

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: GADOLINIUM-BASED)	Case No. 1:08-gd-50000
CONTRAST AGENTS PRODUCTS)	MDL No. 1909
LIABILITY LITIGATION)	
)	Judge Dan Aaron Polster
)	
)	AMENDED¹ MINUTES ORDER
)	(3-6-09 Large Group Conference)
)	

*** THIS DOCUMENT APPLIES TO ALL CASES ***

On March 6, 2009, the Court conducted scheduled Small Group and Large Group Conferences in this MDL. The following agenda items were discuss and resolved.

1. Early Trial Selection Protocol and Case-Specific Discovery

Counsel reported that they had reached an agreement in principle on Early Trial Selection Protocol and case-specific discovery in the Eligible Trial Pool Cases. Essentially, counsel reported that case-specific discovery will commence immediately. Once the number of Eligible Trial Pool Cases is reduced from 20 to 10, the parties will attempt to agree on the first four “bellwether” cases (two from Plaintiffs’ list and two from Defendants’ list) to be tried. To the extent the parties are unable to agree, the Court will make the selection(s) after entertaining argument from counsel. The parties agree that they will waive venue and personal jurisdiction

¹The Minute Order concerning the March 6, 2009 Small and Large Group Conferences, which was issued on March 12, 2009, failed to address the Court’s directive to the parties to complete the case-specific discovery schedule for designated Early Trial Pool cases. (See ECF No. 302.) A paragraph addressing this issue has been added to the end of Section 1, page 2.

(i.e., the *Lexecon* waivers) on the bellwether cases so that they may all be tried before the undersigned in the Northern District of Ohio.

The first case tried will be from the Plaintiffs' list; the second case tried will be from the Defendants' list; the third case tried will be from the Plaintiffs' list; and the fourth case tried will be from the Defendants' list. The parties agree that the first case tried will not be a case in which Mallinckrodt is a defendant. Each trial will have a two-week time limit, excluding jury deliberation. There will be approximately four weeks between trials. This schedule should allow for all four cases to be tried in approximately six months.

Based on recent news that Defendant Bayer has initiated settlement discussions with a number of Plaintiffs, it was agreed that each party may, no later than the close of business on Monday, April 6, 2009, substitute a new case for any case currently on the Eligible Trial Pool list that is settled between now and then. After that date, there may be no substitutions to the Early Trial Pool Cases on that basis alone, and the parties shall follow CMO No. 8 regarding any other substitutions.

Finally, the Court observed that the Case Management Orders presently on the docket which address core case-specific discovery for the 20 selected Eligible Trial Pool cases (i.e., CMO Nos. 8 through 10), are incomplete and presently end with the beginning of case-specific expert discovery on August 4, 2009. (See ECF Nos. 180, 219, 221.) The Court directed the parties to promptly confer and submit a proposed Case Management Order addressing the completion of case-specific discovery in the 20 designated Early Trial Pool cases. The proposed Case Management Order should include a deadline for filing dispositive or other motions and a schedule for briefing them.

2. Inclusion of Wrongful Death Cases among Eligible Trial Pool Cases

Presently, 3 of the 10 cases selected by Defendants on the Eligible Trial Pool list involve wrongful death claims, while none of the 10 cases selected by Plaintiffs do. Despite any alleged assertions to the contrary, the Court made clear that, although there is an obvious interest in having cases resolved while the plaintiffs are alive, there may be certain cases brought on behalf of deceased plaintiffs that would be very instructive to try early. Thus, wrongful death cases on the Early Trial Pool list will be treated the same as any other case on the list.

3. Status of Motions to Dismiss Filed in Individual Cases

After ascertaining that Plaintiffs plan to oppose the motions to dismiss recently filed in eleven individual cases, the Court instructed Plaintiffs to file their opposition briefs no later than March 30, 2009.

4. Update on Proposed Case Management Order No. 11

Counsel reported that they are continuing to negotiate a discovery schedule for cases not on the Eligible Trial Pool list, which schedule will be embodied in proposed Case Management Order No. 11. The Court strongly encouraged counsel to agree on this schedule and to file it, or file briefs setting forth unsettled scheduling issues, no later than March 20, 2009.

5. Status of Motion to Sever in the *Payumo* Cases

The Court noted that no update was necessary since the Court has issued an order requiring this multi-plaintiff case to be severed, so that there is only one plaintiff per case.

6. Discovery Dispute regarding Custodial File and Deposition of Dr. Hugo Flaten

Plaintiffs and the GE Defendants both submitted filings with respect to a discovery dispute regarding the timing of the deposition of Dr. Hugo Flaten, GEHC's Vice President of

Global Pharmacovigilance, and the timing of the production of his supplemental custodial file. (See ECF Nos. 288, 290.)

Upon consideration of the parties' filings, the Court resolved the discovery dispute by ordering that:

- (1) Dr. Flaten's deposition should proceed as scheduled on April 29-30, 2009;
- (2) During this deposition, Plaintiffs can question Dr. Flaten regarding any 2008 documents that were produced from other custodians' supplemental files;
- (3) The GE Defendants shall then produce Dr. Flaten's supplemental custodial file by Monday, May 4, 2009; and
- (4) Plaintiffs shall have the opportunity to re-depose Dr. Flaten regarding two limited areas of inquiry:
 - (a) any document in Dr. Flaten's supplemental custodial file that was not previously produced from other custodians' supplemental files, and
 - (b) any document previously produced from other custodians' supplemental files to which Dr. Flaten testified at his earlier deposition that he did not have knowledge, but was later found to have been produced in Dr. Flaten's supplemental custodial file.

7. Status of Federal/State Court Cooperation

Counsel updated the Court on the status of federal/state court cooperation.

8. Next Conference

The next conference will be a Small Group Conference held in chambers at 9:00 a.m. on April 7, 2009. In anticipation of that Conference, counsel shall file no later than 12:00 noon April 2, 2009: (1) a proposed agenda, (2) all fully-briefed submissions for the Court's consideration, and (3) a list of attendees.

IT IS SO ORDERED.

/s/Dan Aaron Polster March 17, 2009
Dan Aaron Polster
United States District Judge