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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS * Docket MDL 1355-L
LIABILITY LITIGATION *
* December 15, 2005, 9:00 a.m.
*
* New Orleans, Louisiana
* * * * *

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

APPEARANCES:

For the Plaintiffs: Herman, Mathis, Casey,
Kitchens & Gerel
BY: RUSS M. HERMAN, ESQ.
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New Orleans, Louisiana 70113

For the Defendants: Irwin, Fritchie, Urquhart & Moore
BY: JAMES B. IRWIN, ESQ.
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New Orleans, Louisiana 70130

For the Defendants: Drinker, Biddle & Reath
BY: THOMAS F. CAMPION, ESQ.
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Florham Park, New Jersey 07932

For the Defendants: Drinker, Biddle & Reath
BY: CHARLES F. PREUSS, ESQ.
50 Fremont Street, 20th Floor
San Francisco, California 94105

1 APPEARANCES (Continued):

2 Also Participating: RICHARD J. ARSENAULT, ESQ.
3 DAWN M. BARRIOS, ESQ.
4 BARRY HILL, ESQ.
5 CARROLL INGRAM, ESQ.
6 CHARLES S. ZIMMERMAN, ESQ.

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11 Proceedings recorded by mechanical stenography, transcript
12 produced by computer.

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PROCEEDINGS

(December 15, 2005)

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3 THE DEPUTY CLERK: Everyone rise.

4 THE COURT: Be seated. Good morning, Ladies and
5 Gentlemen. Call the case, please.

6 THE DEPUTY CLERK: MDL 1355, In Re: Propulsid.

7 THE COURT: Counsel make their appearances for the
8 record.

9 MR. HERMAN: May it please the Court. Good morning,
10 Judge Fallon. Russ Herman for plaintiffs.

11 MR. IRWIN: Jim Irwin for defendants.

12 THE COURT: I understand we have some folks on the
13 phone.

14 MR. ZIMMERMAN: This is Bucky Zimmerman in my office
15 in Minneapolis.

16 MR. ARSENAULT: Richard Arsenault. Good morning,
17 Judge.

18 THE COURT: Good morning.

19 MR. HILL: Barry Hill. Good morning.

20 THE COURT: Good morning, Barry. This is our monthly
21 meeting. I received from liaison counsel a proposed agenda. I
22 will take them in order. First, state liaison counsel,
23 anything you need to report?

24 MS. BARRIOS: Yes, Your Honor. We will be making a
25 joint presentation with the defense and Mr. Herman on the

1 status of the Propulsid 2 settlement.

2 **THE COURT:** Do you want to do that now?

3 **MR. HERMAN:** Yes, Your Honor.

4 **MR. PREUSS:** Your Honor, the defense, the plaintiffs'
5 steering committee, and the state liaison committee are
6 delighted to report that we have reached an agreement which
7 encompasses the remainder of the litigants in the litigation.
8 It is set up to mirror the original program. The minimum
9 enrollments are 95 percent of the personal injury plaintiffs
10 and 90 percent of the death plaintiffs. That encompasses
11 roughly 1,550 from the federal side and 550 from the state side
12 for a total of approximately 2,500 people. In addition,
13 claimants that haven't filed before are eligible to do so;
14 that's another 7,800. So we are talking, roughly, a little
15 over 10,000 to 11,000.

16 The minimum contribution to the settlement fund
17 is \$14.5 million, a maximum of \$15 million. The administrative
18 fees would be \$3 million and legal fees, subject to your
19 decision, up to \$4 million, including a proposal for Special
20 Master Juneau to preside over the claims processing in a
21 fashion that's identical.

22 It's been a pleasure working with the steering
23 committee headed by Dawn and others, and we are delighted we
24 are able to close the loop on this one.

25 **THE COURT:** That's good news. I congratulate the

1 lawyers. Those are the ones who do the laboring oar. I know
2 it takes a lot of effort, but I appreciate you staying with it.
3 Ms. Barrios, is that consistent with your view?

4 **MS. BARRIOS:** Yes, Your Honor. The only thing I
5 would like to add is profuse thanks to the defense and also the
6 plaintiffs' steering committee. Everyone met with us at times
7 when we requested. We traveled to meetings. We had conference
8 calls. Each person involved and their entire office staff have
9 been more than wonderful to work with and we appreciate it.

10 **THE COURT:** Good. In the MDL proceedings, there's
11 sometimes a little problem dealing with state and federal
12 litigation together. It's difficult, but if it works it's
13 because of the efforts of the people in the state liaison
14 committee and their working with the plaintiffs' committee.
15 This one worked. Sometimes it doesn't, frankly, and sometimes
16 you have to regroup and rethink some of it. This worked and
17 it's because of the people on the committee. I recognize that
18 and I appreciate the work that all of you have done.

19 **MS. BARRIOS:** Thank you, Your Honor. One further
20 note, Your Honor, please. We are going to move as quickly as
21 possible to get the enrollment forms signed. We have a plan in
22 action right now. I would like to introduce to the Court my
23 law clerk, David Coons, who is sitting in the back of the
24 courtroom. He has now applied to Tulane and Loyola law
25 schools. We hope to keep him in the city and continue to have

1 him work with us. David will coordinate a schedule for our
2 committee to visit with all the attorneys who have outstanding
3 claimants who may go into Propulsid 2 so that we don't have to
4 seek an extension of the enrollment deadline. We would like to
5 get it moving since Mr. Juneau's office is up and running.

6 **THE COURT:** Let me know if I can be of any help in
7 that regard, either by inviting counsel into court or other
8 means.

9 **MS. BARRIOS:** Thank you, Your Honor.

10 **MR. IRWIN:** Thank you.

11 **THE COURT:** Thank you very much. The next item is
12 the service list. We should be coming to an end on that.

13 **MR. IRWIN:** We are getting close, Your Honor. I will
14 distribute as usual to Your Honor's staff, one to the state
15 liaison committee, and one to the plaintiffs' steering
16 committee.

17 **THE COURT:** Anything on the trust account?

18 **MR. HERMAN:** No, but I did want to make one comment.
19 I'm a great believer in giving credit to the folks who put the
20 oar in the water and get the ship home. I want to particularly
21 thank from the state liaison committee Ms. Barrios and
22 Mr. Arsenault. There was also input from Mr. Hill and
23 Mr. Capretz, and from the plaintiffs' steering committee
24 Mr. Levin and Mr. Zimmerman. I, too, want to thank Chuck, Tom,
25 and Jim from the defense side for moving this ship forward. I

1 want to thank Your Honor for giving us the steerage we needed.
2 It looks like we'll be able to conclude this matter. The PSC
3 also, in order to facilitate the matter, will undertake a joint
4 meeting for explanation. After we have met with the PSC, we
5 will also invite a member of the defense team to participate.
6 Hopefully, we can have that meeting in New Orleans.

7 **THE COURT:** Fine. Before we leave that, Ms. Barrios,
8 draft something I can put on the web site telling everybody
9 about it.

10 **MS. BARRIOS:** Yes, Your Honor.

11 **THE COURT:** If there are any state courts that ought
12 to be alerted, I can do that, too, or you all can.

13 **MS. BARRIOS:** Yes, Your Honor. I can provide you a
14 list of all the judges, particularly Mississippi, because I
15 have all the docket numbers.

16 **THE COURT:** Anything on the trust account?

17 **MR. HERMAN:** No, Your Honor.

18 **THE COURT:** What about trial schedule? There's one
19 case, I understand, set for trial in West Virginia.

20 **MR. CAMPION:** That's the only one, Judge.

21 **THE COURT:** Pharmacy indemnity agreements, anything
22 on that?

23 **MR. HERMAN:** No, Your Honor.

24 **MR. IRWIN:** No, Your Honor. We suggest that could be
25 removed from future agendas.

1 **THE COURT:** We'll remove that from the agenda. MDL
2 mediation and resolution program.

3 **MR. HERMAN:** Your Honor, I believe a report has been
4 given to you by Mr. Juneau.

5 **THE COURT:** Yes. I received the report from
6 Mr. Juneau. It appears it is working. I do want to set a
7 meeting with the representatives from the government to see if
8 that can move a little faster. We do need to move that. I
9 will be setting a meeting with the government and with
10 Mr. Juneau, and I'll alert liaison counsel if they wish to have
11 somebody come to that meeting. Pro se plaintiffs, what's the
12 report on that?

13 **MR. HERMAN:** Your Honor, defense counsel reports that
14 there are between 300 and 350 pro se. They will provide us
15 with their list. We'll give them our list, which is
16 considerably less. A large number are basically unrepresented
17 individuals who did not enter the enrollment and whose
18 attorneys have withdrawn. We have a joint motion for
19 appointment of a curator. Mr. Irwin and I will be over the
20 next several days making a recommendation to Your Honor,
21 perhaps a list of three for Your Honor to choose whom you wish
22 to be a curator appointed for these folks.

23 **THE COURT:** What is your thinking, that the curator
24 will meet with the people? Mr. Preuss, what's the plan from
25 your standpoint?

1 **MR. PREUSS:** I think the plan, Your Honor, would be
2 to have a meeting with the plaintiffs' steering committee and
3 defense as an orientation of the curator, to provide them the
4 essential information that the curator will need to advise
5 people whether they want to proceed pro se, whether they want a
6 new lawyer, or whether they want to do nothing.

7 **THE COURT:** If they decide to participate, then he
8 will assist them in participating?

9 **MR. PREUSS:** He will make sure that they understand
10 the procedure and that they comply with the order, which will
11 indicate they need to respond to interrogatories and to sign
12 medical authorizations within a period of 60 days.

13 **THE COURT:** How about if they decide not to
14 participate and want to proceed to trial; what does he do?

15 **MR. PREUSS:** Then they do have to respond to those
16 interrogatories and authorizations, advise them they are going
17 to have to comply with the court orders. Once they understand
18 what they are supposed to do, then they are on their own.

19 **MR. HERMAN:** I think that we will have to present
20 Your Honor with a list of what the curator's duties will be.
21 There may be some necessity for the curator to continue
22 representing pro se individuals in connection with motions that
23 may be brought by the defendants or the PSC.

24 **MR. PREUSS:** We'll try to work the details out with
25 the steering committee.

1 **THE COURT:** I think we will have to take it a step at
2 a time in that situation because, generally speaking, when
3 somebody contacts these individuals or talks with them, they
4 may not know a lawyer or know how to get a lawyer. They may
5 just want the curator to represent them. I will have to deal
6 with that situation. We'll take it a step at a time. When we
7 get down to trial, we will have to figure out where the trials
8 go, how they get there, and who tries the cases. I hate to
9 inflict this upon a transferee judge, that he or she is going
10 to have to deal with pro se trials, but I'll deal with that.
11 The preservation of electronic data.

12 **MR. HERMAN:** We have a motion we are agreeable to,
13 Your Honor.

14 **THE COURT:** I saw the motion and I will sign the
15 motion. Proposed order to reflect the dismissal of certain
16 tolling agreement claimaints.

17 **MR. HERMAN:** We have no objection to that. I do want
18 to go back to motions for one minute. There is a motion for
19 reconsideration, which Your Honor is familiar with, filed by a
20 member of the PSC. We would like that motion set on the same
21 date that Your Honor sets the next status conference in this
22 case. That motion is presently set for January 9.

23 **THE COURT:** Okay. I have that motion. Any objection
24 to that from anyone? I will reset that motion to the next
25 status conference.

1 **MR. IRWIN:** Your Honor, there are two other motions
2 on the agenda this morning under item VII of the joint report.
3 One is the Boyd matter; the other is the Helberg matter.

4 **THE COURT:** I did see those two. Any response from
5 anybody? Any opposition? Any discussion on those motions?
6 I'll deal with them. Any other motions that we need to talk
7 about? There's a motion for reconsideration of a denial of
8 remand.

9 **MR. IRWIN:** Yes, Your Honor. That is the Helberg
10 motion. It has been fully briefed. We would suggest that that
11 is basically a reconsideration of a ruling you made a couple
12 years ago, which is all set forth in the briefing.

13 **MR. HERMAN:** The plaintiffs' steering committee has
14 no position.

15 **THE COURT:** What's the next item, the proposed order?
16 We did that. Motion for clarification of August 12 minute
17 entry.

18 **MR. CAMPION:** The matter remains under discussion
19 between Mr. Ingram and our side.

20 **THE COURT:** Mr. Ingram, I understand from talking
21 with counsel you all are going to continue talking and
22 hopefully work the matter out. I would encourage both of you
23 all to try to work it out. I think that would be the best
24 solution in this particular matter.

25 **MR. INGRAM:** Mr. Campion and I have had some good

1 discussions, Your Honor, and it seems we are now on a track to
2 get more substantive and see if we can't resolve that in the
3 days ahead.

4 **THE COURT:** Thank you, Mr. Ingram. I appreciate you
5 coming and staying with this. The next item is the proposed
6 order approving a wrongful death award made by the special
7 master. Flesh that out for me.

8 **MR. HERMAN:** Your Honor, as I understand it, there
9 were nine wrongful death considerations by the medical panel.
10 One was reported out by the medical panel and Mr. Juneau made
11 the award. As I understand it, any award which the special
12 master makes is not appealable, but is subject to Your Honor's
13 signing off on it. I believe Mr. Juneau has given you a report
14 on that. Because the awards made in individual cases are
15 confidential, the PSC is not aware at this time of the value of
16 the award itself, although at some point we will be made aware
17 periodically of awards so that we can determine the amount left
18 in the claimant fund.

19 **MR. CAMPION:** To supplement Mr. Herman's remarks, we
20 received a proposed set of pleadings from Mr. Hill respecting
21 the power of this Court to issue the order of distribution in
22 any wrongful death case or something like that. We are working
23 on it. We hope to have it ready for the next hearing.

24 **MR. HERMAN:** This would avoid Your Honor having to
25 have multiple curatorships in various states.

1 **THE COURT:** If it can be done, I think that's the
2 best way of doing it because it conserves some of the
3 resources. When you have a lot of appointments, it increases
4 the administration fee and deprives the recipient of funds that
5 they would ordinarily get. Mr. Hill, anything from you on
6 that?

7 **MR. HILL:** No, sir. Defense counsel has been working
8 with the model I came up with and they told me that they have
9 several people looking at it and they will get back to us with
10 what they think needs to be in. I'm waiting to hear from them.

11 **MR. HERMAN:** The next is the emergency motion for
12 distribution of attorney's fees. Your Honor is familiar with
13 that. It's interlocutory in nature. All rights are reserved.
14 There is one individual who has made now an objection. In
15 addition, I want to point out to the Court, in order to resolve
16 our differences, I took it upon liaison counsel's part to send
17 a written communication to individuals who had appeared at the
18 hearing or who had spoken with me directly, but not made any
19 public statement, and indicated I would meet with them at their
20 convenience, hear more about their issues, so that hopefully
21 Your Honor won't have to deal with them again.

22 **THE COURT:** Well, we will deal with the
23 reconsideration. I've got that motion before me. Anything
24 further? Folks, the next meeting, then, will be January 25 at
25 9:00. I'll meet with liaison counsel, as usual, a half hour or

1 so before. Thank you very much. Have a good Christmas.

2 **THE DEPUTY CLERK:** Everyone rise.

3 (WHEREUPON, the Court was in recess.)

4 * * *

5 **CERTIFICATE**

6 I, Toni Doyle Tusa, CCR, Official Court Reporter,
7 United States District Court, Eastern District of Louisiana, do
8 hereby certify that the foregoing is a true and correct
9 transcript, to the best of my ability and understanding, from
10 the record of the proceedings in the above-entitled and
11 numbered matter.

12
13
14 s/Toni Doyle Tusa
15 Toni Doyle Tusa, CCR
16 Official Court Reporter
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