

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
Wednesday, April 25, 2012

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

APPEARANCES:

FOR THE PLAINTIFFS:

HERMAN, MATHIS, CASEY, KITCHENS &
GEREL
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FOR THE OFFICE OF
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produced by computer.

1 And would appreciate it if I might get a copy of these
2 remarks from the court reporter.

3 THE COURT: Thank you for doing so. I've known Jerry now
4 for 50 years, he and I graduated from Tulane Law School together,
5 always considered him a friend and always considered him an
6 outstanding lawyer. I've watched his career develop and he has
7 done yeoman's service. I know Burton and Jerry's son will be able
8 to carry on. They have big shoes to fill.

9 He fought this battle for life for many years. His last
10 three years, at least, he's gone through hell. It's been a
11 remarkable journey that he's had. The last part was bad, but he
12 showed us many things; and he certainly showed us how to die, he
13 was courageous in his efforts, he was there for his family, they
14 were oftentimes distraught, he was optimistic and he was the one
15 who was lifting other people up from a horizontal position. He
16 never lost sight of his clients and he never lost sight of his
17 friends and family. We'll miss him at the bar. I thank you for
18 your remarks.

19 MR. HERMAN: Thank you, your Honor.

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23 THE COURT: Hello, this is Judge Fallon, I have you on
24 speakerphone, we're in the courtroom, and let's call the case,
25 Dean.

1 THE DEPUTY CLERK: MDL No. 1355, *in re: Propulsid*
2 *Products Liability Litigation.*

3 THE COURT: And I understand that you are participating
4 by phone, I have in the courtroom Mr. Leonard Davis and Mr. Russ
5 Herman.

6 Today I have before me, as I have noted and noticed for
7 hearing, the Plaintiffs' Steering Committee's motion for
8 distribution of additional attorney's fees and reimbursement for
9 costs in the multidistrict litigation case known as *Propulsid*
10 *Products Liability Litigation.* This case has been going on now for
11 a number of years, it's at the end of the road. The litigants
12 themselves have received their funds, and this aspect of the case
13 has to do with attorney's fees and court costs.

14 The Plaintiffs' Committee has for many years done
15 yeoman's service in this case and they're entitled to fees, and the
16 people who did work in connection with this case are entitled to
17 fees. I asked the committee to look over the records that show the
18 costs expended by everyone and the hours expended by everyone, to
19 consult with everyone, and to take into consideration the nature
20 and scope of the work, as well as the resources expended, and to
21 make some suggestions regarding the attorney's fees and
22 reimbursement of court costs.

23 After extensive work, they submitted to me a proposed fee
24 allocation. At that point I posted it on my web site so that
25 everyone could see, and I invited all parties, anyone having

1 interest to let me know whether they contested it, objected, or
2 even had any suggestions one way or the other. I have received one
3 more properly termed suggestion or question from Bucky Zimmerman,
4 and as I understand it, I talked to him yesterday in conference
5 with the Plaintiffs' Committee, and I understand that this matter,
6 that they have worked it out and that Mr. Zimmerman now intends to
7 withdraw his question on this particular distribution.

8 But I'll hear first of all from Mr. Davis.

9 MR. DAVIS: Good morning, your Honor. Leonard Davis with
10 my partner Russ Herman who was appointed Plaintiffs' Liaison
11 Counsel in the Propulsid Products Liability Litigation, MDL
12 No. 1355.

13 I have the pleasure of coming before you this morning,
14 your Honor, in connection with the Plaintiffs' Steering Committee's
15 motion in support of distribution of additional attorney's fees and
16 reimbursement of costs in connection with MDL Settlement Program I.
17 And we are only here this morning with respect to Propulsid
18 Program II (SIC). Propulsid II is for another day, and I will not
19 address any issues --

20 THE COURT: You're here on Propulsid I, correct?

21 MR. DAVIS: Correct, this is only on Propulsid I and I
22 will not address Propulsid II.

23 THE COURT: Right.

24 MR. DAVIS: I also advised the court that no request has
25 been made or is being made at this time from Pre-Trial Order

1 No. 16, Litigation Fund, and that was clear in our motion that was
2 filed.

3 As the court is well aware, there was a settlement
4 program that was developed and created by the Plaintiffs' Steering
5 Committee along with the defendants Johnson and Johnson and Janssen
6 Pharmaceutica that was supervised by the court. A settlement was
7 reached on February 4, 2004, and since that time quite a number of
8 claimants have gone through the process and a number have been, in
9 fact, paid through the program.

10 On May 3, 2005, the PSC filed a motion for award of
11 attorney's fees and reimbursement of costs, and the court's well
12 aware of what happened with Katrina and the like in this
13 jurisdiction and matters were put on hold for a bit with respect to
14 that fee; but an emergency award was, in fact, made and funds have
15 been paid, and there are orders with respect to those payments of
16 fees and costs over the years.

17 All of this was done after extensive consultation and
18 review by Special Master Patrick Juneau and input from the CPA
19 Philip Garrett of the Wegmann Dazet firm, as well as after review
20 of Deutsch Bank statements.

21 To date the total distributions that have been made from
22 the Propulsid Attorneys Fee Fund that are held at Deutsch Bank
23 total \$16,594,087.14, and there is, in fact, a balance and that's
24 set forth in the motion and the memorandum that was filed in
25 connection with this motion.

1 Well over \$20 million was allocated by the Special Master
2 to pay claimants and other assessments or allocations with respect
3 to other claims were paid as administrative claims. Again, no
4 request is being made pursuant to PTO 16, and the request at this
5 time is made for fees that remain in the Deutsch Bank account.

6 Pursuant to Pre-Trial Order No. 3, time and expense
7 submissions have continuously and routinely been submitted by
8 lawyers that have worked with respect to common benefit in this
9 matter. In particular, the members of the PSC who were involved in
10 the filing of this motion and those who did a substantial amount of
11 work in this matter, they also have had the opportunity to meet and
12 discuss this motion. There have been, I believe, two meetings on
13 this motion and numerous phone calls with members of the PSC.

14 The submissions of time and expenses that were made to
15 Philip Garrett, the CPA, were reviewed, as I stated earlier,
16 monthly reports and expense submissions continued to be made
17 throughout this litigation. And, in fact, reports have been
18 provided to the court at the court's directive.

19 According to the reports provided by Wegmann Dazet, which
20 is attached as Exhibit A to this motion, total held costs in this
21 matter through December 31, 2011, total \$1,609,639.53. Many of
22 these held costs have been reimbursed to the firms that incurred
23 those costs. But as of December 31, 2011, according to Philip
24 Garrett and Wegmann Dazet, unreimbursed held costs total
25 \$94,423.55. And a breakdown of the firms that incurred those are

1 also set forth on Exhibit A.

2 Reimbursement of those expenditures is appropriate at
3 this time. All capital contributions or assessments that were made
4 during this litigation have previously been reimbursed to firms and
5 that report's been provided to the court.

6 According to the most recent statement received from
7 Deutsch Bank for the period ending December 31, 2012 (SIC), and
8 obviously we keep getting new statements but that's as of the time
9 that this motion was filed, and there are a few small dollars of
10 interest, and when I say small I really mean under \$100. From the
11 Deutsch Bank statement that I mentioned, the January 31, 2012
12 statement, there is on deposit \$7,284,054.36, that includes
13 interest or dividends reinvested and that's available for
14 distribution.

15 There was an analysis by Wegmann Dazet and Philip
16 Garrett, as well as our office, and also a review by Special Master
17 Juneau of this motion and the figures that are supplied in the
18 motion and the memorandum were reviewed in-depth by Mr. Garrett.
19 They were verified by him.

20 At this time what the PSC seeks is an order authorizing
21 my partner Russ Herman on behalf of the Plaintiffs' Steering
22 Committee to make an additional distribution from the Fee Fund at
23 Deutsch Bank in accordance with the schedule detail of payouts,
24 which are attached as Exhibit C to the motion. That exhibit
25 outlines each firm and the amount of an award for each of the

1 firms.

2 Further, we request that the remaining funds in reserve
3 be distributed to Russ Herman as Plaintiffs' Liaison Counsel for
4 the purpose of winding down this litigation and to pay outstanding
5 expenses incurred or to be incurred. And as the court's aware,
6 there are some expenses that are to be incurred; for instance, the
7 conclusion of shutting down the depository, which was the subject
8 of a prior order. And we are incurring some additional expenses.

9 If funds remain following payment of the cost and
10 expense, it's our intention to petition the court to distribute any
11 remaining funds pro rata to all counsel who have been allocated
12 attorney's fees from the Deutsch Bank fund.

13 Your Honor, I can go through Exhibit C in great detail,
14 but I think it's very clear.

15 As your Honor previously mentioned, on April 17, 2012,
16 Bucky Zimmerman of the Zimmerman Reed, LLP firm, filed a response
17 in partial objection to the Plaintiffs' Steering Committee's motion
18 for distribution of additional attorney's fees and reimbursement of
19 costs in connection with Propulsid I. That matter was discussed in
20 detail with Mr. Zimmerman, and as your Honor has mentioned, an
21 agreement has been reached with respect to that matter.

22 That issue that arose related to some common benefit time
23 reports. And as the court's aware and as outlined by Mr. Zimmerman
24 in his filing, there was an apparent inadvertence of some time that
25 was not included; and we have spoken to Mr. Zimmerman and we

1 recognize what happened, and the suggestion that was agreed upon
2 was that, in fact, that time be considered.

3 And what that does, your Honor, after computation is
4 increase the time, and a recommendation is made that the dollar
5 amount next to the Zimmerman Reed amount on Exhibit C of
6 \$215,228.10, be increased by \$31,048.83, which would mean that the
7 Zimmerman Reed firm would have an award of \$246,276.93. And those
8 funds would come out of the \$300,000 that is, in fact, being kept
9 in reserve for the payment of ongoing expenses and costs, or
10 holdback as some may call that. That was discussed in detail with
11 Mr. Bucky Zimmerman, and he has agreed to withdraw his motion in
12 light of that. And I know that someone from his firm is on the
13 phone listening in.

14 THE COURT: Right. Hello.

15 MS. ZIMMERMAN: Yes, that's correct. My name is
16 Genevieve Zimmerman, Bucky's law partner and no relation. But we
17 appreciate certainly the court's indulgence, and agree with
18 everything that Mr. Davis has said in terms of the work done on
19 this important and long-drawn-out litigation.

20 And in light of the information provided to the court, we
21 would certainly withdraw the document that we filed that was titled
22 an objection and appreciate that.

23 THE COURT: Okay. All right.

24 MR. DAVIS: Your Honor, as you know, this PSC worked very
25 hard for quite a number of years and overcame quite a lot of time

1 in dealing with this, especially with Katrina and the like. This
2 PSC is comprised of obviously my partner Russ Herman, who I am a
3 little biased as you know, but I think did a spectacular job, and I
4 appreciate all of the guidance that he gave, not only to me but
5 also to this PSC, and the leadership that was shown throughout this
6 litigation. Without my partner I just don't know how I would be
7 able to function before the court, quite frankly, and I personally
8 appreciate that.

9 The PSC members also certainly rowed the oars in moving
10 this boat forward: Arnold Levin, Bob Wright, Bucky Zimmerman,
11 Chris Seeger, Danny Becnel, Steve Murray, Jim Dugan, and Mike
12 Papantonio. And I point those members out to the court because
13 they were instrumental and obviously they were very involved in
14 common benefit.

15 There were also State Liaison individuals who were very
16 important in moving this matter along, such as Dawn Barrios and
17 Richard Arsenault; and I point that out, and they also were
18 individuals who you will see are identified on the exhibit for
19 common benefit.

20 Your Honor, I'll answer any questions, if there may be,
21 and I know my partner Russ Herman had a few comments.

22 THE COURT: No. This has been a hard road in this
23 particular litigation. It was the type of litigation that
24 presented significant challenges to the plaintiffs. They were not
25 successful in the cases that were tried, but they carried on and

1 pushed forward and continued to represent their clients vigorously
2 and ethically and professionally but consistently, and as a result
3 of that they were able to receive a favorable settlement.

4 But it was a long-fought battle, and in the course of it
5 many lawyers who started had given up on it and it was through the
6 PSC, and particularly its leadership, Russ Herman that kept the
7 group together and focused; because oftentimes in a case of this
8 sort, the focus is lost and everybody leaves and there's no one,
9 except individuals without representation by themselves, struggling
10 to get some relief. But Russ Herman kept the group together, kept
11 them focused, and because of his work and because of the diligence
12 of the PSC, they were able to bring this to a successful
13 conclusion. And at least receive and at least some of the people,
14 the litigants who were deserving did receive their funds. So I do
15 appreciate all of the work that they've done on the case.

16 MR. DAVIS: Thank you, your Honor. And as you pointed
17 out, there were several trials in this matter, there was one that
18 was out in California, and I believe there were two in this
19 courtroom. And so it was a hard-fought battle, but we're glad that
20 we could conclude it.

21 THE COURT: Yes, it was. Okay.

22 MR. HERMAN: Your Honor, Russ Herman for Herman Gerel,
23 this was not a Herman, Herman, Katz and Cotlar effort, it was a
24 Herman Gerel in which our firm Herman, Herman, Katz and Cotlar in
25 New Orleans played a lead role.

1 I want to point out, first of all, thanking the PSC which
2 acted as a fee committee as a whole for their participation and
3 advice.

4 Secondly, I thought that there were a couple of very
5 unique happenings: First of all that there's no fee dispute.
6 Secondly, that my colleague Arnold Levin did a lot of the work in
7 vetting the hours before anything was put on paper.

8 I particularly want to talk about my friend Mike
9 Papantonio of Levin Papantonio who was appointed to the PSC as a
10 personal appointment, and during the emergency application for fees
11 called me and said I don't deserve a fee, my firm hasn't done
12 sufficient work, would like my costs back. And again, in the
13 second distribution, which we're seeking today, Mike Papantonio
14 called again and said that he appreciated what the PSC and this
15 honorable court had done on behalf of the individual clients that
16 his firm represented, but he did not feel his firm merited a common
17 benefit fee. I found it laudable and frankly that type of
18 admission statement, confession doesn't happen very often.

19 Lastly, as the court's noted, this was a very difficult
20 litigation. I attended with Arnold Levin and Chris Seeger the
21 class argument that was made in New Jersey, the Drinker Biddle firm
22 did an outstanding job, defeated class cert in New Jersey; Drinker
23 Biddle defended the case that our firm tried in California, which
24 resulted in a zero verdict. And here in the MDL, I found that
25 particularly Jim Irwin as counterpart liaison and Tom Campion from

1 Drinker Biddle together were extraordinarily formidable adversaries
2 in this case, but always conducted themselves with the highest
3 level of professionalism and ethics.

4 And at your Honor's insistence that counsel on opposite
5 sides meet face-to-face to resolve differences, that they get to
6 know each other face-to-face on a personal basis, and that your
7 Honor's hands-on superintendence of discovery issues rather than
8 referring serious discovery issues and Daubert issues elsewhere
9 played an extraordinarily important role.

10 Lastly, at the same time the MDL panel assigned your
11 Honor the MDL in Vioxx, so that as this courthouse was closed, your
12 Honor moved this operation, I say operation, your entire courtroom
13 staff, made an accommodation with the Houston federal court; and
14 not only were Vioxx trials conducted there by your Honor, but
15 Propulsid moved at the same time through not only the Propulsid I
16 process, not only regarding the mediations that preceded
17 Propulsid I that your Honor superintended and directed be held, but
18 also Propulsid II negotiations continued during that same period of
19 time.

20 And as this wonderful courthouse was reconstructed and
21 your Honor returned to these quarters, Propulsid still continued at
22 the same time that your Honor was superintending and directing the
23 Vioxx litigation through a number of other trials.

24 So to quote our Secretary of State, it does take a
25 community. It takes the bench, it takes the bar, it takes both

1 sides to litigation to reach resolution. And at a time like this,
2 I am very proud to be a member of the bar, appreciate your Honor's
3 remarks.

4 And as your Honor has observed, any achievement, if it be
5 called that in these cases, could not be done without the boy scout
6 Leonard Davis by my side - trustworthy, loyal, friendly, courteous,
7 kind, obedient, cheerful, thrifty, brave, clean and reverent. So I
8 thank Leonard. Thank you, your Honor.

9 THE COURT: Thank you. Just in conclusion, these cases
10 are monumental. They have thousands of lawyers involved in them
11 oftentimes, and there are thousands and thousands of litigants
12 involved in it, and the reason they're able to be handled in a
13 relatively efficient manner is because in this type of litigation
14 because of its scope and because of the amounts involved really
15 bring to the floor the best of the best on both sides of the "V" so
16 to speak, plaintiff and defendant. And it's been my experience in
17 these cases that there are extraordinary lawyers handling the
18 cases, and the job of the court has been made much easier because
19 of the ability of the lawyers.

20 And the court kind of focuses, keeps them focused and
21 sort of gets out of the way as it possibly can, it really works to
22 the benefit of the litigation, to the litigants, and to the system.
23 So I do recognize that the lawyers are the ones who pull the oars
24 and the judge may have the boat, but they row it and they do the
25 yeoman work.

1 So I do appreciate all that they have done in this
2 particular case, and I think the litigants were well served. Very
3 difficult case but they were well served.

4 All right. Thank you very much both of you all, I
5 appreciate it. Just prepare, Lenny, for me some sort of
6 judgment --

7 MR. DAVIS: Yes, your Honor.

8 THE COURT: -- and we will do it. Okay. Thank you.

9 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

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15 I, Karen A. Ibos, CCR, Official Court Reporter, United
16 States District Court, Eastern District of Louisiana, do hereby
17 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.

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Karen A. Ibos, CCR, RPR, CRR
Official Court Reporter

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