



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

CHAMBERS OF  
U.S. DISTRICT JUDGE: PROPULSID PRODUCTS \*  
ELDON E. FALLON LIABILITY LITIGATION \*

MDL No. 1355-"L"

New Orleans, Louisiana

Thursday, October 21, 2004

9:03 a.m.

\* \* \* \* \*

MONTHLY STATUS CONFERENCE  
BEFORE THE HONORABLE ELDON FALLON  
UNITED STATES DISTRICT JUDGE

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

## Morning Session

(Thursday, October 21, 2004)

(Court convened at 9:03 a.m.)

THE COURT: Good morning. Call the case.

DEPUTY LAMBERT: MDL #1355 IN RE: Propulsid.

THE COURT: Counsel, make your appearances for the record.

MR. HERMAN: May it please the Court, Russ Herman of Herman Mathis for the Plaintiffs' Steering Committee.

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

THE COURT: We are here today for our monthly status conference. I have received from the parties the Joint Report giving me some indication as to what will be

discussed. I will be taking them in the order given.

First, updated rolling document production.

MR. HERMAN: Your Honor, there is no more production scheduled, and we currently, I believe, have reached an agreement that we will discuss later today on the use of documents in connection with depositions that have been taken.

MR. IRWIN: And Your Honor, I also think discussions are still underway with respect to the suspension of the preservation of electronic materials. The PSC has asked,

1 and I think we have agreement, the PSC has asked that we  
2 hold in abeyance until the recruitment period for the  
3 program finalized. That would crystallize the application  
4 of this suspension order. And of course, that deadline is  
5 right around the corner, and we would have to wait.

6 THE COURT: The next item is the state liaison  
7 Counsel.

8 MR. HERMAN: Dawn Barrios is here from the State  
9 Liaison Committee.

10 THE COURT: Ms. Barrios, anything?

11 MS. BARRIOS: We just have been cooperating and trying  
12 to coordinate with different counsel and the defendants'  
13 PSC putting together with plaintiffs' counsel around the  
14 States to make sure that they get together with Mr. Campion  
15 and review the list of the claimants that would be subject  
16 to the settlement.

17 THE COURT: Okay, thank you very much. Those claims  
18 that cannot be settled, you are going to have to focus on  
19 what you need from the MDL committee to try those cases.

20 The next item is the Patient Profile Form.

21 MR. IRWIN: Yes, Your Honor. The joint report reports  
22 the numbers, and in accordance with our profile figures  
23 suspended the motion activity pending culmination of the  
24 settlement program.

25 THE COURT: Service list, anything on that?

1 MR. IRWIN: Your Honor, we have the service list as  
2 discussed in chambers before the conference this morning.  
3 We are going to double check to make sure the service list  
4 is current with respect to possible pro se plaintiffs.

5 And also, Mr. Davis informs us that there maybe a  
6 receiver who should be getting notice. We will confirm  
7 that and make sure that the service list is complete in  
8 that regard next month.

9 THE COURT: Okay. And I think there are maybe some  
10 pro se people that need to get service, too. Talk about  
11 that. Somebody else I think Mr. Davis mentioned?

12 MR. IRWIN: Yes, he did, Your Honor. We are going to  
13 make sure we have our list correct.

14 THE COURT: Okay. Class certification is the next  
15 item.

16 MR. HERMAN: We can defer that issue pending  
17 enrollment and proceeding with the settlement program.

18 THE COURT: How about trust account?

19 MR. HERMAN: Defendants have made some deposits since  
20 October 7th in the trust account. In connection with the  
21 settlement, the recommendation of a qualified account with  
22 regard to settlement funds has been resolved.

23 THE COURT: How about mediation?

24 MR. HERMAN: There are no mediations that have taken  
25 place, Your Honor, in light of the enrollment, current

1 enrollment date, due date of October 29th.

2 THE COURT: The trial schedule is the next item.  
3 Anything on trials from the State court?

4 MR. HERMAN: The last list was furnished in September,  
5 and I don't believe there are any additions to that. But  
6 there are no --

7 MR. IRWIN: That's correct, Your Honor.

8 THE COURT: And the Pharmacy Indemnity Agreements is  
9 another item.

10 MR. IRWIN: The status is as was reported last month,  
11 Your Honor.

12 THE COURT: Okay. And MDL Mediation and Resolution  
13 Program?

14 MR. HERMAN: Your Honor, we believe that we will --  
15 there is a full report, but the bottom line is we believe  
16 that we will reach full enrollment figures based on the  
17 responses we have had telephonically and in writing by the  
18 vast majority of the lawyers that have the largest number  
19 of cases. There are approximately 2300 or 2400 total  
20 individuals enrolled at the present time. But we expect  
21 those numbers to go up dramatically between now and October  
22 29th.

23 THE COURT: And October 29th is the date?

24 MR. HERMAN: That is correct, Your Honor. Plaintiffs  
25 anticipate that there may be a couple of weeks needed in

1 extension but that would be for reconciliation purposes and  
2 review of the enrollment form. We have made a request of  
3 defense counsel to that issue, and they haven't agreed to  
4 it. But it may be necessary to ask for a couple weeks'  
5 extension. But as it is right now, we believe that we are  
6 going to reach full enrollment.

7 THE COURT: Any input from defendant on that?

8 MR. IRWIN: Your Honor, Mr. Preuss is working with  
9 Plaintiff's Steering Committee.

10 THE COURT: Okay. Global Application of Daubert?

11 MR. HERMAN: That matter is on hold pending enrollment  
12 and the settlement program.

13 THE COURT: Stipulation and Pre-Trial Order?

14 MR. HERMAN: We have worked on that.

15 MR. IRWIN: You rHonor, we still have a couple of

16 wrinkles to work out. I thought we would have it in. Last  
17 month we reported -- we thought we would. I still think we  
18 will get it in shortly. I hope the Court will be patient  
19 with us. We sent a couple of minor revisions to Russ'  
20 office; they sent a couple of minor ones back to us and  
21 that is what is kind of going on.

22 THE COURT: What is the problem as you see it?

23 MR. IRWIN: There is a question about whether the  
24 30(B)(6) depositions should be covered by a specific  
25 segment of Rule 32 and specifically refers to 30(B)(6)



1 depositions or the entire rule. And we are looking at  
2 that.

3           The other issue is there is a provision that we  
4 recently added into the order that requires that if any  
5 state court litigant uses these depositions, that that  
6 state court litigant will agree to abide by Pre-Trial Order  
7 Number 5, which is the confidentiality order, and they are  
8 to submit to the jurisdiction of this Court for the limited  
9 purpose of enforcement of that order. There is no  
10 disagreement on that principle. The PSC has asked that  
11 language be included that makes it clear that they, PSC is  
12 not going to regulate the enforcement or compliance with  
13 Pre-Trial Order Number 5. We think we are okay with that,  
14 but we haven't been able to vent that yet to our client.  
15 And that just came up recently. Those I think are the two  
16 issues.

17           MR. HERMAN: That's correct, Your Honor. The  
18 defendants have submitted a more restrictive interpretation  
19 of Rule 32. We have submitted a more expansive one, and we  
20 originally were concerned that we did not want anyone to  
21 decide the, not to go into this settlement, that somehow  
22 were coercing them in terms of requiring federal court  
23 jurisdiction over their state cases, et cetera. But I  
24 think we have satisfied ourselves. It is a fair issue, and  
25 our only problem is we don't have to enforce 600 state

1 cases out there for those folks who are not living up to  
2 what they should. And we do have a meeting scheduled this  
3 afternoon in an attempt to resolve it.

4 THE COURT: Any motion for Summary Judgment?

5 MR. HERMAN: Your Honor, we are not going to proceed  
6 with that motion at this time.

7 THE COURT: What about the motion for Summary Judgment  
8 as to the Doctor, defendant Stephen Tramill?

9 MR. IRWIN: Your Honor, I believe that one --

10 THE COURT: Any objection?

11 MR. IRWIN: No, sir. I believe that this is the case  
12 where a proposed order has been submitted to the Court.

13 THE COURT: Right, the Court will act on it.

14 MR. HERMAN: On the motion to dismiss on our Summary  
15 Judgment motion?

16 THE COURT: I will deal with that.

17 MR. HERMAN: Your Honor, I would like to, and I want  
18 to make it clear, and I am not sure if I stated the  
19 opposition correctly -- on Item 13, the motion for Summary  
20 Judgment, we are not going to file at this time the motion  
21 for Summary Judgment regarding J & J's liability pending  
22 the enrollment and settlement program.

23 THE COURT: All right, okay. Pre-Trial Order listing  
24 MDL Plaintiffs.

25 MR. HERMAN: That item can be removed. I will put

1 that on our web site so everybody knows and understands.

2 THE COURT: It has already been done?

3 MR. HERMAN: That's correct, Your Honor. After we get  
4 together with defense counsel following enrollment,  
5 probably some additions or deletions to that list.

6 THE COURT: Okay.

7 MR. HERMAN: With respect to the King matter, Item 16,  
8 Mr. Hill of the State Liaison Committee has been in touch  
9 with the Court that presides in the Emma McClain matter.  
10 We will add the disciplinary counsel in Ohio or the proper  
11 person to be notified to the service list. I received a  
12 communication from Mr. Hill saying that he would do  
13 everything he could to assist the pro se Propulsid  
14 claimants but would not undertake representation. So that  
15 we appreciate Mr. Hill's activity in this matter.

16 THE COURT: The Court does likewise. He volunteered,  
17 and I appreciate his interest and willingness to do that.  
18 He has been very helpful.

19 The Opt Out Form for Johnnie L. Jones?

20 MR. HERMAN: That matter is moot.

21 THE COURT: Okay, what about any new items? I have a  
22 motion from Mary Thornton and Simon Cofrancesco for Summary  
23 Judgment.

24 MR. IRWIN: Yes, Your Honor, and these motions really  
25 address themselves to the sovereign immunity and proper

1 party status. They are the health care provider  
2 defendants.

3 Johnson & Johnson takes no position on this motion.

4 THE COURT: I will deal with them. It is not on the  
5 agenda, but is there any input regarding the government  
6 liens or potential government liens? Have you all been  
7 talking with the government on that?

8 MR. PREUSS: Yes, Your Honor, we have. And subsequent  
9 to the last status conference, we provided the medical  
10 records of a cross section, and they deal with that. And  
11 they sent us a claims form which designates the information  
12 we will need so when I talked to to or got a message from  
13 her last week, and she is available today to talk. So they  
14 have been giving us a call.

15 THE COURT: Okay, you are satisfied with their working  
16 on it?

17 MR. PREUSS: So far I am satisfied, yes.

18 THE COURT: Okay. Anything further from anyone?

19 MR. HERMAN: We have not seen that, but Mr. Preuss has  
20 agreed to provide us with that.

21 Your Honor, I am a bit embarrassed because when  
22 Your Honor raised the lien issue, we neglected to include  
23 in that report a report that attorneys purportedly  
24 representing Blue Cross-Blue Shield have indicated that  
25 they may have some lien rights. And Mr. Campion and Mr.

1 Preuss and Mr. Davis and I and Mr. Irwin have communicated  
2 with those folks. Although they have not been able to  
3 provide any information as to who these claimants are or  
4 potentially are, so it is not a problem now. But we do  
5 want to alert the Court we have received communication.

6 THE COURT: Okay. I am mainly concerned about the  
7 government liens because that has some overreaching  
8 problems or at least can create difficulties for lawyers  
9 involved as well as for the litigants. And rather than  
10 wait, I would like them to focus on their liens early on  
11 and can you find some way of expediting this process? That  
12 is going to be key. I think from my talking with them, I  
13 had the feeling that they were very amenable to working out  
14 either a global settlement or some method that could be  
15 expeditiously handled so it is not a black hole, and the  
16 litigants do not have to wait to receive their money  
17 because liens cannot be worked out. So I want them on  
18 board. If I can do anything to help, let me know. Is  
19 there anything further, anything from the State? Let's get  
20 another date then for our next meeting. We should know by  
21 this next meeting.

22 (No response from counsel.)

23 I need to do it by Friday, on Friday the 19th. I  
24 am going to be gone in and out of Washington sometime  
25 before then. So is the 19th all right with everybody?

1 Counsel getting married.

2 Can I be excused? I'm getting married on the 20th.

3 THE COURT: All right, that is a valid reason.

4 Counsel getting married at my age.

5 MR. HERMAN: We have a great honeymoon suite.

6 THE COURT: The 19th is all right?

7 MR. HERMAN: Yes, Your Honor. I'm going to ask -- I'm  
8 going to be in trial. I will ask Mr. Zimmerman or Mr.  
9 Wright to be present.

10 THE COURT: We can do it the first week in December if  
11 everybody is better at that time.

12 MR. HERMAN: I think in light of the reasonable date,  
13 it is set on the 19th would probably be better. And I  
14 also, Your Honor, have a recommendation. I do not know  
15 what anyone's availability is on the first, well, on the  
16 third, but probably we ought to report to the Court at  
17 least telephonically or in some way as to what exactly what  
18 happened with the enrollment.

19 THE COURT: You are talking November?

20 MR. HERMAN: November 3rd by phone.

21 THE COURT: Let's do that. Let's do this: Let's have  
22 a status conference, telephone status conference keeping me  
23 up on, get me up to speed on how many people and what we  
24 are looking at. What is a good time for you all in the  
25 afternoon?

1 MR. IRWIN: Yes, Your Honor, that is a good time.

2 THE COURT: I will make the call then.

3 MR. HERMAN: What time?

4 THE COURT: 2:30. Let my staff know who wants to be  
5 on that call, and we will coordinate. I will have a status  
6 conference on the liaison, not the mediation with the  
7 resolution of the cases, how many still outstanding and so  
8 forth. And when we get that and get a little better fix on  
9 it, we will have to put our heads together and see how many  
10 are left and what we do with those cases and whether I keep  
11 them here and try them or get them back in some way and try  
12 them or go there and try them or send them to local federal  
13 courts.

14 MR. HERMAN: Your Honor, I think the plaintiffs and  
15 the defendants appreciate the hard work that the Court's  
16 staff has done. I note that the federal judiciary budget  
17 has been cut again. And it is very difficult when you are  
18 working with one-tenth of one percent of the money that is  
19 budgeted for the entire operation of all three elements of  
20 government. So we certainly hope that your staff does not  
21 have to travel to hear these cases.

22 THE COURT: When I go to Texas, they put us in a truck  
23 stop saving money. Court will stand in recess. Thank you.

24 (Court adjourned at 9:22 a.m.)  
25

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 accurate transcription of his Stenograph notes taken Thursday, October 21, 2004.

New Orleans, Louisiana, this 24th day of October, 2004.



DAVID A. ZAREK  
Official Reporter