

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

IN RE: BAYER HEALTHCARE LLC)	Case No. 1:12 MD 2319
AND MERIAL LIMITED FLEA)	MDL No. 2310
CONTROL PRODUCTS MARKETING)	
AND SALES PRACTICES LITIGATION)	Judge Dan Aaron Polster
)	
)	<u>ORDER</u>
)	

THIS DOCUMENT APPLIES TO ALL CASES

On May 1, 2012, the Court held a Case Management Conference with counsel of record, during which the Court engaged counsel in substantial discussions about the nature of the claims against the two Defendants: Bayer Healthcare, LLC, and Merial Limited.

The Plaintiffs in this MDL contend that Defendants make false or misleading claims in the marketing and sales of their flea-and-tick products, which are made for dogs and cats.¹

Although Bayer and Merial are separate entities selling separate products, they make virtually identical assertions. Bayer makes the following assertion about its flea-and-tick products:

After topical application of the product, imidacloprid is rapidly distributed over the animal's skin within one day of application. It can be detected on the body surface throughout the 28-day treatment interval. Imidacloprid localizes in the

¹ The relevant Bayer products are Advantage, Advantage II, Advantix, Advantix II, K9 Advantix, K9 Advantix II, Advantage Multi, and Advocate. The relevant Merial products are Frontline, Frontline Plus, Frontline Top Spot, and Certifect.

lipid layer of the skin surface, which spreads not only over the surface of the skin but also onto the hair.

(Case No. 11-cv-2172, Doc. # 3 at 15 ¶ 57.a.). Merial makes these claims:

[The products] spread over the pet's body by a process called translocation. When applied, these products are gradually dispersed by the pet's natural oils, collecting in the oil glands in the skin. It is then "wicked" onto the hair over the next 30 days. The translocation process can take up to 24 hours to complete.

(Id. at 17 ¶ 62.a). Both Defendants stand by their assertions and maintain that they have performed studies that back them up. Thus, the key issue is whether Defendants' products truly perform as claimed, namely, whether the products, after applied as directed, migrate across the pet's body (a.k.a., translocate) without getting into the animal's bloodstream,² which would require FDA approval.

After lengthy discussions with the Court, the parties accepted the Court's suggested procedure. No later than 4 p.m. on May 15, 2012, Defendants will forward to the Court and Plaintiffs' counsel any studies conducted after January 1, 2010, that substantiate Defendants' above-quoted assertions. After Defendants produce the studies, Plaintiffs will have until 4 p.m. on Monday, July 16, 2012, to refute the studies, *e.g.*, showing how they are unreliable, inaccurate, or incomplete, or these cases will be dismissed.

If, however, Defendants do not have such studies, then the parties will choose a neutral, third-party laboratory to test the products and will agree upon a testing protocol. If the parties are unable to agree on a neutral laboratory, then they will independently recommend a neutral testing facility, and the Court will choose the laboratory. The results of this testing will be

² With one exception, Bayer's Advantage Multi, which does, according to Bayer, enter the pet's bloodstream.

conclusive as to the veracity of Defendants' claims that their products spread topically over the pet's body within a short period of time.

IT IS SO ORDERED.

/s/ Dan A. Polster May 2, 2012
Dan Aaron Polster
United States District Judge