

**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
)	
)	MINUTES ORDER
)	(7-29-09 Small Group Conference)
)	

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

On July 29, 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. Strikes and Bellwether Trial Scheduling Issues

The Plaintiffs' Steering Committee ("PSC") filed a brief advocating a change to the protocol outlined in Case Management Order ("CMO") No. 12 for striking early trial pool cases, requesting a two-week extension of the deadline for Plaintiffs to disclose their case-specific experts (presently September 8, 2009), and advance the deadline for stipulating to the identity and order of bellwether trials and, if necessary, briefing on that subject (presently August 11, 2009 and August 14, 2009, respectively). (ECF No. 439.) Defendants Bayer Healthcare Pharmaceuticals, Inc. and Mallinckrodt, Inc. filed a joint position statement agreeing with the PSC's position. (ECF No. 454.) The GE Defendants ("GEHC") filed a brief opposing

any change to the bellwether trial selection protocol and advancement of the deadlines thereto, and opposing an extension of the deadline for Plaintiffs to disclose their case-specific experts unless the Court gives a similar extension to Defendants and adjusts the entire bellwether trial schedule outlined in CMO No. 12 accordingly. (ECF No. 456.) GEHC noted that two additional facts made the present bellwether trial schedule unworkable. (Id.) That is, (a) Plaintiffs' disclosure on June 15, 2009 of 19 generic experts, and (2) the PSC's presentation to GEHC last week of proposed dates for deposing those experts – which dates do not begin until a full month after the start of expert discovery – leaving only 21 business days to take the depositions of 17 of the experts and all of GEHC's experts. (Id.) As such, GEHC proposed new bellwether trial discovery deadlines and a new trial date for the first bellwether trial. (See ECF No. 459-5 , at 2-5.)

Upon reviewing the parties' submissions and entertaining argument from counsel during the conference, the Court concluded that:

- **No later than August 7, 2009**, Plaintiffs shall reduce the number of designated generic experts from 19 to 10.
- **No later than August 31, 2009**, Defendants shall designate no more than 10 generic experts.
- **No later than 9:00 AM on August 12, 2009**, the parties shall either inform the Court of their agreed selection for the first bellwether trial, or submit concise briefs on the subject, which will include their second choice for the first bellwether trial. The Court will make a prompt ruling.
- No other changes to the strike protocol or bellwether discovery/trial schedule will be made.

2. Individual Discovery Disputes (Ivancic and Kono cases)

On July 15, 2009, counsel for Plaintiffs Richard Ivancic (Case No. 1:08 GD 50249) and Doyle and Joyce Kono (Case No. 1:08 gd 50192) faxed a letter to the Court seeking the Court's assistance in getting GEHC to better respond to their discovery requests – with particular regard to communications between GEHC and Plaintiffs' healthcare facilities; sales contracts; sales representative documents; marketing materials; distributor information; and identification of responsive documents. On July 27, 2009, GEHC faxed a response letter to the Court challenging Plaintiffs' position and explaining how it has conducted its investigation when responding to Plaintiffs' discovery requests. GEHC also advised the Court that it had resolved some of the discovery issues with the PSC.

After reviewing the parties' submissions and entertaining argument from counsel during the conference, the Court determined that GEHC's responses were satisfactory. The Court noted, however, that if Plaintiffs provide GEHC with additional names to search, GEHC must search their databases for documents relating to that custodian.

3. Plaintiffs' Dispute Re: Discovery of Nycomed's and GEHC's Alleged Research and Development of Macrocylic GBCAs

The PSC submitted a brief asking the Court to order GEHC to produce documents related to GEHC's alleged research and development of alternatives or predecessors to Omniscan. (ECF No. 443.) More specifically, the PSC claims that they have uncovered documents which show that, "at various times in the past 25 years, and even as late as 2007, GEHC and its predecessors sought to develop a safer macrocylic GBCA." (Id. at 2.) GEHC submitted a brief denying that any such product was ever conceived or planned and challenging the PSC's characterization of macrocylic GBCAs. (ECF No. 457.)

After reviewing the briefs and entertaining argument from counsel, the Court ruled as follows. The Court denied Plaintiffs' request for documents preceding FDA approval of Omniscan in 1993, with one exception. Plaintiffs may obtain documents reflecting (and ask witnesses questions about) whether GE predecessors considered developing GBCAs with other configurations and, if so, why they stopped developing them. Plaintiffs then contended that GE is currently developing an alternative to Omniscan which, they further contended, is a safer alternative. GE denied this contention. The Court noted that it did not know whether GE was working on an alternative to Omniscan or, if so, the reason why. The Court ruled, however, that Plaintiffs may have full discovery on any recent efforts by GE to change the configuration of Omniscan since it may bear on the question of general causation.

4. Defense Counsel's Request to Participate in All Teleconferences with the Court

The Court considered defense counsel's request to participate in all future teleconferences with the Court, and advised counsel that the Court will determine who needs to be present on any teleconference. The Court notes that CMO No. 3, which was jointly drafted by the parties and submitted for the Court's approval, permits the Court to conduct teleconferences with liaison counsel, who shall then relate the result of those discussions to co-counsel. There appear to have been breakdowns in communications this month on both sides.

5. Next Conference

The next conference will be a Small Group Conference held in chambers at 9:00 A.M. on Tuesday, September 22, 2009. In anticipation of that conference, counsel shall file on or before 12:00 P.M. on Wednesday, September 16, 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 August 3, 2009

Dan Aaron Polster

United States District Judge