

MAR 16 2001

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

CHAMBERS OF

\*\*\*\*\*

IN RE: PROPULSID PRODUCTS MDL No. 1335  
LIABILITY LITIGATION SECTION "L"  
New Orleans, Louisiana  
Wednesday, ~~December 20, 2000~~  
9:00 a.m. *March 15, 2001*

\*\*\*\*\*

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

APPEARANCES:

FOR THE PLAINTIFFS: HERMAN, MIDDLETON, CASEY & KITCHENS  
BY: RUSS M. HERMAN, ESQ.  
LEONARD A. DAVIS, ESQ.  
820 O'KEEFE AVENUE, SUITE 100  
New Orleans, LA 70113

LEVIN, MIDDLEBROOKS, THOMAS,  
MITCHELL, GREEN, ECHSNER, PROCTOR  
& PAPANTONIO  
BY: R. LARRY MORRIS, ESQ.  
ROBERT BLANCHARD, ESQ.  
316 S. Baylen Street, Suite 600  
Pensacola, FL 32501

BECNEL, LANDRY & BECNEL  
BY: DANIEL E. BECNEL, JR., ESQ.  
106 West Seventh Street  
Reserve, LA 70084-0508

MURRAY LAW FIRM  
BY: STEPHEN B. MURRAY, SR., ESQ.  
909 Poydras Street, Suite 2550  
New Orleans, LA 70112-4000

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1        APPEARANCES CONTINUED:

2                                NEBLETT, BEARD & ARSENAULT  
3                                BY: RICHARD J. ARSENAULT, ESQ.  
                                 2220 Bonaventure Court  
                                 Alexandria, LA 71301

4                                GAUTHIER, DOWNING, LaBARRE,  
5                                BEISER & DEAN  
6                                BY: JAMES R. DUGAN, II, ESQ.  
                                 3500 N. Hullen Street  
                                 Metairie, LA 70002

7                                SEEGER WEISS, L.L.P.  
8                                BY: CHRISTOPHER A. SEEGER, ESQ.  
9                                One William Street  
                                 New York, NY 10004

10                                ZIMMERMAN, REED P.L.L.P.  
11                                BY: GORDON RUDD, ESQ.  
12                                901 North Third Street, Suite 100  
                                 Minneapolis, MN 55401

13                                PARSONS, THOMPSON & HILL  
14                                BY: BARRY HILL, ESQ.  
15                                1325 National Road  
                                 Wheeling, WV 26003

16                                BARRIOS, KINGSDORF & CASTEIX  
17                                BY: DAWN M. BARRIOS, ESQ.  
18                                701 Poydras Street, Suite 3650  
                                 New Orleans, Louisiana 70139

19                                DUMAS & ASSOCIATES  
20                                BY: WALTER DUMAS, ESQ.  
21                                1263 Government Street  
                                 Baton Rouge, Louisiana 70821

22                                FOR THE DEFENDANTS:

23                                IRWIN, FRITCHIE, URQUHART & MOORE  
24                                BY: JAMES B. IRWIN, ESQ.  
                                 QUENTIN URQUHART, ESQ.  
25                                400 Poydras Street, Suite 2700  
                                 New Orleans, LA 70130

APPEARANCES CONTINUED:

DRINKER, BIDDLE & SHANLEY  
BY: THOMAS F. CAMPION, ESQ.  
500 Campus Drive  
Florham Park, NJ 07932-1047

PREUSS, SHANAGHER, ZVOLEFF & ZIMMER  
BY: CHARLES F. PREUSS, ESQ.  
225 Bush Street, 15th Floor  
San Francisco, CA 94104-4207

Official Court Reporter: Arlene Movahed  
501 Magazine Street, Room 406  
New Orleans, Louisiana 70130  
(504) 589-7777

Proceedings recorded by mechanical stenography, transcript  
produced by computer.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

2                                    (THURSDAY, MARCH 15, 2001)

3                                    (STATUS CONFERENCE)

4

5                    THE COURT: Be seated, please. We're here today to  
6 receive a report from counsel on the status of the case since  
7 our last conference. But before we get the formal report, I  
8 would like to hear from Mr. Irwin on his report of the new  
9 addition to the bar and to our Propulsid family.

10                    MR. IRWIN: Well, thank you, Judge. I am happy to  
11 report that on Monday a new little Irwin boy was brought into  
12 the world, 8 pounds. And I got him and his mom home last night  
13 and they're both doing fine.

14                    THE COURT: That's wonderful. And we're all happy for  
15 you.

16                    MR. BECNEL: Judge, I am sure he denied liability.

17                    THE COURT: Well, please extend the best wishes from  
18 the federal judiciary to the young one and welcome him to the  
19 bar, hopefully. Let's hear from counsel.

20                    MR. HERMAN: May it please the Court, good morning,  
21 your Honor. Russ Herman of Herman, Mathis and Herman, Herman,  
22 Katz and Cotlar for the plaintiffs. And I also want to  
23 formally, on the record, extend my congratulations and it often  
24 happens to trial lawyers that their children have their  
25 mother's beauty and brains and hopefully their father's charm,

1 and I am certain that is true in this case. But I do  
2 congratulate Jim and it's wonderful.

3 Your Honor, I think I can accurately report a few  
4 things this morning. Verilaw is up and running, and we served  
5 an FDA subpoena on Verilaw. I have heard from the attorney  
6 with the FDA. I provided Mr. Irwin with that attorney's name  
7 and phone number and et cetera. And if your Honor would like a  
8 copy of that FDA subpoena to put on the website, we can provide  
9 it.

10 THE COURT: I logged on and I saw that you were served.  
11 I didn't pull up the subpoena, but I did note that we have a  
12 link into Verilaw and I think it's a very good process. It  
13 looks very well done. Among other things it sets forth a list  
14 of all of the attorneys, which is helpful to the court and the  
15 court staff. I will keep reviewing this site either daily or  
16 certainly every couple of days.

17 MR. HERMAN: I also wish to advise the court that we  
18 have received a number of e-mail addresses for attorneys who  
19 have cases that we did not have before, so that seems to be  
20 progressing well and we're going to stay behind it. And we  
21 would not anticipate that we will need additional direction  
22 from the court at this time. But will, with Mr. Irwin, make an  
23 interim report before the next scheduled meeting.

24 THE COURT: I pulled up the calendar. I didn't see any  
25 list of depositions or anything scheduled in March. Did you

1 all set those yet?

2 MR. HERMAN: Your Honor, depositions were completed  
3 this week, organizational depositions in Philadelphia. I am  
4 pleased that not only counsel opposite attended but two or  
5 three members of our liaison committee, Mr. Arsenault,  
6 Ms. Barrios, and who else? Brad Duhe attended. And we  
7 appreciate their attendance. The depositions went well and  
8 there was no need to call anybody about anything.

9 THE COURT: Any problems with liaison and the  
10 depositions?

11 MR. ARSENAULT: Not at all, Judge. It went very well.

12 THE COURT: Good.

13 MR. HERMAN: And I want to give Walter Dumas's name for  
14 the record also who attended. I can take this out of order.

15 THE COURT: Sure.

16 MR. HERMAN: We have made progress in terms of  
17 receiving additional documents. We have negotiated and are  
18 negotiating Belgium discovery and Beerse of both document  
19 discovery and organizational type discovery. We believe, and  
20 have every reason to believe, that we will work that out and  
21 that that discovery will proceed within the next three or four  
22 weeks. Well, we anticipate within the next three or four weeks  
23 that -- I shouldn't say that. I think what we believe is  
24 within 60 days we will have documents and other discovery in  
25 Belgium. The total domestic discovery in the United States

1 should be in by June 1st. With regard to --

2 MR. IRWIN: Forgive me for interrupting. I believe the  
3 date we have been shooting for, the target date is June 30th.

4 MR. HERMAN: I think that's correct.

5 THE COURT: Let's try to return to the report.

6 MR. HERMAN: The virtual document depository, we have  
7 made no further progress. Both parties are concerned about  
8 security issues and instead of those security issues becoming  
9 less concerning, they have become of more concern.

10 Master Complaint and Answer, we will have a brief  
11 to the court which we want to provide counsel opposite,  
12 Mr. Irwin, before it comes to court so he is aware of it and  
13 that will be done next week. I want to give the court advance  
14 notice that the brief takes the position that in the PSC's  
15 view, not only would it be difficult but it would not be  
16 prudent to draft a master complaint at this time. I want to  
17 give liaison counsel plenty notice on that before it's filed  
18 with the court.

19 Rolling document production by June 30th. We  
20 should receive hard copy of production, domestic hard copy  
21 production. We received additional responses and objections to  
22 the request for production as the defense had promised. I  
23 believe those came in last night or this morning, so that's on  
24 target and timely.

25 Verilaw is up and running. State liaison counsel

1 did attend the 30(b)(6) depositions, which we're pleased with.  
2 Had a letter from Mr. Arsenault, it was copied to Ms. Barrios,  
3 which they asked that they be included in conference calls with  
4 other non-MDL attorneys who have cases. We're trying to  
5 schedule regular conference calls. Of course, the PSC has no  
6 objection to that and welcomes their participation in those  
7 phone calls.

8           With regard to electronic document production, we  
9 have had further negotiations on those issues. There will be  
10 something to present to the court for determination at  
11 sometime, but for the most part most of the issues are being  
12 worked on daily. If not daily, certainly several times a week.  
13 And we are making progress and much of it will be resolved  
14 without the necessity of the court's intervention. We will,  
15 however, the plaintiff will, however, seek a briefing time line  
16 for foreign electronic document production, and we will do that  
17 at the next conference after, of course, we have had an  
18 opportunity to meet and confer on dates with liaison and  
19 defense counsel.

20           THE COURT: How about foreign document production, are  
21 we having any problems, or are those problems resolved from the  
22 standpoint of issues of destruction or whatever?

23           MR. HERMAN: There are two issues, your Honor.

24           THE COURT: I am confident that defense counsel has  
25 done a lot along the way of trying to avoid that.

1           MR. HERMAN: We have those assurances and we accept  
2 them. It's fair to say that there are some difficulties. We  
3 have an agreement on the production from Beerse in Belgium. As  
4 to other foreign production, there is no agreement in terms of  
5 the issue of preservation. The defense team has assured us  
6 they have made every necessary effort to inform their clients  
7 and see that the materials are preserved. There are some  
8 technical issues which I do not think either party feels are  
9 ripe to bring to the court at this time.

10           THE COURT: Let me hear from Mr. Irwin on that area.  
11 And also how about the information from the plaintiffs, are you  
12 getting the informational sheets?

13           MR. IRWIN: Yes, your Honor. Jim Irwin for defendants.  
14 We have received a few of the plaintiff profile forms that have  
15 trickled in. The deadline is today and we expect to receive  
16 others today from Mr. Herman's office.

17           About a week ago I sent to Mr. Herman a list of  
18 the plaintiffs who we thought, according to our records, whose  
19 plaintiff profile forms were due today. It's a pretty big  
20 list. So I assume we will be getting some of that information  
21 today.

22           I wanted to bring to the court's attention that we  
23 may have a problem with respect to using the authorizations to  
24 collect the medical. We talked about that this morning. I  
25 don't think we will have a problem, but I wanted to bring it to

1 the court's attention.

2 THE COURT: What's the problem, as you see it?

3 MR. IRWIN: The authorizations are made out to me,  
4 Mr. Campion and to Mr. Bruce because it's not practical for us  
5 to make authorizations out to every single local counsel. When  
6 we circulate those authorizations to local counsel, our defense  
7 local counsel in the various states, we're assuming that with  
8 the proper letter from us that they will be able to use those  
9 authorizations to get the medical information.

10 If we encounter problems, Mr. Herman is very  
11 courteous and has assured us that he will give us whatever  
12 letter we need to utilize those authorizations efficiently and  
13 economically, but we may ask your Honor for help.

14 THE COURT: If you need anything from the court, give  
15 me some notice and I will take care of it.

16 MR. IRWIN: If I have answered your question on  
17 plaintiff profile, now I will try to answer your question about  
18 foreign preservation.

19 THE COURT: Yes. But before you do that, let me hear  
20 from Mr. Herman if he expects to receive some of them, or a  
21 large portion of them today.

22 MR. HERMAN: I have to confess that I was just talking  
23 with Mr. Davis and Mr. Becnel and, Jim, and I haven't seen that  
24 list, notwithstanding that we have sent out a letter after the  
25 last conference which was a reminder. I know that we're in a

1 position in our own cases to provide those today.

2           What I will ask is that perhaps, I am going to  
3 meet with Mr. Irwin this afternoon on another matter, and he  
4 can let me know the status at that time and then we will get  
5 behind this again. I can't report to the court about what is  
6 going to come in today or not. I just don't know.

7           THE COURT: Sure. I understand.

8           MR. IRWIN: Your Honor, with respect to foreign  
9 preservation, I think we reported last time that we had  
10 notified the responsible management people in various relevant  
11 locations in Europe and that we had also sent out some  
12 questions to the appropriate people about preservation and that  
13 we were awaiting responses to see what could be done  
14 technologically to satisfy ourselves that we can implement the  
15 necessary measures. I am advised that we have received 20  
16 responses to our questions and that we're reviewing them now.  
17 And, I believe, this was discussed yesterday at a conference  
18 call between Mr. Conour and Mr. Davis.

19           THE COURT: What geographical areas are you looking at?  
20 I know Belgium is one of the areas, but what areas are you  
21 dealing with?

22           MR. IRWIN: I do not know, Judge, what the other  
23 geographical areas are.

24           THE COURT: Tell your people that the Court directed  
25 you to get a name of an individual in each of those

1 geographical areas whose responsibility it is to see that those  
2 materials are taken care of. And rather than just the defense  
3 counsel being responsible for it, the court would like to have  
4 the name and address of an individual in each of those areas so  
5 that I have that information in the event something goes awry  
6 I'll know who to look to.

7 MR. IRWIN: Yes, your Honor, we will gather that up.

8 MR. BECNEL: Daniel Becnel. In reference to the  
9 medical authorizations, I know one of the real bad things that  
10 happens down the road in cases getting authorizations which are  
11 dated and signed to outside counsel around the country, in 30,  
12 60 or 90 days, depending on the state, they're not submitted  
13 and they become stale. And when they become stale then he has  
14 to come back to the plaintiff lawyer who has to go back to the  
15 client to do something. So maybe we could have some sort of  
16 order issued by the court as an agreement. That, you know,  
17 we're not trying to get around it, but I don't want to have to  
18 go back to my clients to get authorizations because somebody  
19 sat on it or they couldn't find a hospital or what have you.

20 THE COURT: What about dates, can you leave dates blank  
21 or fill in the dates when you request it?

22 MR. IRWIN: I think, if I understand the Court's  
23 question, I believe that the authorization is six months. And  
24 what we may want to do is work on submitting an order to your  
25 Honor to renew that in six months.

1 THE COURT: Sure.

2 MR. IRWIN: And I appreciate Mr. Becnel's remarks in  
3 that regard.

4 THE COURT: Give some thought to that, if you can,  
5 because it is a problem. It's just a perpetual problem with  
6 authorizations when you date them. From the plaintiff's  
7 standpoint, they want a date because they don't want an  
8 open-ended situation and they feel they have to have a date.  
9 From the defendant's standpoint, it's a problem because the  
10 date gets stale and then counsel have to go back and get  
11 additional authorizations and that's a problem logistically in  
12 a case like this, so give some thought to how we can deal with  
13 that.

14 MR. HERMAN: Your Honor, I can assure the Court,  
15 Mr. Irwin, it will only take a phone call to resolve that  
16 problem.

17 THE COURT: I think we have covered the material.

18 MR. HERMAN: I think we have. I have been purposely  
19 non-descriptive on some of these issues because they're in  
20 negotiation and I wouldn't want to disturb what I think is  
21 sensitive negotiations on some of these issues. So if my  
22 report, or our joint report this morning has been a bit  
23 non-descriptive in some areas, that's the reason, your Honor.

24 And I have three matters to hand to your clerk for  
25 informational purposes. Mr. Irwin has copies. One is the

1 letter of transmittal to the FDA regarding the subpoena.  
2 Another is the subpoena. The reason I submit these for  
3 informational purposes is because quite often the Justice  
4 Department, as your Honor knows, or the FDA internal attorneys  
5 require some magistrate or judicial intervention. I just want  
6 to alert the court in advance. I don't know that that is  
7 necessary.

8 THE COURT: What is the nature of the subpoena, what is  
9 the thrust of it?

10 MR. HERMAN: Well, the thrust of it is give us all of  
11 your documents that relate to Propulsid. There are some  
12 privilege issues that deal with sensitivity of names of  
13 individuals reporting, physicians, et cetera. So in a sense it  
14 says give us what is non-privileged. We want the Ponderosa.

15 THE COURT: Have the defendants looked at that? Are  
16 you comfortable with that situation?

17 MR. CAMPION: Your Honor, we are just starting to look  
18 at this. I suspect we will have no difficulty with documents  
19 which are publicly available. But with respect to trade  
20 information, we will look at that and we will be back with him  
21 shortly.

22 THE COURT: And then if you need some court  
23 intervention or protective order or whatever it is, give me  
24 some heads up on it.

25 MR. HERMAN: I think we have a protective order which

1 may need some additional language. But the only other matter  
2 is that I would like to give the court a letter that Verilaw  
3 sent out on March 6th to all of the Propulsid MDL attorneys  
4 with copies to Mr. Davis and Mr. Irwin, as well as their  
5 instructions for electronic service which are fairly detailed,  
6 as information to the Court.

7 THE COURT: Give that to us and we will put that on our  
8 website. Perhaps somebody may need that information and they  
9 can pull it out.

10 MR. HERMAN: On behalf of the PSC, your Honor, we have  
11 no other issues. We appreciate, again, the multiple meet and  
12 conferences on these issues that have taken place and the  
13 professionalism and the courtesies that were extended in  
14 connection with the depositions that have been scheduled. They  
15 have gone very smoothly.

16 THE COURT: Let me hear from the defendant.

17 MR. IRWIN: Your Honor, we will be submitting to the  
18 court this afternoon, we will file it probably later on this  
19 morning, a joint motion to correct the confidentiality legend.  
20 I think I mentioned that to your Honor last month. That has  
21 been signed. It's just a matter of routine submission which  
22 will be filed today. And with that, we have no other comments  
23 with respect to the meeting today. We appreciate the  
24 courtesies from the other side.

25 THE COURT: In a matter of this sort, sometimes I feel

1 that we're meeting perhaps too often, but I think that it's  
2 important to have meetings because the meeting requires the  
3 parties to confer about issues and flesh things out. When we  
4 get further along, we may meet every six weeks or something of  
5 that sort rather than every month.

6 But I do think at the present stage of these  
7 proceedings it is necessary to continue on our present  
8 schedule. I do think we're getting some milage out of it and  
9 hopefully heading off some things at the pass rather than  
10 having to deal with them at their crisis stage. And if we can  
11 focus early on, oftentimes that's where the solution is, not at  
12 the crisis stage. At the crisis stage, you can't see a  
13 solution because there are too many other things that are  
14 coming at you.

15 Anybody have comment on this?

16 MR. IRWIN: Your Honor, I believe that the process of  
17 preparing a joint report facilitates a great deal of our  
18 communications and having this meeting facilitates it even  
19 more, so I for one would think that we should maintain our  
20 schedule for the foreseeable term. We would ask, with the  
21 Court's permission, that we try to stick with the 9 A.M.  
22 schedule because it certainly makes our flights in and out more  
23 convenient.

24 THE COURT: I am aware that people are coming from out  
25 of town and that is significant concern, so I will do

1 everything I can to facilitate that. I think also you have to  
2 recognize that in cases of this sort some of you may be seeing  
3 each other for the first time, or at least getting to work  
4 together for the first time, and I think you get some milage  
5 out of working on things early on and establishing some kind of  
6 relationships that will hold you in good stead later on.

7 MR. HERMAN: Please the Court, first of all, I join  
8 with Jim Irwin in saying to you that we don't feel that the  
9 schedule is laborious or unwarranted at all. We feel it's  
10 helpful to the process. It does require some folks to travel a  
11 pretty good distance, but the case requires that anyway. So we  
12 likewise feel that it's necessary and it's helpful.

13 I did, however, negligent to put one issue on the  
14 agenda which the court asked us to address. And Mr. Irwin and  
15 I have addressed it, we are continuing to address it and that  
16 is the issue of the 706 electronic expert which you asked us to  
17 consider. We have some ideas on that.

18 Frankly, they are really on a back burner now  
19 because we're not real sure how much issue has to come before  
20 you. But I do want to advise the Court that we have taken  
21 notice of your Honor's directions and we have discussed the  
22 issue.

23 THE COURT: Anything else from anybody, liaison?

24 MR. ARSENAULT: Your Honor, Richard Arsenault. We  
25 submitted a report to Mr. Herman, and we will continue to work

1 through Mr. Herman in terms of reporting to him our activities  
2 and he can include those in the agendas if he sees fit or  
3 report to the Court as he sees fit as liaison counsel.

4 THE COURT: Let's pick another date. How about  
5 Thursday, April 19th, 9 o'clock, will that work?

6 MR. HERMAN: Yes, your Honor.

7 THE COURT: Okay. Thursday, April 19th at 9 o'clock.  
8 All right, folks, thank you. Court will stand in recess.

9 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)  
10  
11

12 REPORTER'S CERTIFICATE

13  
14 I, Arlene Movahed, Official Court Reporter, United  
15 States District Court, Eastern District of Louisiana, do hereby  
16 certify that the foregoing is a true and correct transcript, to  
17 the best of my ability and understanding, from the record of  
18 the proceedings in the above-entitled and numbered matter.  
19  
20

21 \_\_\_\_\_  
22 Arlene Movahed, CCR

23 Official Court Reporter  
24  
25