

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

<b>IN RE: GADOLINIUM-BASED</b>	)	<b>Case No. 1:08-gd-50000</b>
<b>CONTRAST AGENTS PRODUCTS</b>	)	<b>MDL No. 1909</b>
<b>LIABILITY LITIGATION</b>	)	
	)	<b>Judge Dan Aaron Polster</b>
	)	
	)	<b>MINUTES ORDER</b>
	)	<b>(4-7-09 Small Group Conference)</b>
	)	

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

On April 7, 2009, the Court conducted a scheduled small group conference in this MDL. The following items were discussed, some of which required rulings by the Court.

**1. Adamo (1:09-gd-50075) - Court Granted Plaintiff's Motion to Remand (ECF No. 16)**

At the outset, the Court addressed the Plaintiff's pending Motion to Remand filed in *Adamo v. General Electric Co.* (1:09-gd-50075) (ECF No. 16). Upon reviewing the parties' submissions and the applicable law, as well as after hearing some brief argument from counsel, the Court granted the Plaintiff's motion and ordered that the case be remanded to New York Supreme Court in New York County. As explained in more detail on the record, the Court held that the Removing Defendants had not demonstrated that General Electric Company was a fraudulently joined defendant. General Electric Company is in fact a defendant in a number of other cases in this MDL, and while counsel for GE asserted that this corporate entity is not a responsible party, the Court has not previously been asked to rule on this issue. Accordingly,

because Plaintiff and General Electric Company were both citizens of New York under 28 U.S.C. § 1332, there was no diversity of citizenship, and the Court could not exercise federal subject matter jurisdiction over this action.

**2. Court Met Separately With Each Party**

The Court then met separately with counsel for each of the parties to discuss the impact on the MDL of current settlement negotiations involving the Bayer Defendants, the potential for further settlement negotiations involving the other Defendants, and any other matter counsel needed to raise concerning case management.

**3. Case Management Order #11 - Procedures For Cases Not In The Eligible Trial Pool**

Next, the Court addressed the parties' submissions regarding a proposed CMO #11 that would govern discovery and docket management procedures for cases not in the Eligible Trial Pool (*see* ECF Nos. 311, 312).

In light of these submissions, the Court issued the following rulings: (1) CMO #5 and CMO #8 shall remain in force without amendment; (2) Plaintiffs are permitted to conduct product identification discovery by first conducting third-party discovery and then, if necessary, deposing the Defendants' sales representatives; and (3) Defendants are permitted to conduct NSF diagnosis discovery in no more than thirty (30) cases in which there is a good faith dispute regarding the diagnosis.

Based on these rulings, the parties shall jointly file a proposed CMO #11 for the Court's entry **no later than 4:00 P.M. on Friday, April 17, 2009.**

**4. Case Management Order #12 - Pretrial Schedule For First Bellwether Trial**

The Court then addressed the parties' submissions regarding a proposed CMO

#12 that would complete the discovery schedule set forth in CMO # 10 and outline the schedule for the first bellwether trial (*see* ECF Nos. 323, 324).

The Court first noted that it was disappointed that the parties' submissions were not filed until the day before the conference, despite repeated admonitions by the Court that the parties should timely file all submissions several days in advance of the preceding conference. The Court also noted that it had substantive concerns with both the Plaintiffs' and the Defendants' proposals – namely, that the Plaintiffs' proposal did not provide the parties and the Court with sufficient time and that the Defendants' proposal was open-ended and did not establish a firm trial date. Accordingly, the Court instructed the parties to renegotiate the schedule and to jointly file a new proposed CMO #12 **no later than 4:00 P.M. on Tuesday, April 21, 2009**, or the Court would issue its own schedule by Friday, April 24, 2009.

In regards to the renegotiation of the schedule for the first bellwether trial, the Court offered the following guidance: (1) Defendants should be required to disclose the identity of their corporate witnesses they intend to call at trial early in the process; (2) Plaintiffs shall submit their Rule 26(a)(2) expert reports by September 8, 2009 and Defendants shall submit their Rule 26(a)(2) expert reports between forty-five (45) and sixty (60) days after Plaintiffs submit their reports and the parties should then have approximately thirty (30) days to depose each other's experts; (3) dispositive and/or *Daubert* motions should be filed approximately thirty (30) days after the completion of fact and expert discovery; (4) the parties should allow the Court three weeks to resolve any dispositive and/or *Daubert* motions and the trial should not start until approximately thirty (30) days after the Court issues any rulings on the motions; (5) modifications to the times set forth in the Court's standing trial order may be appropriate,

particularly with respect to motions *in limine* and deposition designations; and (6) a firm trial date for the first bellwether trial should be set for some point in the spring of 2010.

**5. Defendants' Motions To Dismiss For Failure To Substantiate Product Identification**

The Court then discussed the Defendants' pending Motions to Dismiss for Failure to Substantiate Product Identification.

First, in *Anderson* (1:08-gd-50227), the parties agreed that the GE Defendants and Mallinckrodt should be dismissed without prejudice, which would properly leave the Bracco and the Bayer Defendants in the case. Accordingly, the Court will dismiss without prejudice the GE Defendants and Mallinckrodt and term the Defendants' motion as moot.

Similarly, in *Rostad* (1:08-gd-50293), the parties agreed that the GE Defendants, the Bracco Defendants, and Mallinckrodt should be dismissed without prejudice, which would properly leave the Bayer Defendants in the case. Accordingly, the Court will re-enter the Court's Order dated March 31, 2009 that was previously vacated; dismiss without prejudice the GE Defendants, the Bracco Defendants, and Mallinckrodt; and term the Defendants' motion as moot.

Likewise, in *Stanic* (1:08-gd-50343), the parties agreed that the GE Defendants and Mallinckrodt should be dismissed without prejudice, which would properly leave the Bayer Defendants in the case. Accordingly, the Court will enter the Plaintiffs' stipulated notice of dismissal dismissing without prejudice the GE Defendants and Mallinckrodt and term the Defendants' motion as moot.

And finally, in *Keller* (1:09-gd-50042), in which there still appears to be a dispute regarding the identity of the proper Defendants and in which Plaintiff has propounded product

identification discovery, the Court ordered that the Plaintiff, **no later than 4:00 P.M. on Monday, June 8, 2009**, produce evidence substantiating product identification for the named Defendants or dismiss without prejudice the GE Defendants, the Bracco Defendants, and Mallinckrodt, which would properly leave the Bayer Defendants in the case.

**6. Parties' Update On The Status Of Case-Specific Discovery**

The Court directed the parties to move forward with the case-specific discovery in the twenty (20) Eligible Trial Pool cases. The Court reminded counsel that CMO #8 permits depositions of a reasonable number of treating physicians.

**7. Plaintiffs' Motion For A Qualified Protective Order**

The Court entered the Plaintiffs' unopposed motion for a qualified protective order to facilitate resolution of government-based liens in settled cases (*see* ECF Nos. 319, 327).

**8. Amended Common Benefit Order (PTO #2)**

Counsel for Plaintiffs informed the Court that an amended common benefit order (PTO #2) may need to be filed. The Court granted Plaintiffs leave to file a proposed amended order.

**9. Discovery Dispute Regarding Dr. Flaten's Deposition**

Counsel for the GE Defendants raised a discovery dispute regarding Dr. Flaten's deposition scheduled for April 29, 2009 in Oslo, Norway and the general protocol for depositions of corporate and foreign witnesses. Specifically, counsel for the GE Defendants orally requested a briefing schedule and hearing date to resolve the issue of creating a separate CMO covering depositions of corporate and foreign witnesses.

After lengthy discussions with counsel for Plaintiffs and the GE Defendants, the

Court ruled as follows: (1) all parties shall have the right to conduct perpetuating depositions, as provided for under the Federal Rules of Civil Procedure, but the parties must provide two weeks notice of their intent to conduct a perpetuating deposition and inform the other side of approximately how long their examination should last; (2) all depositions in the MDL shall not exceed two days (7 hours each day) without prior Court approval; and (3) with respect to Dr. Flaten's deposition, Plaintiffs' counsel Ramon Lopez shall have the opportunity to examine Dr. Flaten for four hours, given the GE Defendants' counsel's agreement that Dr. Flaten will be available for an extra hour at the beginning and end of each of the two days of his deposition. Accordingly, the Court determined that briefing was not necessary on the issue and that a separate CMO was not needed.

**10. Plaintiffs' Motion For Enlargement Of Time To Substitute Early Trial Pool Cases**

The Court granted in part Plaintiffs' motion for enlargement of time to substitute three early trial pool cases (*Flattery*, Case No. 1:08-gd-50035, *Frazier*, Case No. 1:08-gd-50022, and *Bennett*, Case No. 1:08-gd-50320) in which there are active settlement discussions with Bayer. (ECF No. 326.) Specifically, the Court ruled that: (1) Plaintiffs must provide notice of substitution **no later than 4:00 P.M. on Thursday, April 30, 2009**; (2) Plaintiffs can only substitute the two cases that were referenced in Plaintiffs' motion (*i.e.*, *Little* (1:08-gd-50201) and/or *Campbell* (1:08-gd-50045)); and (3) Defendants, if they so chose, are permitted to begin case-specific discovery in *Little* (1:08-gd-50201) and *Campbell* (1:08-gd-50045).

**11. Status of Federal/State Court Cooperation**

Counsel updated the Court on the status of federal/state court cooperation, and the Court advised counsel of its conversation with Judge King of Alabama.

**12. Next Conference**

The next conference will be a small group conference held in chambers at 9:00 A.M. on Wednesday, May 20, 2009. In anticipation of that conference, counsel shall file no later than 4:00 P.M. on Thursday, May 14, 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 April 8, 2009*  
**Dan Aaron Polster**  
**United States District Judge**