

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCT MDL 1355
LIABILITY LITIGATION Section "L"
New Orleans, Louisiana
Thursday, May 22, 2003
9:00 a.m.

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

APPEARANCES:

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1 the case and their indication was they did not desire to
2 appeal. Of course the appeal period is still open, but in
3 order for the PLC to act or not act, we're going to need
4 something from them in writing indicating that.

5 THE COURT: If we need a 54(b), let me know and I'll do
6 the 54(b). I don't think we need it, but if we do need it,
7 we'll do that. Anything else on that?

8 MR. IRWIN: Judge, I guess this one is a little bit
9 unusual, it's a single case and it's as described in paragraph
10 18. Apparently plaintiff counsel in this case filed a motion
11 to withdraw in the transferee court. That motion was granted
12 in the transferee court. The case was actually docketed here
13 at the time. And in the meantime we went about the business of
14 trying to get the patient profile form answered, and we were
15 met with the information that he had withdrawn, was no longer
16 counsel.

17 It is our view that he should be informed that he
18 still is counsel and must necessarily file a motion here in the
19 MDL, and then we will take up the question anew concerning the
20 response to the PPF.

21 THE COURT: I agree with that. I think once the MDL
22 court receives the transfer no further action is appropriate
23 from the transferor courts. So I'll do a minute entry advising
24 the party of that, and I'll send it directly to him, a copy to
25 the Plaintiffs' Committee and a copy to you.

1 MR. HERMAN: Plaintiffs' position is that your Honor's
2 ruling is clear that the Daubert motion was restricted to that
3 case only. The defendants believe that it has universal
4 application. And I don't think the matter, I don't know, we
5 put it on here because it's of concern to both sides and there
6 is a disagreement, but I don't know that it calls for the court
7 to do anything at this time.

8 MR. IRWIN: Your Honor, we agree with Mr. Herman's
9 observation on that point. We put it on the agenda to bring
10 the issue to the court's attention. We are talking about it.
11 I don't believe any side is in any position to make any
12 recommendation to the court at this point, but it is something
13 that we need to keep on our radar screen and we are going to
14 continue discussions with the Plaintiffs' Steering Committee on
15 that.

16 THE COURT: Okay. Next item is Motion to Withdraw in
17 the Matter of Donald Anderson.

18 MR. HERMAN: Your Honor, with regard to Daubert, we
19 are, the PLC will be requesting from plaintiff lawyers who
20 actively involved in representing the clients that have gone to
21 judgment advising us as to whether they desire to appeal the
22 Daubert ruling itself, and as soon as we're advised and wired
23 in we'll advise the court and opposing counsel.

24 I want to state to the court and opposing counsel
25 at this juncture, we brought this issue to the attorneys trying

1 Withdraw.

2 MR. HERMAN: This frankly, your Honor, is the most
3 troubling issue to counsel for plaintiffs on today's agenda.
4 In addition to the cases listed, I understand there are
5 approximately 300 claimants either represented directly by Bart
6 and Gallagher or other counsel where the counsel wish to
7 withdraw. Beyond individual counsels, obligations, the PLC has
8 obligations to the same folks. We're attempting to work this
9 issue out and we're going to need some time.

10 It may be that the PLC will agree to undertake the
11 handling of those matters until whatever conclusion is reached.
12 And we may not. But I would ask at this time that there be no,
13 that the court consider not granting the motion to withdraw --

14 THE COURT: You need to tell the lawyers that I am not
15 going to grant a motion to withdraw unless somebody substitutes
16 for them. I am not going to cut 200 people loose without
17 lawyers. I'm not going to do that. So they're going to be
18 representing these people either voluntarily or involuntarily
19 until somebody else comes in and substitutes for them. They
20 have to know that.

21 MR. HERMAN: We'll advise them of that. We're
22 attempting to work this out, and we'll report to your Honor
23 either before or at the next status conference.

24 THE COURT: Application of the Daubert Motion to other
25 Plaintiffs.

1 October, November, December, those months should be available.
2 I'll try to keep my calendar reasonably clear and see if we can
3 handle it in that way.

4 MR. HERMAN: Thank you, your Honor.

5 THE COURT: Thank you.

6 MR. HERMAN: There is really nothing to report on the
7 pharmacy indemnity agreements, on the VeriLaw.

8 A planning committee has met a couple of times,
9 they're still meeting, and we won't have anything to report,
10 that is the defendants or the plaintiffs jointly, until the
11 next status conference unless there is something that comes up
12 that we need your Honor's input on.

13 THE COURT: In our last monthly meeting I made
14 reference to the End Game Planning Committee, we set a meeting
15 for that committee. I met with that committee, I felt the
16 committee was moving in the appropriate direction. They have a
17 spokesman for each side, experienced, talented individuals who
18 are trying to focus on the end aspect of this litigation.
19 Hopefully they'll make some headway.

20 And I met with them again this morning, and they
21 have some future meetings set. I'll hear from them whenever
22 it's appropriate.

23 Item 15 is Patricia Robinson's deposition.

24 MR. HERMAN: No issue regarding that.

25 THE COURT: Item 16 is Bart/Gallagher Motions to

1 pick them, those are the ones that I will deal with. If you
2 don't pick any of them or fail to pick the cases, then I'll
3 pick them and set them for trial. But you folks, because of
4 your experience and professionalism and the way that you've
5 been working in the case, you've been able to get a lot done by
6 agreement. And so I'd like to give you an opportunity to
7 continue to do this, look at the cases, decide which ones are
8 ready for trial and pick those.

9 I'll require that this be done within two weeks.
10 The defendants have the responsibility of advising the court on
11 the list of cases to be tried and the lawyers in those cases.
12 When I get that information, I'll then set a status conference
13 on all of those cases with those lawyers and we'll talk about
14 cutoff dates, reasonable cutoff dates, reasonable trial dates
15 and see whether or not we can move them forward in that way.

16 Presently I'll probably try the cases myself. But
17 if that doesn't work out, then I'll enlist the support of some
18 of the other judges in the district. But presently I'll plan
19 to do it myself, and we'll get some dates and cutoff dates in
20 that fashion.

21 MR. HERMAN: Your Honor, I have no desire on behalf of
22 the PLC to delay that process, but I would ask that we have it
23 until June 13th to do that.

24 THE COURT: Let's do that by June 13th. The dates that
25 I would like to be focused on for trial dates is sometime in

1 additional motion to withdraw additional funds for the trust
2 account in order to deal with hard costs and cost contributions
3 to the common fund.

4 THE COURT: Declassified Documents is No. 9.

5 MR. HERMAN: We have nothing new on that, your Honor.

6 THE COURT: Item 10, Mediation, let me hear from the
7 defendants.

8 MR. HERMAN: I'll let Jim or Tom report on that.

9 MR. IRWIN: Your Honor, the numbers are described in
10 the joint report. Mr. Preuss is here today, and before we all
11 jump on airplanes we're going to be talking to Mr. Davis about
12 trying to pick some dates in June to resume the mediations,
13 obviously we will have to work with Mr. Juneau on that, but
14 that's the plan.

15 THE COURT: Okay. Fine. Trial Schedule is No. 9.
16 There are no cases presently set for trial on those cases that
17 have been filed in the Eastern District. I talked to counsel
18 this morning in our premeeting conference, and my feeling is
19 that the way we ought to handle trial scheduling is for the
20 parties, the plaintiffs and the defendants to get together,
21 look over those cases that are filed in Louisiana, see whether
22 or not there is some realistic grouping that can be made of
23 those cases and then decide which of those cases ought to be
24 tried.

25 I'd like you to try to pick them first. If you

1 MR. HERMAN: Thank you, your Honor.

2 With regard to other discovery issues at page 4,
3 sales force documents, their discussions between the parties as
4 to the production of electronic materials, the defendants have
5 indicated that they furnished hard copy of documents, and I
6 believe of a non-electronic nature, so those discussions we're
7 attempting to work that out.

8 With regard to Norcisapride, this has been a
9 motion, there have been continuing discussions. We have agreed
10 to some discovery on that issue, and pending completion of that
11 discovery will advise the court as to whether the motion needs
12 to be brought at all for here.

13 THE COURT: What is the reasonable time we can finish
14 that?

15 MR. HERMAN: I think we ought to be able to finish it
16 in the next four weeks.

17 THE COURT: Let's do it in a month then.

18 MR. HERMAN: And the defendants have indicated that
19 within, I believe they said a week but I think they probably
20 need ten days, to respond to with additional responses to set
21 No. 7 of the Merit Interrogatories.

22 THE COURT: Let's do it within ten days.

23 MR. IRWIN: Thank you.

24 THE COURT: Item 8 is Trust Account.

25 MR. HERMAN: Yes, your Honor, we're going to bring an

1 states, tell me whether I have the responsibility, the duty,
2 whatever to determine class certification for another state
3 before I send it back to that particular state for trial. And
4 then if not, then the Louisiana classes.

5 And I make no decision on any of those issues, but
6 those are issues that I think I need some input on.

7 MR. HERMAN: Yes, your Honor. On Request For
8 Production. First with regard to our request for admissions
9 under 803 of what the PLC indicates are business records and
10 should form exceptions to the hearsay rule, we've got responses
11 from the defendants and we're working out a mechanism to bring
12 before the court expeditiously and in a way that can be
13 facilitated, the objections and the arguments on both sides.

14 THE COURT: The procedure that would be helpful is for
15 you to give me the documents, even highlighting certain areas
16 in the documents that a party feels is objectionable or that
17 another party feels that is significant, and give me a list of
18 the documents with the objections consisting of one line, one
19 word, whatever, explaining the ground for your objection and
20 the response that the plaintiffs make and then a little line
21 for my ruling.

22 I'll try to look them over in globo, make some
23 observations and discuss the law applicable to 803(6), and then
24 I will go down the list and rule on each one of those
25 objections, make it a part of the record and we'll move on.

1 to expedite this we'll just send them a copy of the transcript
2 and they will be directly familiar with your Honor's intentions
3 and rulings.

4 With regard to No. 6. We intend to call a PLC
5 meeting on Monday, June 2nd in New Orleans. Those members that
6 can't attend we'll ask to appear by conference call.

7 At that time we're going to discuss two issues
8 regarding class certification, potential scheduling dates so
9 that I can get together with Mr. Irwin and we can work back
10 from that date.

11 Secondly, to narrow potential issues involved in
12 class cert. And we'll also handle other business at that time,
13 including a survey of cases that may be put on the trial
14 calendar. Louisiana cases that may be put on the trial
15 calendar.

16 THE COURT: Let me talk just briefly on class
17 certification. As I see it, it would be helpful if the parties
18 would discuss, first, the eligible issues for class
19 certification. There are some that are more eligible than
20 others. The other issues are (1) the potential of a national
21 class; (2) individual state classes, whether it's this court's
22 responsibility to determine whether there is a class for
23 various states; and (3) whether there is a class for Louisiana.

24 So I think it's national, I think it's several
25 states, if I've got only 30 class actions filed from various

1 With regard to the Degge Group. We plan to send
2 someone to Degge to review their documents and then determine
3 which documents we want copied. We're attempting to resolve
4 some procedural issues that Degge has placed on the table.

5 THE COURT: I thought I made myself clear with the
6 attorneys when we dealt with this issue. My feeling is that
7 the most expeditious way of resolving this matter, and Degge
8 Group should know this, is for the Plaintiff Committee to send
9 a representative to their offices, prior to this visit Degge
10 should have them put in a room or a reasonable facility the
11 documents that are at issue, let the representative for the
12 plaintiffs look them over, Degge can have a representative
13 present at the time.

14 The documents that the plaintiffs are interested
15 in should be tagged, affording Degge an opportunity to look
16 over those tagged items. If Degge finds any of those tagged
17 items objectionable, then they should make a log of those
18 items, give it to me with the items, I'll look them over.
19 Otherwise, the items that the plaintiffs express interest in
20 will be copied at the plaintiffs' expense and delivered to the
21 plaintiff. That's the easiest way of doing it.

22 Degge should be advised of that and reminded of
23 that. I thought I made it clear. If not, get to me and I'll
24 convene another conference.

25 MR. HERMAN: Thank you, your Honor. I think in order

1 Ms. Lambert's copy and I'll give Mr. Kingsdorf a copy for the
2 State Committee and I have Mr. Davis' copy.

3 THE COURT: Thank you. Third Party Subpoena Duces
4 Tecum is the fifth item.

5 MR. HERMAN: With regard, your Honor, to the subpoena
6 issue to Dr. Zipes, there is still one issue outstanding, but
7 we believe it's going to be resolved. The Ingenix --

8 THE COURT: First of all with Dr. Zipes, what's the
9 realistic period at which that can be resolved?

10 MR. IRWIN: Your Honor, I think it's a communication
11 question. There is a question about whether the documents that
12 were furnished in connection with the certification, which has
13 been supplied, included the corporate documents. I believe
14 that they did, and I just need to confirm that to Mr. Davis
15 that it included all of his corporate documents. And I think
16 there are documents in that production that consist of his PC
17 or PLC or something like that.

18 THE COURT: What's reasonable, a week?

19 MR. IRWIN: Yes.

20 THE COURT: Let's do it within a week. Thank you.

21 MR. HERMAN: With regard to Ingenix, your Honor, there
22 is no problem with that.

23 With regard to McKinsey & Company, there is no
24 problem with regard to that.

25 There is no problem with regard to Medicom.

1 THE COURT: The second item on the agenda is State
2 Liaison Counsel. I notice that we do have a representative
3 from the State Liaison Committee present. Do you have anything
4 to report?

5 MR. KINGSDORF: No, your Honor.

6 THE COURT: And could you give us your name, please.

7 MR. KINGSDORF: Bruce Kingsdorf and I'm appearing this
8 morning on behalf of Ms. Barrios, Mr. Arsenault and Mr. Capretz
9 and the State Liaison Committee.

10 MR. IRWIN: Your Honor, on item 3 of the court's agenda
11 this morning, the joint report is the subject of the patient
12 profile forms. There are 133 that are overdue and 17 coming
13 due shortly. We have prepared and I think are planing on
14 filling tomorrow the third motion that would address those 133
15 that are outstanding.

16 THE COURT: All right. For the record, the plaintiffs
17 object to their dismissal without prejudice, I will dismiss
18 them with prejudice. My feeling is that we've made every
19 effort to call to the attention of those individuals that they
20 have to take some action and take some action. Notwithstanding
21 those efforts, they have failed to do so. So it's appropriate
22 that they be dismissed from the lawsuit, file the motion and
23 I'll take that action.

24 MR. IRWIN: We will do, your Honor.

25 Next on the agenda is the Service List and I have

P R O C E E D I N G S

(STATUS CONFERENCE)

(THURSDAY, MAY 22, 2003)

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5 THE COURT: Be seated please. Good morning, ladies and
6 gentlemen. Call the case, please.

7 THE DEPUTY CLERK: MDL No. 00-1355, in re, Propulsid
8 Products Liability Litigation.

9 THE COURT: Counsel make your appearances, please.

10 MR. IRWIN: Good morning, your Honor, Jim Irwin for
11 defendants.

12 MR. HERMAN: Good morning, Judge Fallon, Russ Herman
13 for Herman Mathis and Herman, Herman Katz and Cotlar for the
14 Plaintiffs Legal Committee.

15 THE COURT: We're here today for our monthly status
16 report. I've received from the parties a proposed agenda of
17 matters to be covered, I'll take them in the order given to me.

18 The first one is Update of Rolling Document
19 Production and Electronic Document Production.

20 MR. HERMAN: We've had discussions with the defendants
21 and production is ongoing. We do have some issues between the
22 parties, but most of them are being resolved as we discussed.
23 I have nothing further to report on that issue.

24 THE COURT: Anything from the defendant on item No. 1?

25 MR. IRWIN: No comment, your Honor.

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produced by computer.

1 MR. IRWIN: That should get things going, Judge.

2 MR. HERMAN: Your Honor, I would like the opportunity,
3 if your Honor does not object, to address the court in a matter
4 of personal privilege off the record.

5 THE COURT: Sure. Let me set another date for the
6 agenda first. How about Thursday, June 26th, is that an
7 agreeable date for the parties for the next meeting? At nine
8 o'clock and I'll see the parties at 8:30.

9 Anything further, anybody? All right. Folks,
10 thank you very much. The court will stand in recess.

11 THE DEPUTY CLERK: Everyone rise.

12 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

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17 I, Karen A. Ibos, CCR, Official Court Reporter, United
18 States District Court, Eastern District of Louisiana, do hereby
19 certify that the foregoing is a true and correct transcript, to
20 the best of my ability and understanding, from the record of
21 the proceedings in the above-entitled and numbered matter.

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23

24

Karen A. Ibos, CCR, RPR

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Official Court Reporter