

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: PROPULSID PRODUCTS
LIABILITY LITIGATION

Docket No. MDL 1355
New Orleans, Louisiana
~~Friday, January 14, 2005~~
Wednesday, May 25, 2005

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

APPEARANCES:

FOR THE PLAINTIFFS:

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by computer.

P R O C E E D I N G S

(WEDNESDAY, MAY 25, 2005)

(MOTION BY THE PLAINTIFF STEERING COMMITTEE FOR AWARD OF
ATTORNEY'S FEES AND REIMBURSEMENT OF COSTS)

THE COURT: Call the first matter, please.

THE DEPUTY CLERK: MDL 1355, in re: Propulsid.

THE COURT: Counsel make their appearance for the record,
please.

MR. HERMAN: May it please the court, your Honor, Russ
Herman and Leonard Davis of Herman Mathis for the Plaintiffs
Steering Committee.

First of all, your Honor, we want to thank Susan Bryson
for her service to the court and in this case in particular. We
understand that she will be leaving the court very soon. Susan, we
thank you, we wish you well, and remember when you play quidditch
you use the Nimbus 2005, that's the newest model.

THE COURT: You've exhausted five of my clerks in this
particular case, four of them have gone and now Susan's about ready
to leave. Hopefully we will finish the case.

MR. HERMAN: Your Honor, it's true and we did it with all
good intentions.

Your Honor, we're here to confirm a \$22,500,000 legal fee
that was negotiated in connection with the MDL 1355 settlement. I

1 want to make -- I make these representations to your Honor as an
2 officer of the court. The fee paid by the defendants was negotiated
3 separately and only after the common fund for the benefit of
4 claimants and only after the settlement fund was negotiated, the
5 administration fund was negotiated.

6 The administration fund has been operating, the \$15
7 million negotiated was placed in an account at interest with
8 Deutsche's Bank. The \$70 million plus available for claimants has
9 been placed already in the fund with Deutsche's Bank and the claims
10 procedure is ongoing.

11 With respect to the fee which we asked to be confirmed,
12 there are numerous cases both in the federal courts and in
13 Louisiana, for example, in re: Combustion from the Western
14 District, and cases from this district that confirm a percentage
15 fees in excess of what we are requesting.

16 In applying the Johnson factors in terms of skill, in
17 terms of difficulty, in terms of the inability to do other work, in
18 terms of result, we believe that we have performed at levels which
19 justify this fee. Your Honor is knowledgeable of what we have done
20 in superintending and directing this entire matter is superior to
21 ours and you have a point vantage which you must bring to bear in
22 looking at this.

23 In terms of the commitment as to hours, the total hours
24 which have been forwarded to the court on a form through an
25 independent certified public accountant have been provided to the

1 court on a monthly basis. As an officer of the court, I say to you
2 that not all hours are the same hours. Some were performed by
3 paralegals, some were performed by first or second year lawyers,
4 some by contract lawyers, and some by very experienced lawyers who
5 were directly appointed by the court and their partners.

6 It is safe to say that more than 60,000 hours have been
7 spent at one level or another. As to whether how productive they
8 are, as an officer of the court, even if we reduce them by a third,
9 40,000 hours is significant, particularly in a case of this kind.
10 Two members of the Plaintiffs Legal Committee, our firm tried one of
11 these cases in California unsuccessfully, trial took a couple of
12 months. Mr. Becnel tried one of his cases in this court

13 unsuccessfully. It's a very difficult case and we're frankly very
14 proud of the result.

15 In terms of shared costs and expenses, over \$2 million
16 were spent. And by shared costs what I mean most respectfully, your
17 Honor, is the cost of depositions, experts, the depository, salaried
18 personnel, the depository itself, copying costs and costs of those
19 nature that are set out, have been set out on a monthly basis.

20 In terms of held costs, there are over \$2,400,000 in held
21 costs. A held cost would be airfare, hotel, something of that
22 nature where firms held their own costs until resolution. And
23 basically we're responsible to eat those costs in the event that
24 there wasn't success.

25 Almost all of the shared costs have been reimbursed

1 through an assessment of four percent and six percent, four percent
2 in state court cases settled, six percent in terms of federal cases
3 which are resolved. Out of the held costs have not been reimbursed
4 nor have any future reserves been made in connection with the
5 depository, which is obligated to stay open for at least 18 months
6 which has certain rent, salary and other costs attached to it.

7 With respect to the four percent and six percent, your
8 Honor, those, any future four percent and six percent assessments as
9 we go through the claims process will be held in escrow and will not
10 be disbursed as legal fees or costs, except by contradictory motion
11 brought for your Honor for consideration at some future date. Those
12 funds will be placed in escrow with Deutsche's Bank with the same
13 investment and interest and protection as the \$22,500,000, or as
14 much as your Honor approves of that amount.

15 In terms of how lawyers who claim common benefit will be
16 treated, the first situation is that the Plaintiffs Legal Committee
17 appointed by your Honor will send out a questionnaire to each
18 attorney that claims common benefit, and they will be asked to list
19 their employees, the date of hire, the date of termination, their
20 background, their experience in class action work, whether they were
21 contract employees, permanent employees, associates, paralegals or
22 partners.

23 THE COURT: That questionnaire will be sent to all
24 lawyers?

25 MR. HERMAN: All lawyers who have submitted common benefit

1 papers in accord with your Honor's order which was posted and which
2 has been ongoing for almost five years now.

3 THE COURT: And that includes the State Liaison Committee?

4 MR. HERMAN: Yes. I am going to get to that in a minute,
5 your Honor.

6 For each year there was a sign-in sheet at the Propulsid
7 depository listing names of individuals. Those names have been
8 soldered as to whether they worked a whole day, part of a day,
9 whether they were working on other matters at the same time they
10 were in the depository. The PSC will have to review those, review
11 the questionnaire returns and then determine for each firm seeking
12 common benefit how they, how the common fund will be allocated.

13 The PSC members themselves will then attempt to arrive at
14 a fair apportionment of fees. The other court appointed lawyers in
15 this case are the State Liaison Committee, and the State Liaison
16 Committee has submitted their hours, they have submitted their
17 expenses in connection with state liaison work, and they will
18 likewise be sent questionnaires before, each one of them afforded
19 the opportunity to present their claim for common benefit fees.

20 In the event that any fee allocation is not reserved, then
21 at that point a fee committee will be appointed by the PSC and we
22 will attempt to resolve any fee disputes at that point. In the
23 event that we can't do that, I have met with Special Master Juneau.
24 Special Master Juneau is prepared to call each attorney in who has
25 submitted a request for common benefit, review their materials, sit

1 with the CPA and audit any audits that are necessary, and then make
2 a report to your Honor. And the dispute, if it can't be resolved by
3 the Special Master will then be resolved by yourself.

4 I am a bit distressed by individuals who have written or
5 called me claiming common benefit fees. I've explained this
6 procedure to them, evidently they don't accept my word for it, and
7 it's a bit of an embarrassment after shepherding this case for five
8 years. Frankly I am offended by it. The order of the court was
9 very clear it was to common benefit, and the fact that that issue
10 has been raised to me personally is insulting. I say that only
11 because there obviously has been some discussion or communication
12 that certain folks were disturbed that they might not be considered
13 for common benefit. I've never been party to such a thing and I
14 won't be party to it.

15 Notwithstanding that, your Honor, I appreciate the
16 opportunity that you appointed me to the position that I hold and I
17 say to you as an officer of this court, someone who has been
18 familiar with this case from inception, that I believe that the fund
19 is barely adequate to compensate the attorneys that pulled this
20 load. If we just went on an hourly basis, it would be less than
21 what the top lawyers at the New Orleans bar, much less the bars of
22 Philadelphia, New York and other places are able to recover in terms
23 of their functioning hourly rates.

24 On the other hand, we're contingent fee lawyers and
25 contingent fee lawyers always accept the risk that they're not going

1 to be well compensated and they should accept the risk, because if
2 the only motivation in practicing law is to earn a fee, then we
3 should become butchers or bakers or candlestick makers. The law is
4 a calling, it's a responsibility. The highest service is to the
5 client, and of course to this court.

6 So in sum, your Honor, I feel very comfortable, very safe
7 to say to your Honor that the \$22,500,000 figure that we request to
8 be approved is fair, equitable and reasonable.

9 In addition to that, your Honor, arrangements have been
10 made to deposit these funds in escrow with Deutsche's Bank. The
11 escrow agreement and the investment agreement have been agreed to
12 based upon whatever you order, whether it's 22,500,000 or some
13 lesser sum, those funds will immediately be deposited. They will
14 not be distributed. And when they are distributed costs will be
15 reimbursed firsts. Verified out of pocket costs will be reimbursed
16 first with some factor to account for the interest and after that
17 common benefit fees will be disbursed.

18 So I thank your Honor for hearing us this morning, and I
19 am prepared to answer any questions.

20 THE COURT: All right. Before I ask the questions,
21 anybody else have any comments?

22 MR. ARSENAULT: Your Honor, I was uncertain with the
23 settlement program whether there needed to be a separate application
24 made by non-PSC members that were claiming common benefit. I spoke
25 to Mr. Herman about that, he was very cooperative and returned my

1 call immediately. He indicated we need make no separate application
2 and he explained to me the protocol that he's just explained to your
3 Honor. It appears imminently fair and we're satisfied with that
4 protocol.

5 THE COURT: Okay. Thank you. Anybody else? We have it
6 in open court at this point. I instructed counsel to advise
7 everyone of this motion so that it could be in open court so that I
8 could entertain any comments. Hearing none.

9 I have been familiar, of course, with the work that was
10 done in this matter. I required from the outset a CPA be appointed
11 and that a CPA give me periodic reports, namely on a monthly basis,
12 showing the amounts expended as well as the hours put into the case.
13 I reviewed those as they came in and consistently supervised that
14 type of program.

15 In looking at this matter I've considered, first
16 considered the number of hours spent. I've also fashioned in my own
17 mind a fee based on a lodestar method, and then after doing so I
18 turned to the various Johnson factors such as time and labor
19 required and time and difficulty of the issues and the skill
20 required to perform the legal services properly to conclusion and,
21 loss of opportunity from other employment, the customary fee looking
22 both at the national customary fee, as well as the customary fee
23 locally and regionally and whether or not the fee was fixed or
24 contingent.

25 Contingency is the type of fee that was involved in this

1 particular case, it was a rather dicey case in some instances, some
2 of the scientific aspects of the case were problematic at best and
3 there was some question as to recovery at all. So contingency was
4 meaningful in a case of this sort. The other Johnson factors I
5 considered were, the time limitations imposed by the client and the
6 circumstances which consumed a tremendous amount of time. The time
7 involved, the results obtained it seems to me that all sides
8 benefited from the result obtained in the litigation. Other factors
9 I considered included the experience, reputation and ability of the
10 attorneys I had selected both liaison counsel, lead counsel and also
11 the various committees, including the State Liaison Committee. I
12 picked the people that I felt could handle the case and I felt that
13 they were the top people in the field of this type of litigation. I
14 was familiar with them and with their ability. I also considered
15 the desirability or undesirability of the case, the nature and
16 professional relationship with the client, as well as the awards in
17 other cases.

18 The application that I have before me actually has two
19 aspects in it, one is for approval of the amount of fee negotiated
20 by the committees with opposing counsel, and that's one aspect of
21 it. The other aspect seeks approval for the fee which the court set
22 forth in PT No. 16, which is a percentage, a four percent, six
23 percent of the amounts. I am not going to authorize that amount at
24 the present time.

25 I've got various state cases that are still outstanding,

1 as well as other cases. So I don't want to speak on that fee on
2 that disbursal fee at this time, so I am not going to approve a fee
3 on the four and six percent as requested by liaison counsel.

4 I will address only the \$22,500,000 which has been
5 negotiated. With regard to that amount, I feel that it's an
6 appropriate amount, both based on the load star method as well as a
7 consideration of the Johnson factors, and I would authorize and do
8 authorize the payment of that fee.

9 I tell liaison counsel, however, that I would like that
10 fee paid in some kind of, disbursed in some kind of increments, that
11 is to say I would not want all of that fee disbursed before a
12 substantial amount of the parties receive their funds, namely the
13 claimants. I would like to see them come forward and get their
14 settlement amounts before the entirety of that fee is disbursed so
15 that we get the program underway and also so that the litigants get
16 paid at the same time or somewhat before the attorneys. That's the
17 way it should be done in this type of litigation.

18 MR. HERMAN: Your Honor, we will attempt to resolve
19 first --

20 THE COURT: Costs.

21 MR. HERMAN: -- benefit held costs.

22 THE COURT: I understand that.

23 MR. HERMAN: And at that point I will report to the
24 court --

25 THE COURT: Let's take care of all of the costs first, and

1 then when you get to the fee, if you have any problem with having to
2 work out the fee with regard to the disbursement of that fee I would
3 like to make sure that we get the program well underway before
4 that's started.

5 MR. HERMAN: With regard to disbursement, we will notice
6 the court and make a recommendation to the court before any fees are
7 disbursed.

8 THE COURT: All right. I will authorize the \$2,500,000
9 fee under that program, disburse the costs first in the manner
10 explained by counsel, and then from the standpoint of the
11 disbursement of the fees I'll await further discussions with
12 counsel.

13 MR. HERMAN: Thank you, your Honor.

14 THE COURT: Anything further? Okay. Thank you very much.

15 MR. HERMAN: Thank you, Judge.

16 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

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

Karen A. Ibos, CCR, RPR
Official Court Reporter