meetings scheduled with some of the attorneys in state
3 litigation either now or in the next couple of days. Let me
4 hear from you sometime next week. Liaison counsel can get on
5 it and let's talk about it.

6 MR. HERMAN: What I propose is that on Monday to
7 reach your office and defense counsel for a time and report on
8 the meeting in New Jersey. And then with regard to the
9 meeting on the 23rd, which Mr. Arceneaux and Ms. Barrios will
10 attend with me with Mr. Petrof, report to you that afternoon
11 and to defense counsel jointly.

12 THE COURT: Just to mention, before we started the
13 meeting, I had a telephone conference with Judge Cardenas in
14 New Jersey which was attended by liaison counsel and also some
15 New Jersey counsel.

16 And it just seems to me that we have an opportunity
17 here; we have litigation in federal court and litigation in at
18 least three state courts, and from the standpoint of the
19 discovery aspect of the case, there are common issues.

20 They are probably identical issues with some
21 modification dealing with some state procedural laws perhaps
22 and other minor differences.

23 But primarily they are the same, and it just seems
24 to me that litigation profits, the system profits, certainly
25 the litigants profit by just having you go through the

1 discovery process one time instead of two or three or four
2 times. I don't think it is to anybody's benefit to go through
3 it over and over again.

4 So if I can facilitate that approach, I want to do
5 so. But everyone should know that that's another burden on
6 the Court. It is not for the Court's benefit, it is really
7 for the litigants' benefit, for the system's benefit. I'm
8 willing to do it, but I need your help on it particularly
9 liaison counsel, I need your help on it.

10 Let's go to the next topic. Anything else with
11 document production? Protocol.

12 MR. IRWIN: I think that this order that was
13 submitted earlier will address that.

14 MR. HERMAN: The motion and briefing on electronic
15 discovery was filed yesterday. I believe it covers some of
16 the same issues in these law review articles.

17 THE COURT: Right. I had an opportunity to read
18 it. And I'm waiting for the response.

19 MR. HERMAN: We would like an opportunity after we
20 read these law review articles.

21 THE COURT: Let me hear from you on it.

22 MR. HERMAN: The last thing is we have received
23 from I guess 60 percent of the participant lawyers their
24 billing and cost records. We need a week to submit those
25 sealed to the clerk. Some have asked for additional time. We

1 anticipate the rest to be in by the end of the month, and then
2 they should be filed timely every month thereafter.

3 THE COURT: I think once we get over the first one,
4 we will have some routine and it will be easier in the future.
5 So it is just the first one which is the hardest to get in
6 shape.

7 Okay, anything else from anybody? Does defense
8 counsel have anything?

9 MR. IRWIN: No. Thank you, Your Honor.

10 THE COURT: Plaintiffs or liaison any comments or
11 observations?

12 (No response from counsel.)

13 THE COURT: Okay, folks, thank you. Court will
14 stand in recess.

15 (Status conference concluded at 3:16 p.m.)
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REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter, United States District Court, Eastern District of Louisiana, the foregoing to be a true and correct transcription of his stenograph notes taken on Thursday, January 18, 2001.

New Orleans, Louisiana, this ____ day of _____.

David A. Zarek
Official Reporter, Section "A"