

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

In re:	:	
	:	MDL Docket No. 4:03CV1507 WRW
PREMPRO PRODUCTS LIABILITY LITIGATION	:	
	:	ALL CASES
	:	

**OPPOSITION TO PLAINTIFFS' NOTIFICATION TO COURT
ON NON-BREAST CANCER CASES RE
PLAINTIFFS' REQUEST FOR A CENSUS FROM DEFENDANTS**

The Plaintiffs' Steering Committee has not done what the Court ordered it to do, and so claims that it lacks basic information about the plaintiffs and their claims. The Committee's solution to this problem of its own making is for the Court to order defendants to do the work that the Court first assigned to the Committee. Perhaps if the Committee were like Tom Sawyer, contemplating the "far-reaching continent of unwhitewashed fence" that Aunt Polly told him to paint, and the Committee had fooled us, as Tom fooled his friend, Ben Rogers, that whitewashing the fence wasn't really work at all ("Like it? Well, I don't see why I oughtn't to like it. Does a boy get a chance to whitewash a fence every day?"), then maybe we would eagerly take up the paintbrush and do the Committee's work for it. But we have our own chores to do, and *if* there is any more fence to whitewash (and there is not), the Committee should paint it.

1. In fact, no further order is necessary, as the Committee has the information it wants. The Committee's Notification reports that it received responses "from 62 law firms who represent 7,982 plaintiffs."¹ Thus, the Committee received responses for more than 100 percent of the remaining plaintiffs in these proceedings. Taking into account those plaintiffs whose

¹ Plaintiffs' Notification to Court on Non-Breast Cancer Cases Re Plaintiffs' Request for a Census from Defendants [Doc. No. 2308] at 1.

claims have been dismissed or remanded, as well as the plaintiffs who have filed duplicate claims, there are less than 7,000 plaintiffs. Contrary to the Committee's assertion, there are not "several thousand cases . . . unaccounted for."²

The Committee wanted to know roughly how many plaintiffs seek recovery for injuries other than breast cancer. As the Committee's representative explained at the May hearing: "We don't even know ourselves for sure whether that's ovarian cancer, or heart attacks and strokes, for example. And in order to decide who ought to be doing the work and who ought to put the money up for all of these experts we've got to come up with, we would like to know which plaintiffs' lawyers have those cases. It's just that practical."³ Based on its own survey, now the Committee knows.

2. The Court ordered the Steering Committee from the beginning to be in a position to collect this kind of information. It is basic to the duties of any MDL steering committee. Practice and Procedure Order No. 1 required Plaintiffs' Lead Counsel to "organize themselves and agree on a plan for conducting the litigation on behalf of all plaintiffs"; "call meetings of plaintiffs' counsel when appropriate to consult with plaintiffs' counsel on matters of common concern"; and "perform all tasks necessary to carry out the functions of Lead Counsel and to properly coordinate plaintiffs' pretrial activities." The Order further required Plaintiffs' Liaison Counsel to "maintain and distribute to the Court, co-counsel and to Defendants' Liaison Counsel an up-to-date service list of all plaintiffs' counsel, including the date of the most recent

² *Id.* at 2. In stating that "[t]he Pacer system lists 15,126 individuals a claimants in the MDL," the Committee apparently did not bother to examine what the Pacer system shows about the dismissal or remand of plaintiffs.

³ Hr'g Tr. (May 14, 2010) at 19-20.

revision.”⁴ The Court entered this Order in June 2003. Thus, for seven years, the Committee has been obligated to maintain an up-to-date list of plaintiffs’ counsel so that it could carry out just the kind of survey it has now done at the Court’s direction. It has been true all along that the Committee *should* do this work for itself, and it is now clear that the Committee *can* do this work for itself. Were there further information the Committee needs from plaintiffs’ counsel (or certain plaintiffs’ counsel), the Court can just as easily – and more appropriately⁵ – order them, not defendants, to produce it.

Respectfully submitted,

/s/ F. Lane Heard III

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⁴ Order No. 1 – Practice and Procedure [Doc. No. 14] at 8.1.2 (f)(l) & (o), 8.2.2(a).

⁵ Plaintiffs and their counsel know best what claims they intend to pursue at this time. At best, defendants can interpret complaints and Fact Sheets (often years old), and that evaluation is work product.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 2010 a true and correct copy of the foregoing Opposition to Plaintiffs' Notification to Court on Non-Breast Cancer Cases Re Plaintiffs' Request for a Census from Defendants was electronically filed with the Clerk of Court using the CM/ECF system, and a true and correct copy was forwarded by e-mail to the parties listed on the attached Service List.

/s/ F. Lane Heard III

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