

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN RE: WHIRLPOOL CORP. :
FRONT-LOADING WASHER : CASE NO. 1:08WP65000
 : MDL No. 2001
PRODUCTS LIABILITY LITIGATION :
 : ORDER
 :
 :
 :

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

I. CASE MANAGEMENT CONFERENCE

The Court notifies all counsel and parties that the Court in the above-entitled action sets this case for a Case Management Conference ("CMC") on March 27, 2009, at 1:30 p.m., before Judge James S. Gwin, 18A, Carl B. Stokes Federal Courthouse, 801 West Superior Avenue, Cleveland, Ohio 44113. Counsel should report their presence to Judge Gwin's Deputy.

This Court requires the attendance of all parties, counsel and a representative with full authority for settlement purposes. "Parties" means either the named individuals or, in the case of a corporation or similar legal entity, that person who is most familiar with the actual facts of the case. "Party" does not mean in-house counsel or someone who merely has "settlement authority." The agenda for the CMC is set forth in Rule 16.3(b)(2) of the Local Rules of the United States District Court for the Northern District of Ohio.

Case No. 1:08WP65000
Gwin, J.

II. APPLICABLE RULES

This case is subject to both the Local Rules of the United States District Court for the Northern District of Ohio and the Federal Rules of Civil Procedure. All counsel are therefore expected to familiarize themselves with the Local and Federal Rules. Counsel shall also become familiar with the principles and suggestions contained in Manual for Complex Litigation, Third.

III. TRACK ASSIGNMENT

This case is subject to the provisions of Differentiated Case Management (DCM) as set forth in the Local Rules effective on January 2, 1992, as renumbered on April 7, 1997. The Court shall evaluate this case in accordance with LR 16.2(a)(1) and assign it to one of the case management tracks described in LR 16.2(a)(2). Each of the tracks (expedited, standard, complex, mass tort and administrative) has its own set of guidelines and timelines governing discovery, motions and trial. Pursuant to LR 16.3(a), and subject to further discussion at the CMC, the Court recommends that this case be assigned to the Complex track.

IV. ELECTRONIC FILING

Effective January 1, 2006, all attorneys are required to file electronically pursuant to modifications to both the local civil and criminal rules. The Court's electronic filing policy/procedure is available on the Court's web site (www.ohnd.uscourts.gov) along with registration forms, training materials and tutorials.

All attorneys who participate in MDL 2001 should complete and submit the registration form to the Clerk of Court immediately. Typically, the Court only permits attorneys to register to

Case No. 1:08WP65000
Gwin, J.

file electronically if they have been formally admitted to practice before this Court; however, Rule 1.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation permits attorneys in good standing of the Bar of any U.S. District Court to continue to represent their clients without condition. To facilitate the processing of your registration, please indicate in the appropriate section of the form that you are Counsel of Record in MDL Action 2001. In order to retrieve documents from the CM/ECF system, attorneys and law firm staff will also need access to a PACER (Public Access to Court Electronic Records) Account. PACER is a national system that includes case information from nearly all federal courts. While most law firms already have a PACER account for use by their docketing staff, attorneys will need to become aware of their firm's PACER ID and password, or obtain a PACER ID and password of their own, to access documents from the CM/ECF system. Users who do not have a PACER account will be unable to view or retrieve docket sheets or documents. PACER accounts can be established through the PACER Service Center: <http://pacer.psc.uscourts.gov>

V. FILING PAPERS WITH THE COURT

The purpose of the following instructions is to reduce the time and expense of duplicate filings of documents through the use of the master case file, and to prevent the master case file from congestion of miscellaneous pleadings and orders that are of interest only to the parties directly affected by them. It is not intended that a party would lose any rights based on a failure to follow these instructions. Except in extremely rare circumstances, the Court requires all pleadings and exhibits to pleadings to be filed electronically. Except upon a showing of extremely good cause, the Court will deny motions/requests that matters be filed under seal.

Case No. 1:08WP65000
Gwin, J.

A. Separate Filing

A document that relates only to a specific case and would not be of interest except to those parties directly affected by it – such as an amended complaint adding a party or a motion to dismiss a party – should bear the caption and case number of that specific case rather than of the master case file. Such a document will be docketed and filed in that case and not in the master case file. Please note that cases removed or transferred to this Court are assigned a new case number in this Court.

B. Address; Number of Copies

The Court requires that all documents be filed using the Court's ECF system.

C. Discovery Documents

Unless otherwise ordered by the Court, initial disclosures, discovery depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto shall not be filed with the Clerk's Office, except that discovery materials may be filed as evidence in support of a motion or a response. Deposition transcripts should be filed in electronic format. Electronically filed deposition transcripts should be complete transcripts unless the deposition exceeds 300 pages. Any transcript of a deposition that exceeds 300 pages shall be filed as an excerpt of the original deposition taken. Deposition excerpts needed to support or oppose a dispositive motion (i.e., summary judgment, motion to dismiss) should be filed with a memorandum in support and attached as exhibits.

VI. MOTIONS

A. Applicable Rules

Motion practice shall be guided by LR 7.1(a)-(k), as well as all applicable Federal Rules of

Case No. 1:08WP65000
Gwin, J.

Civil Procedure.

B. Notice of Motions

Except for unusual circumstances or when a ruling is required on a shortened basis, motions shall not be brought for hearing at any time other than a regularly scheduled status conference, which shall be set from time to time by the Court.

C. Length of Briefs

Briefs related to dispositive motions may not exceed forty (40) pages without leave of Court. Every memorandum related to a dispositive motion must be accompanied by a certification specifying that this matter has been assigned to the complex track and a statement certifying that the memorandum adheres to the page limitations set forth in LR 7.1(g). Memoranda relating to all other motions must not exceed fifteen (15) pages in length. All memoranda exceeding fifteen (15) pages in length must have a table of contents, a table of authorities cited, a brief statement of the issues to be decided, and a summary of the argument presented. Appendices of evidentiary, statutory or other materials are excluded from these page limitations and may be bound separately from memoranda.

D. Briefing Schedule

At the Case Management Conference, the Court, after consultation with counsel, will establish cutoff dates for the filing of dispositive motions. For non-dispositive motions, and absent order of the court, opposition memoranda shall be filed within fourteen (14) days after service of any non-dispositive motion. Any replies to non-dispositive motions shall be filed within seven (7) days after service of the opposition memorandum, excluding intermediate Saturdays, Sundays and legal holidays.

Case No. 1:08WP65000
Gwin, J.

E. Motions to Dismiss

The Court requires Defendants to file an answer to the complaint regardless of whether they have filed or plan to file a motion to dismiss. The filing of the motion to dismiss shall not delay the time in which the party must answer the complaint.

F. Telephone Status Conferences

Status Conferences may be conducted by telephone at the Court's discretion by prior arrangement with the Court's chambers, provided that all interested parties are available and receive at least seventy-two (72) hours notice. In an emergency, the Court may shorten the notice requirement. Telephone conference calls will often serve as an efficient substitute for Court appearances, as, for example, where counsel desire to present short arguments and obtain immediate rulings. The Court itself may initiate conference calls on procedural or scheduling matters.

VII. APPOINTMENT OF LEAD AND LIAISON COUNSEL

A. Plaintiffs' Co-Lead Counsel

The Court provisionally appoints:

Jonathan D. Selbin
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8th Floor
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Case No. 1:08WP65000

Gwin, J.

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to serve as co-lead counsel for the Plaintiffs.

Any party objecting to the appointment of co-lead counsel should file an objection by March 12, 2009. Any objection should be accompanied by a memorandum describing the basis of such objection. Any party wishing to respond to any filed objection shall file any response by March 19, 2009.

B. Plaintiffs' Liaison Counsel:

Brian Ruschel
Ste. 660
925 Euclid Avenue
Cleveland , OH 44115

C. Plaintiffs' Steering Committee:

George K. Lang
Paul M. Weiss
Freed & Weiss
Ste. 1331
111 West Washington Street
Chicago , IL 60602

James C. Shah
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Case No. 1:08WP65000
Gwin, J.

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Anyone objecting to the appointment of any member of the Plaintiffs' Steering Committee shall file an objection by March 12, 2009. Any objection should be accompanied by a memorandum describing the basis of such objection. Any party wishing to respond to any filed objection shall file any response by March 19, 2009.

Case No. 1:08WP65000
Gwin, J.

D. Hearing

The Court will conduct a hearing on objections to the appointments of lead and liaison counsel and objections to the appointments of the Plaintiffs' Steering Committee on **March 27, 2009, at 1:00 p.m., Courtroom 18A (Cleveland).**

VIII. ATTORNEYS' TIME AND EXPENSE RECORDS

A. Maintenance of Contemporaneous Records

All counsel who may seek any award of fees shall keep a daily record of their time spent and expenses incurred in connection with this litigation, indicating with specificity the hours, location, and particular activity. The failure to maintain such records will be grounds for denying court-awarded attorneys' fees, as will an insufficient description of the activity (such as "research" or "review of correspondence").

B. Filing

By the fifteenth day of each month, each firm that may seek an award (or approval) of a fee by the court shall file with Lead Counsel a report summarizing according to each separate activity the time and expenses spent by its members or associates during the preceding month (and the ordinary billing rates of such attorneys in effect during such month) and the accumulated total of the firm's time, hourly rates, and expenses to date. Lead Counsel shall file under seal with the clerk by the last day of the month a report summarizing for all participating counsel such time and expenses reports, arranged according to the particular activities.

Case No. 1:08WP65000
Gwin, J.

IX. SERVICE OF DOCUMENTS

A. Orders

All parties are required to register for ECF participation. The Court will serve all orders through the ECF system. Plaintiffs' Lead and Liaison Counsel shall be responsible for providing copies of any order to any party/counsel who does not receive service of the order through the ECF system. This order is being provided to the persons shown on Attachment A, which has been prepared from the list of counsel presently known to the Judicial Panel on Multidistrict Litigation to represent parties in related litigation, as well as all counsel who are currently registered for electronic filing in this case. Counsel on this list are requested to forward a copy of the order to other attorneys who should be notified of the conference. Persons who are not named as parties in this litigation but may later be joined as parties or are parties in related litigation pending in other federal and state courts are invited to attend in person or by counsel.

B. Pleadings, Motions, and Other Documents

As above described each party is required to participate in this Court's ECF filing system. That system gives each party immediate access to all electronically filed cases and obviates the need to make personal service on individual parties.

X. PRELIMINARY REPORTS

A. Preliminary Reports

Counsel will submit to this Court by March 20, 2009, a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. These statements will not be filed with the clerk, will not be binding, will not waive

Case No. 1:08WP65000
Gwin, J.

claims or defenses, and may not be offered in evidence against a party in later proceedings.

B. List of Pending Motions

Counsel's statement shall list all pending motions.

C. List of Related Cases

Counsel's statement shall list all related cases pending in state or federal court and their current status, to the extent known.

D. Refinement of Pleadings

It is anticipated that an amended, more specific complaint and answer may be required before a case is scheduled for trial or remanded to a transferor court, but that amendments of pleadings prior to that time should generally be avoided.

XI. DISCOVERY – IN GENERAL

The plan for document production, interrogatories, requests for admission, and depositions has been developed based on the following principles: (1) discovery should be conducted on the assumption that there may be a separate trial for each case filed; (2) additional "true discovery" will not be needed with respect to many potential witnesses who have previously testified in depositions or in trials; (3) videotaped depositions (which are also stenographically recorded) should be taken for potential use as trial testimony of all persons whose testimony will likely be needed in a number of trials, thereby enabling trials to be conducted in different courts at the same time without complications arising from unavailability of witnesses; (4) through use of a document depository, all parties in any federal or state court should have quick and inexpensive access to, and the ability to retrieve, (A) all existing and

Case No. 1:08WP65000
Gwin, J.

future depositions, interrogatories, requests for admission, and trial transcripts in text-readable and searchable computer files and (B) all potentially relevant documents from the Defendants and other sources that are likely to be used during depositions or at trial in more than a single case; (5) claims of confidentiality and use of "protective" orders restricting use of materials should be kept to an absolute minimum; (6) some discovery will be "national" in scope (i.e., potentially needed in various cases throughout the country), while other discovery will be "regional" and still other discovery will be ("case-specific") (e.g., depositions of plaintiffs); (7) the plan should be designed to accommodate coordinated, cost-efficient discovery in both federal and state courts; and (8) in order to minimize unnecessary burdens and expense of redundant discovery, parties should not submit document requests, interrogatories, requests for admission, and notices of depositions without first determining that the materials are not available in the library or are inadequate.

XII. INITIAL DISCLOSURES

By April 15, 2009, Defendants will provide initial disclosure documents pursuant to Rule 26.

XIII. DOCUMENT RETENTION

A. Retention

During the pendency of this litigation, and until otherwise ordered by this Court, each of the parties herein and their respective officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are restrained and enjoined from altering, interlining, destroying,

Case No. 1:08WP65000

Gwin, J.

permitting the destruction of, or in any other fashion changing any "document" in the actual or constructive care, custody, or control of such person, wherever such document is physically located, or irrevocably changing the form or sequence of the files in which the document is located. Such persons are also enjoined from changing the location of any such documents except to facilitate compilation, review, or production (as by filing in a document depository).

B. Scope

"Document" shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped coded, electro-statically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained, including (but not limited to) notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, computer storage tapes, computer storage cards or disks, books, journals, ledgers, statements, reports, invoices, bills, vouchers, work-sheets, jottings, notes, letters, abstracts, audits, charts, checks, diagrams, drafts, recordings, instructions, lists, logs, orders, recitals, telegram messages, telephone bills and logs, résumés, summaries, compilations, computations, and other formal and informal writings or tangible preservations of information.

This order pertains only to documents containing information that may be relevant to, or may lead to the discovery of information relevant to the front-loading washing machines. Any document described or referred to in any discovery request or response made during this litigation shall, from the time of the request or response, be treated for purposes of this order as containing such information unless and until the court rules such information to be irrelevant.

C. Electronic Data

Case No. 1:08WP65000
Gwin, J.

During the pendency of this litigation, defendants shall maintain electronic document and data retention policies designed to ensure the retention of defendants' discoverable electronic information. In connection therewith, defendants shall (I) maintain back-up procedures designed to back up all network storage devices potentially containing discoverable electronic information; (ii) suspend the routine or automatic deletion of discoverable electronic information, including the automatic deletion of electronic mail or removal of unused electronic data and files; and (iii) secure the hard drives (or mirror image back-ups of such hard drives) of all computers (including laptop or desktop computers used by defendants' employees and/or contractors [as defined in paragraph 5 below]) potentially containing discoverable electronic information that are not backed up in the ordinary course, before the reformatting, redeployment, or disposal of such hard drives. With respect to items (ii) and (iii), supra, these steps shall be interim measures followed while the parties develop agreed alternative measures to accomplish the preservation of data subject to the procedures in items (ii) and (iii). All electronic information or data archived or backed up as part of a special back-up, whether due to system upgrade, transition planning, system migration, disaster recovery planning, or any other reason, that potentially contains discoverable electronic information shall be securely retained for the remainder of this litigation.

All current or legacy software and hardware necessary to access, manipulate, print, etc., discoverable electronic information that is either "live" or has been archived or backed up shall be securely retained for the remainder of the litigation. If necessary, the parties shall meet and confer to develop procedures designed to minimize any undue hardship associated with the continued retention of such items. Any existing or hereafter created "full" (as opposed to incremental) back-up tape or other back-up storage media (collectively, "back-up tape") created

Case No. 1:08WP65000
Gwin, J.

on a monthly basis, as well as any full back-up tape created on a periodic basis greater than a month (e.g., quarterly or yearly back-up tapes) that potentially contains discoverable electronic information shall be securely retained. The parties shall meet and confer concerning the disposition of back-up tapes and present to the Court proposals for the continued treatment of such back-up tapes.

Defendants shall obtain certifications on behalf of all employees or independent contractors who (1) work at defendants' facilities for a duration longer than two weeks and (2) are reasonably believed to create, alter or access discoverable electronic information on their non-network storage devices (i.e., desktop hard drives, laptop hard drives, and home computer hard drives), that such devices and any backup tapes thereof maintained by each such employee or contractor have been searched for discoverable electronic information and any such data has been copied to a backed-up network storage device for the preservation of the same. Defendants shall instruct such employees and contractors in the manner of copying such files so as to retain, without modification or alteration, all meta-data (file creation dates, modification dates, etc.) associated with the files at issue. Defendants shall on a semiannual basis have such employees and contractors that potentially possess discoverable electronic information certify that any newly created data has been copied to a secure, backed-up network storage device to ensure its preservation. The parties shall meet and confer to develop the form of notice and certification directed to defendants' employees, as well as the procedures to be used by defendants' employees and contractors when searching for and copying discoverable electronic information.

Defendants shall implement specific steps to monitor their employees' compliance with the preservation guidelines herein. To that end, the parties shall meet and confer to develop

Case No. 1:08WP65000
Gwin, J.

specific procedures to effectuate such monitoring. Further, defendants shall conduct random audits of their employees' non-networked storage devices following receipt of the semiannual certifications required under paragraph B.5 herein. In connection with each semiannual audit, defendants shall search the non-networked storage devices of not less than ten (10) of their employees believed to possess discoverable electronic information to determine if any discoverable information, not otherwise stored on a network storage device, exists on those employees' non-networked storage devices. Defendants shall, on a regular basis, report to plaintiffs the results of such audits and, if requested, provide to plaintiffs certification from those employees whose devices are audited. The parties shall meet and confer to implement any additional procedures needed to ensure the effective preservation of discoverable electronic information contained on non-networked storage devices. In the event the parties, after meeting and conferring, are unable to agree that monitoring or effective preservation have been accomplished the parties shall submit their dispute to a Special Master that the Court, if needed will appoint. Defendants shall maintain records of any compliance audit undertaken in accordance with this paragraph. The reports of any compliance audit by defendants shall be securely retained by defendants in the event that such information may need to be submitted to the Court or any Special Master.

Defendants shall take specific measures to preserve discoverable electronic information possessed by their international subsidiaries and affiliates. To that end, defendants shall use their best efforts to implement the preservation procedures and protocols contained herein to preserve discoverable electronic information possessed by such entities. Defendants shall timely notify plaintiffs' counsel of any instances where implementation is not reasonably practical. Defendants

Case No. 1:08WP65000
Gwin, J.

will meet and confer with plaintiffs further to the extent that the implementation of the preservation procedures and protocols contained herein by their international subsidiaries and affiliates is impracticable in light of the systems utilized by such entities and to develop acceptable procedures and protocols for such entities designed to achieve the preservation of discoverable electronic information possessed by them.

D. Limitation of Order

This order pertains only to documents containing information that may be relevant to or may lead to the discovery of information relevant to the claims in the above-captioned litigation and sales and marketing.

E. Confidentiality

The parties are to confer to establish procedures for managing materials for which they intend to seek restrictions on access.

F. Numbering System and Indexing of Documents

All materials will be uniquely identified by a prefix of as many as three letters and a page number of as many as ten digits. This combination of letters and digits should then be used throughout the discovery process and at trials whenever referring to a particular document or page. All reasonable efforts should be made to avoid having the same page being assigned more than one such identifying number except when there is a need to account for different copies of the same document or page, for example, because of special notations placed on a document.

H. Legibility of Documents

Each producing party shall take reasonable steps to assure that the copies of the documents it produces are legible. To the extent a producing party cannot or does not produce a

Case No. 1:08WP65000
Gwin, J.

legible copy, it shall make the original document(s) available for inspection and copying.

XIV. DISCOVERY -- INITIAL DISCLOSURES

The parties are to confer regarding the production of materials contemplated by Fed. R. Civ. P. 26(a). Disclosure will comply with the date above established.

XV. DISCOVERY RULES

A. General Rules

The parties are directed to proceed without interruption with discovery. All methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery. Fed. R. Civ. P. 26(d).

B. Deadlines Imposed by Other Courts

Orders issued by other courts imposing dates for initiation or completion of discovery are, when a case is removed or transferred to this Court, vacated and replaced by the schedule provided in this Order.

C. Coordination of Discovery With Other Courts

Defendants shall produce in these proceedings all documents and information that they produce, by agreement or order, in other related litigation pending in other courts, on the same schedule or as near thereto as is practicable. Liaison Counsel or their designees shall confer with their counterparts in related proceedings to accomplish coordination of discovery without unnecessary duplication of effort or undue burden.

Case No. 1:08WP65000
Gwin, J.

D. Exceptional Cases

Any party may move for relief from the prescribed discovery schedule when merited by special circumstances, such as when a Plaintiff is "in extremis" or to obtain information pertinent to critical preliminary issues (e.g., forum non-conveniens issues respecting claims by foreign Plaintiffs).

XVI. OTHER DISCOVERY

The parties are to confer to establish guidelines for the production of documents in hard copy and in electronic format.

XVII. TRIALS

This Court has not yet made any determination whether any cases should be consolidated for trial, whether some issues should be tried separately from others, whether any cases should be transferred to this Court under 28 U.S.C. § 1404 or § 1406, etc. At the Case Management Conference, the Court will establish trial dates for cases filed in the Northern District of Ohio. And the Court will, at the conference, consider other proposals regarding how these cases may be structured for trial, either in this district or other districts. For planning purposes, this Court generally schedules all trials, including complex trials, within ten months of filing.

XVIII. RESOLUTION PRIOR TO CMC

In the event that this case is resolved prior to the CMC, counsel should submit a jointly

Case No. 1:08WP65000
Gwin, J.

signed stipulation of settlement or dismissal, or otherwise notify the Court that the same is forthcoming.

IT IS SO ORDERED.

Dated: February 25, 2009

s/ James S. Gwin

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

ATTACHMENT “A”

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