

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCT
LIABILITY LITIGATION

MDL NO. 1355
NEW ORLEANS, LOUISIANA
THURSDAY, JULY 18, 2002
9:00 A.M.
SECTION "L" (4)

HEARING

BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

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P-R-O-C-E-E-D-I-N-G-S

(9:00 A.M. - MORNING SESSION)

(THURSDAY, JULY 18, 2002)

(COURT CALLED TO ORDER)

THE CLERK: Everyone rise.

THE COURT: Be seated, please.

Good morning, ladies and gentlemen.

Call the case, please.

THE CLERK: MDL 1355. In re: Propulsid Products
Liability Litigation.

THE COURT: Counsel make their appearance.

MR. MURRAY: Stephen Murray for the PLC, Your Honor.

MR. IRWIN: Good morning, Your Honor, Jim Irwin for
defendants.

THE COURT: We're here for our monthly status meeting.
Prior to the meeting, I've had an opportunity to meet with
Liaison Counsel to get ready for the meeting. We have discussed
some issues, but we will go over the joint report which they
have submitted.

The first item is the rolling discovery update.

MR. IRWIN: Your Honor, as I believe we've reported
to you, our main contact on this case, Mr. Conour, has been
suffering from the virus lately and that explains some of the
blanks we have in the report. I can say he's doing a little
better in the last couple of days, I've had some contact with

1 him.

2 The domestic e-mails have been completed. I think, as
3 we indicate in the report there, there are going to be some
4 Beerse e-mails that will be delivered today or tomorrow to Mr.
5 Davis. He and Mr. Murray and I spoke about that last night and
6 that Mr. Davis and Mr. Buchanan and Mr. Conour are meeting again
7 on the other issues involving e-mails and we will report back to
8 the Court shortly about that.

9 THE COURT: Do the Plaintiffs have any comment on that?

10 MR. MURRAY: Nothing to add, Your Honor.

11 THE COURT: The second item is State Liaison Counsel.
12 I understand there's a substitution.

13 MR. MURRAY: Your Honor, Mr. Walter Dumas has resigned
14 from the State Liaison Committee. Mr. Herman has requested that
15 Sam Davis of New Jersey be appointed in his stead.

16 THE COURT: Anyone have any objections to Mr. Davis?

17 MR. IRWIN: No objection, Your Honor.

18 THE COURT: Let Mr. Davis be appointed, and please
19 alert him to that appointment.

20 MR. MURRAY: Yes, Your Honor.

21 THE COURT: Number 3 is the patient profile forms and
22 authorization.

23 MR. IRWIN: Your Honor, the status of the patient
24 profile forms and authorizations are reported in paragraph 3 of
25 the report, and we have not decided yet whether we will pursue

1 further motion practice with respect to those remaining issues.
2 It is not large in comparison to the previous issues we've had.

3 THE COURT: Do give some thought to it because we're
4 moving into an area where we ought to have only those
5 individuals who are interested in pursuing the case. It's my
6 feeling that often times you get to a particular point where
7 people who have not participated or not interested all of a
8 sudden become interested or think they may be or should be
9 interested and this begins to slow matters down. So let's be
10 conscious of that. We're getting into an area in which we're
11 moving toward the completion of the case and beginning to see an
12 end in sight. So let's get the people only who want to complete
13 the voyage.

14 MR IRWIN: We'll take a look at it and report back to
15 Your Honor on August 23 about that.

16 THE COURT: Okay. The fourthll item is: Subpoenas to
17 the FDA.

18 MR. MURRAY: Your Honor, the PLC has reviewed the FDA's
19 return on the subpoena decus tecum. There are some unresolved
20 issues were respect to that review. There are gaps in the Bates
21 numbers that we can't explainmm, where there are Bates stamped
22 numbers or pages which are missing from the production not
23 explained by the privileged log, but we'll follow up with the
24 FDA and attempt to resolve that.

25 THE COURT: The FDA has been cooperative. I appreciate

1 the cooperation up to this point but we need them to cooperate
2 completely in this situation, so if there is some
3 misunderstanding try to clear it up. If it isn't a
4 misunderstanding and there is some reluctance get me the name
5 from somebody from the FDA and I will order them to come to
6 court and explain it to me.

7 MR. MURRAY: Thank you, Your Honor.

8 THE COURT: Thank you.

9 Service list of attorneys.

10 MR. IRWIN: Yes, Your Honor. We have the list this
11 month, the most current list. I have a copy for your clerk, a
12 copy for the State Liaison Counsel and for Mr. Davis.

13 THE COURT: The next item is ongoing studies, subpoena
14 to BevGlen.

15 MR. MURRAY: Your Honor, with respect to some of the
16 defendant studies, there are pending issues as to
17 decertification of some of those documents. There seems to be
18 at least a potential that we can resolve that issue with respect
19 to the CIS-NED-32, but as to the remaining studies identified in
20 the defendants response for production of documents, there may
21 be the need for some motion practice. But we are continuing to
22 discuss those issues.

23 THE COURT: All right. The parties should understand
24 that we have an MDL case which involves multiple state court
25 actions. The state court actions have either be suspended or

1 held up either by virtue of the voluntary cooperation of the
2 state court judges or by virtue of the orders of this Court, but
3 I don't want to impede those actions from going forward. The
4 litigant in these state court cases will need certain material
5 to proceed forward. I want to make sure that they have that
6 material. I am sensitive, however, to proprietary problems that
7 this disclosure might present. Some time there's difficulties
8 in certain proprietary interest regarding how the material is
9 accumulated or whatever, but the basic feeling of the Court is
10 that that material has to be made available to people who want
11 to try the cases and who need the material to do so. We can
12 construct court orders or seek the help of the state courts in
13 holding that material confidential, but the bottom line is that
14 necessary materials are going to have to be distributed in some
15 form or fashion.

16 MR. MURRAY: And we'll be filing the motion to
17 decertify by the end of the week, Your Honor.

18 THE COURT: All right.

19 MR. IRWIN: Your Honor, we will work with the PSC on
20 the CIS-NED-32 issue. We may be able to resolve that. If we
21 are unable to resolve the wholesale declassification we will
22 file a response brief and it is our view that we do not require
23 oral argument on that.

24 THE COURT: And we will set those motions for two weeks
25 hence. I'll decide the matter on the briefs. Anything else on

1 that area?

2 MR. MURRAY: No, Your Honor.

3 THE COURT: Okay. Then motions for class certification
4 is the next item on the agenda. We dealt with one motion for
5 class certification but there is another aspect to that
6 particular motion. I suspended the matter holding it in
7 obedience until we had future motions on the issue of nation wide
8 class certification.

9 MR. IRWIN: Your Honor, all sides are interested in
10 resolving the remaining issues surrounding class certification.
11 We agree that further production of the e-mail information is
12 appropriate, and we suggest that when we return for the August
13 meeting that we may be able to present the court with a more
14 finite schedule for resolving that but the two are related. The
15 delivery of the e-mails and the scheduling of the class
16 certification.

17 THE COURT: Plaintiffs' and defendants' respective
18 request for production of documents is the ninth item. Any
19 comments there?

20 MR. IRWIN: Your Honor, we are, and Mr. Davis and Mr.
21 Murray and I spoke about this last night, the fifth request for
22 production of documents is something that we are also talking to
23 them about in connection with the 30(b)(6) deposition that is
24 being scheduled, and I don't know whether we'll be able to
25 resolve that or not but we are talking about that in connection

1 with the 30(b)(6) deposition and I think we will be able to
2 resolve the issues surrounding the 30(b)(6) deposition.

3 THE COURT: What's a reasonable date for concluding
4 that or bringing it to the Court's attention so the Court can
5 conclude it?

6 MR. IRWIN: I think with respect to the fifth request
7 for production of documents if we do not have it resolved as
8 between ourselves by August 23, that the Court should then be in
9 a position to resolve it.

10 I do believe that we will be able to agree upon a
11 procedure for the 30(b)(6) deposition. That is a deposition of
12 an individual who will speak to the 800 studies. The Court will
13 recall the exhibit we produced basically containing a break out,
14 a spread sheet of all the 800 studies. They have asked for a
15 30(b)(6) deposition of a witness to explain all of those
16 studies, so obviously we have to go to a great deal of effort to
17 prepare that witness so that that witness can speak accurately
18 about that large amount of data.

19 Mr. Campion has spoken to Mr. Herman and to Mr. Davis
20 about actually putting together a data base for that deponent
21 to refer to in providing that 30(b)(6) deposition. I believe we
22 will agree on all of that and right now the ball, so to speak,
23 is in the court of PSC with respect to the information that
24 we're going to assemble in that data base for that deponent.

25 THE COURT: Let me know a week before the next hearing

1 as to whether or not that matter has been resolved. If not, I
2 will resolve it at the time of the hearing.

3 MR. IRWIN: Yes, sir.

4 MR. MURRAY: Your Honor, there's also pending the PLC's
5 motion to compel with regard to the Norcisapride documents and
6 discovery, and I believe I heard Your Honor say that you would
7 set that for argument at the next status conference.

8 THE COURT: That's my understanding that that's the
9 date that's convenient and satisfactory with both sides that at
10 the next status conference we will have oral argument on that
11 particular motion at that time.

12 MR. IRWIN: Yes, Your Honor.

13 THE COURT: Okay. After if meeting then we'll go into
14 that for malt.

15 MR. MURRAY: Thank you, Your Honor.

16 THE COURT: Motions for a remand. That's removed from
17 the agenda.

18 Item 11, deposition procedure.

19 MR. IRWIN: Yes, Your Honor, we have agreed to AN
20 amendment, a supplemental pretrial order for pre-trial order
21 number 7. Pre-trial number 7 was Your Honor's order with
22 respect to the taking of depositions and the conduct at
23 depositions. This is a supplement to that that provides for the
24 handling of certain exhibits. It's been signed by Plaintiffs'
25 Liaison Counsel and Defendants Liaison Counsel, and I will give

1 the original and a copy to your clerk.

2 THE COURT: The next item is the Shell/Morganroth
3 Study.

4 MR. MURRAY: Your Honor, the defendants have requested
5 production of some of the data used by Dr. Morganroth. We have
6 followed up with Dr. Morganroth, he says that he doesn't have
7 those EKG interpretations currently in his possession. The
8 belief is that they were likely returned to Dr. Shell. The PLC
9 will have representatives at Dr. Shell's office to go through
10 Dr. Shell's materials and see if they can be located and we
11 promised a response to the Defendants Liaison Counsel by the end
12 of next week.

13 THE COURT: That's important because it is necessary
14 for their preparation. As I understand it, they've taken the
15 deposition; the deponent referred to certain matters.
16 Defendants now need to see those documents he; mentioned or
17 relied upon. It's important that that be accomplished. Let me
18 hear from the defendant.

19 MR. CAMPION: Your Honor, if I may just supplement. We
20 appreciate the e-mail that counsel for the PSC gave us recently
21 about Dr. Morganroth, understanding that he has no retained
22 documents. Our concern concerns both Morganroth and Dr. Vincent
23 who are two co-authors. We have arranged, when we stood up for
24 some of the third party subpoenas, to end up getting a
25 certificate of compliance or noncompliance, as the case may be,

1 and we would be looking to the same from the PSC respecting the
2 Shell study.

3 THE COURT: All right. The next item is 30(b)(6)
4 depositions regarding defendants studies.

5 Mr. Irwin: Your Honor, I think we touched upon that a
6 few moments ago in connection with the previous agenda item.

7 THE COURT: And the trust account is the next item on
8 the agenda.

9 MR. MURRAY: Your Honor, there are some issues
10 currently under discussion with respect to what documents need
11 to or what records need to be maintained by the depository bank
12 and for whose benefit those records would be maintained, and
13 therefore discussions as to who bear the cost of that, but we
14 haven't resolved those issues but we're working on them.

15 THE COURT: Okay. Bring it to my attention the week
16 before the next status conference. I'll resolve it at that
17 conference, if it hasn't been resolved.

18 MR. MURRAY: Yes, Your Honor.

19 THE COURT: The next item is the motion to dismiss
20 Forshag's Pharmacy. I ruled on that. That can be removed from
21 the agenda.

22 The next item is: Declassifying documents. I think we
23 touched on that a moment ago or do we need to discuss it any
24 more?

25 MR. IRWIN: I think the only thing we could add to that

1 here, Your Honor, is that this specifically relates to the
2 declassification of the documents that were attached to the
3 motion for class certification by the PFC. We agree to the
4 declassification of all but seven, and Mr. Davis and I spoke
5 about this last night. They have sent us a list back of the
6 exhibits that we are agreeing to, and we're working on
7 submitting to Your Honor an order that would provide for the
8 declassification and I still believe that Mr. Davis' group has
9 not quite decided where they stand on the seven, but those are
10 the only remaining issues.

11 THE COURT: What's a reasonable time that that can be
12 completed? Mr. Davis, what's a reasonable time that you can
13 complete this?

14 MR. DAVIS: Your Honor, those seven items will be
15 subject to the motion to declassify. It will be included in
16 that motion. What we are working on is getting an order to you
17 and we should do that relatively soon. That order will allow
18 for the declassification of a number of items and attached to
19 that order will be a listing of those items. It's a matter of
20 just having that listing confirm to be acceptable.

21 THE COURT: Let's do that in a week then. One week
22 from day.

23 The motion to withdraw counsel of record in the Anthony
24 Scott case is the next item on the agenda.

25 MR. IRWIN: Excuse me, Your Honor. I was making a

1 note.

2 THE COURT: Motion to withdraw in the Anthony Scott
3 case. That's a case, as I remember, out of Florida.

4 MR. IRWIN: Yes, sir. Our recommendation to the Court
5 is, having consulted with the Plaintiffs Liaison Counsel on
6 this, that we will consult with Mr. Levin who has a draft motion
7 and order for the withdrawal that has been used in other cases.
8 We will attempt to develop an order that we can agree on our
9 concern is that there should be a record that effectively
10 establishes that there has been communication between counsel
11 and the client establishing the client's knowledge of the
12 obligation to comply with PTO Number 9.

13 Further, it is the defendants' request that any order
14 that would permit the withdrawal of the attorney also include in
15 it a clear specification that it is not to the prejudice of the
16 defendants rights to pursue its PTO-9 remedies against and pro
17 se plaintiff. And further, that we be provided with an accurate
18 address of the plaintiff in the event the attorney is permitted
19 to withdraw.

20 THE COURT: I agree with your observation and request.
21 I think that that's consistent with the Court's previous ruling
22 and comments throughout litigation, so get with Mr. Levin and
23 see where we are with it. Let me know in a week from today as
24 to what can be done.

25 MR. IRWIRN: We will, Your Honor.

1 THE COURT: The report indicates that with regard to
2 the trial schedule, DLC has provided PLC with a draft of the
3 pre-trial order as to cases originating in the Eastern District.
4 As I mentioned to counsel last time, I do recognize that one of
5 the problems or criticisms, I should say, throughout the country
6 with the MDL procedure, is that once the case is transferred to
7 the MDL nothing is heard from or about that particular case for
8 a long, long, if ever, time. It's the black hole comment, that
9 is a criticism that some attorneys sometimes make about MDL
10 litigation. It generally comes from attorneys who are not on
11 the various committees. I want to be sensitive to that. In
12 those cases that are ready for trial early on or who feel that
13 they can be tried or are willing to be tried, want to tried, we
14 ought to give them an opportunity to express their interest to
15 the Court and peel them off from the MDL and let them go their
16 way toward trial. Consistent with that view I directed counsel
17 to get to me a list of cases from Louisiana. That is to say,
18 those cases that have been filed in Louisiana in which I am the
19 trial court. I'm not the transferee court under 1407. I am
20 actually the trial court. I am willing to try any of those
21 cases that are ready for trial as soon as possible. I'd like to
22 begin trying those cases sometime in November or December of
23 this year.

24 Counsel, pursuant to the Court's direction got together
25 or are getting together an order, a pre-trial order for those

1 particular cases. I'm interested in seeing whether or not we
2 can group those cases. There are about 60 or thereabout cases
3 originally filed in Louisiana. We ought to be able to group
4 them in terms of death cases, infant cases or personal injury
5 cases or some grouping that makes sense, and then the parties
6 should rank those cases and then we can begin trying them in
7 some fashion that will hopefully give you some input as to what
8 juries feel is an appropriate result so that you can use that
9 information to help you resolve the entire litigation. At the
10 appropriate time, I would like to get with counsel and talk
11 about the method of trial, the type of trial, the procedure for
12 selecting jurors; the question of whether or not we issue
13 questionnaires to prospective jurors; how we do the voir dire
14 and things of that nature. The cases originally filed outside
15 of Louisiana that are ready for trial may involve some
16 additional elements or problems. We have to decide whether or
17 not those cases ought to be spun off, ought to be released from
18 the MDL to go their way in the separate states or whether those
19 individuals if they are willing to try the case in Louisiana
20 with the consent of all of the parties can try them in
21 Louisiana.

22 Let me hear any comments from parties on this item or
23 any of my comments.

24 MR. IRWIN: Well, Your Honor, we are encouraged by
25 these developments and we have worked with the Plaintiffs

1 Liaison Counsel to respond to Your Honor's comments in that
2 regard and we will continue to do so. I hope that by the time
3 we come back in August that we will have some more concrete
4 proposals for Your Honor.

5 We will get a list of the 67 cases to the Court. We
6 have a draft list that we have given to Plaintiffs Liaison
7 Counsel. We probably need to refine it as among ourselves and
8 we will get it to Your Honor.

9 MR. MURRAY: Your Honor with respect to the 67
10 Louisiana filings, Bob Wright of the PLC has undertaken to
11 confer with the lawyers representing each of those plaintiffs
12 and he is obtaining data in the form of a -- a form to be
13 completed by those lawyers which will assist the parties in
14 determining which may be appropriate for trial settings.

15 THE COURT: Okay. Let me hear from counsel in two
16 weeks from today on that list and we can decide which cases are
17 going to trial in November and December.

18 MR. MURRAY: Mr. Wright would have been here, Your
19 Honor, but he had a brother who passed away.

20 THE COURT: Okay. The next item on the agenda is the
21 appointment of a mediator.

22 MR. MURRAY: Your Honor, at the Court's suggestion the
23 parties met and discussed the potential for agreement on a
24 mediator who would be acceptable to both sides. To that end,
25 Mr. Irwin and I exchanged a number of names in order to identify

1 qualified people who might be acceptable to both sides. We were
2 able to identify a number of such people, but after preliminary
3 telephone contacts and availability discussions it was agreed
4 that we would interview two who we both felt were very well
5 qualified and a Mr. John Perry of Baton Rouge and Patrick Juneau
6 of Lafayette. They accommodated us by coming into New Orleans
7 and we interviewed them at length. Both sides were comfortable
8 with both men, but when we took into account the availability
9 issues, we agreed that Mr. Juneau would be the best choice.
10 Just by way of information to people who are here, Pat Juneau is
11 an attorney of considerable litigation experience located in
12 Lafayette, Louisiana. In recent years he served as special
13 master in both federal and state courts in mast disaster
14 litigation. Most notably he has been the special master in the
15 Nortex train derailment train gas release in New Orleans East
16 that was litigated in the Civil District Court for the Parish of
17 Orleans, a tremendous number of claimants, great complexity.
18 Mr. Juneau handled a large number of functions for the court,
19 including the mediation and girding of the individual damage
20 claims. That litigation is winding up and so he now has some
21 availability that he can extend to this court and to the parties
22 to assist us in mediation, and so I think both sides are very
23 comfortable in recommending Mr. Juneau to Your Honor for
24 appointment as mediator in this litigation.

25 THE COURT: I know both Mr. Perry and Mr. Juneau. I

1 have litigated with them in my other life, and I have also had
2 experience with them since I've been on the bench. I think
3 highly of both of them. Mr. Juneau particularly has a lot of
4 experience and a lot of ability and I'm delighted to hear that
5 both of you all agreed upon him.

6 MR. IRWIN: Your Honor, I would only add on behalf of
7 the defendants, that we echo Mr. Murray's comments. We also
8 compliment Mr. Murray's industry in working with us to review
9 all of these candidates. We all spent a great time deal of time
10 on this.

11 As we said in the joint report we have for Your Honor a
12 short resume from Mr. Juneau, he provided it to us. We're all
13 familiar that Your Honor is aware of his excellent
14 qualifications but I'll hand a copy to your clerk and Mr. Davis.

15 THE COURT: All right. Any input or comments from
16 State Liaison Counsel on any of that material?

17 MR. ARSENAULT: We obviously share everyone's
18 sentiments with regard to Mr. Juneau. I think he was involved
19 in the MDL litigation with Judge Haik involving combustion.
20 He's past president of the Louisiana Association of Defense
21 Counsel, an excellent candidate.

22 THE COURT: Anything further from Liaison before we
23 move on? Anything of interest to you? Any problems that you're
24 having? Any difficulties that you can bring to the Court's
25 attention that I can resolve?

1 MR. ARSENAULT: No new developments since the last
2 status conference.

3 THE COURT: And you're satisfied with the appointment
4 of the substitute state liaison counsel, okay.

5 Anything else? Anything further?

6 MR. IRWIN: No, sir.

7 THE COURT: And the date for the next conference is
8 August the 23rd at 9:00 o'clock and following that conference,
9 we'll have argument on the motions.

10 Anything further from anyone?

11 MR. MURRAY: Yes, Your Honor. The PLC has requested
12 from Johnson and Johnson and Janssen production of any and all
13 indemnity agreements between those companies and pharmacy
14 defendants in any matter pending in the MDL. Mr. Campion, as I
15 understand it, has agreed to produce those to Your Honor for in
16 camera inspection.

17 THE COURT: All right. I assume that they're all the
18 same. Produce one of them for an in camera inspection, I'll
19 take the comment from plaintiffs counsel as an informal motion
20 for production, I'll treat it as such. Give the indemnity
21 agreement to me and then I'll make the decision as to whether or
22 not it's producible.

23 MR. IRWIN: Yes, Your Honor.

24 MR. MURRAY: And also, Your Honor, we have conferred
25 with counsel in the West Virginia cases where the pending

1 motions for dismissal of the Rite Aid pharmacy interests are
2 pending and can advise the Court that he's comfortable with the
3 setting on those motions within 30 to 45 days.

4 THE COURT: We'll do that then. I'll set them within
5 that period of time.

6 MR. MURRAY: That you, Your Honor.

7 THE COURT: Anything further from anyone?

8 (NO RESPONSE)

9 THE COURT: Thank you, gentlemen.

10 MR. IRWIN: Thank you, Your Honor.

11 THE CLERK: All rise.

12 Court's in recess.

13 * * * * *

14 C E R T I F I C A T E

15
16 I, Victor D. Di Giorgio, Official United States Court
17 Reporter in and for the Eastern District of Louisiana, do hereby
18 certify that the foregoing proceedings were taken down by me in
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Official U.S. Court Reporter