

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION  
(at Covington)

JUDITH ROMO, et al.,	)	<u>Lead Case</u>
	)	Civil Action No. 2: 15-089-DCR
Plaintiffs,	)	
	)	
V.	)	
	)	
MCKESSON CORP., et al.,	)	<b>CASE MANAGEMENT ORDER</b>
	)	<b>No. 1</b>
Defendants.	)	

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Being sufficiently advised, it is hereby

**ORDERED** as follows:

**I. General**

A. As described in this Court’s consolidation orders [Record Nos. 166, 320], these matters have been consolidated for purposes of discovery and other pre-trial proceedings. While consolidated and subject to intervening orders, all matters will be filed in the docket of the lead case, *Romo, et al., v. McKesson Corp., et al.*, Civil Action 2: 15-cv-089-DCR only. Once consolidation ends, or if an individual case is appealed to the United States Court of Appeals for the Sixth Circuit, the parties will be given time to designate any portion of the master case record that is pertinent to the individual case to be transferred into the individual case file.

These cases will proceed in two phases. Phase I will involve limited written discovery, abbreviated plaintiff depositions, amendment of Complaints, and a show cause process for all pending cases. Phase I is designed to narrow the claims and parties in these

cases. Based on the Court's knowledge of these and related matters, it is anticipated that certain claims and certain defendants in several cases may be dismissed at the conclusion of Phase I, whether voluntarily or pursuant to motion practice.

Phase II will involve discovery (fact and expert) and pretrial work-up of an initial pool of remaining plaintiffs for trial, which will be selected out of those individual cases remaining after Phase I proceedings and dismissals. The Court will establish case-specific scheduling orders for those remaining cases, including potentially setting one or more of those cases for trial or through other alternative dispute resolution proceedings. The Court will hold a status conference and issue further scheduling orders for Phase II proceedings.

B. This Case Management Order shall apply to all non-MDL propoxyphene actions currently pending before this Court and consolidated for discovery and other pre-trial purposes under Rule 42(a) of the Federal Rules of Civil Procedure. Unless otherwise directed, this Order will also govern all newly-consolidated cases. Counsel should familiarize themselves with the Local Rules of this Court. The provisions of this Case Management Order, and any subsequent scheduling orders, supersede any inconsistent provisions of this Court's Local Rules. The following provisions, many of which are adopted from certain orders entered in the matter of *In re: Darvocet, Darvon, and Propoxyphene Products Liability Litigation*, MDL 2226, shall apply to all phases of the litigation and discovery, unless otherwise directed.

## **II. Docket Management**

A. All attorneys must be registered with this Court's Case Management/Electronic Case Filing (CM/ECF) system no later than 20 days from the date of entry of this Case Management Order, absent application to the Court for relief from this

requirement, and all filings in these actions must be made electronically via the CM/ECF system. The CM/ECF registration form can be found on the Court's web site at <http://www.kyed.uscourts.gov>. The login and password issued by the Eastern District of Kentucky upon such registrations will be used only for the purpose of filing documents in the Lead Consolidated Case, *Romo, et al., v. McKesson Corp., et al.*, Civil Action No. 2: 15-cv-089-DCR. Said login and password are not to be used to file documents in any other case in the Eastern District of Kentucky unless the attorney is admitted or becomes admitted to practice in this district pursuant to Local Rule 83.1.

B. All filings shall be served electronically, if it applies to an individual case, on all counsel of record for the individual case, or if it applies to all the cases, on each of the attorneys on the attorney service list on the electronic docket of the Lead Case. A distribution list should not be included on documents filed in this Court; rather, a certificate of service stating that all attorneys appearing on the electronic docket of the Lead Case were served is sufficient. Any attorney who wishes to have his or her name added to or deleted from the service list may do so upon request to the Clerk of this Court with notice to all other persons on such service list, provided, however, that at least one counsel for each party separately represented must remain on the list.<sup>1</sup> Service shall be deemed sufficient if made upon all attorneys on the attorney service list.

C. Any document filed in any of these actions which is substantially identical to any other document filed in another of these actions shall be sufficient if it incorporates by reference the document to which it is substantially identical. Where counsel for multiple

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<sup>1</sup> This requirement in no way amends the obligations of counsel under Local Rule 83.6 regarding withdrawal of counsel.

parties plan to file substantially identical documents, they shall join in the submission of such documents and shall file only one document on behalf of all the parties so joined.

D. Hearings shall not be held on any motions filed except by order of the Court and upon such notice as the Court may direct. Pending motions in any of the actions transferred to this Court must be electronically re-filed.

E. Any orders, including protective orders, previously entered by any transferor district court shall remain in full force and effect unless modified by this Court upon application.

F. Service of Process – Service of all papers filed with the Court shall be accomplished by electronically filing, and no other type of service is permitted or required. Service of all papers that pertain to the cases that are not filed with the Court shall be accomplished by plaintiffs serving counsel of record for the individual case, or if it pertains to all the cases, on each of the attorneys on the attorney service list on the Court’s web site, by either: (i) overnight mail service; (ii) e-mail; or (iii) hand-delivery. Whenever feasible, the serving party shall send courtesy copies simultaneously via e-mail in PDF format to such defendants’ national counsel or to plaintiffs’ counsel, as applicable, of any document otherwise served by overnight mail service or hand-delivery. For service of all papers that pertain to an individual case only, service shall be accomplished in the same manner, but only upon the attorneys who have appeared in the docket number for that individual case.

G. Communications – Unless otherwise ordered, all substantive communications with this Court shall be in writing, with copies to opposing counsel. The Court recognizes that cooperation by and among plaintiffs’ counsel and by and among defendants’ counsel is essential for the orderly and expeditious resolution of this litigation. The communication of

information among and between plaintiffs' counsel and among and between defendants' counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorneys' work product, and cooperative efforts contemplated above shall in no way be used against any plaintiff by any defendant, or against any defendant by any plaintiff. Nothing contained in this Order shall be construed to limit the rights of any party or counsel to assert the attorney-client privilege or attorney work product doctrine.

H. The Court will enter separate orders addressing: (i) the preservation of documents, electronically stored information, and tangible items within the United States; (ii) a stipulation and protective order of confidentiality; (iii) document production protocol and cost; (iv) discovery management; and (v) an abbreviated deposition protocol.

### **III. Defendants' Document Production**

The parties agree that the documents produced by the Brand Defendants<sup>2</sup> in MDL 2226 that were previously paid for by any MDL plaintiff may be considered produced documents in these consolidated actions. However, to the extent any plaintiff here requests that those documents be reproduced by Brand Defendants, the cost order provisions in Case Management Order No. 4 will apply. Plaintiffs may not serve additional discovery on Defendants during Phase I without leave of Court.

### **IV. Early Voluntary or Agreed Dismissals**

Nothing in this Case Management Order should be viewed as prohibiting or inhibiting plaintiffs' counsel from filing voluntary dismissals for those plaintiffs who no longer wish to pursue his/her action or who are unable to produce the requisite information and/or a fully

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<sup>2</sup> As used herein, "Brand Defendants" refers to defendants that sold propoxyphene-containing pain products pursuant to an NDA at any time.

completed and verified Plaintiff Fact Sheet with authorizations.<sup>3</sup> The Court's preference is that these voluntary dismissals occur prior to any Order to Show Cause so as to increase efficiency and avoid unnecessary time and expense by the parties and the Court.

## V. Phase I

**A. Amended Complaints.** The plaintiffs may file amended Complaints without further leave of Court on or before March 17, 2016.

**B. Discovery – Depositions.** As more specifically set out in other Case Management Orders, the parties shall conduct abbreviated depositions of those plaintiffs who have provided a substantially complete Plaintiff Fact Sheet (with all appropriate documents requested therein) and a physician certification (if required) and are not subject to an Order to Show Cause regarding the failure to comply with the provisions of written Phase I discovery. Phase I depositions will commence on or around April 1, 2016, and should be completed no later than June 30, 2016. An Abbreviated Deposition Protocol, separately entered as Case Management Order No. 6, shall govern Phase I depositions.

**C. Discovery Otherwise Stayed.** Except as otherwise provided this and other Case Management Orders, all disclosure obligations and discovery proceedings in these actions, and any newly-consolidated actions, shall remain stayed until further order of the Court.

**D. Order to Show Cause Regarding Brand Defendants.** A number of similar claims against Brand Defendants were dismissed in the Multidistrict Litigation known as *In re: Davocet, Darvon, and Popoxyphene Products Liability Litigation*, MDL No. 2226. If,

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<sup>3</sup> The details of the "Plaintiff Fact Sheet" are set forth more fully in Case Management Order No. 5 – Discovery Management Order.

upon receipt of the Plaintiff Fact Sheet or at the conclusion of the Abbreviated Depositions, it is apparent that the law of a state that has been the subject of a previous MDL Order to Dismiss claims against a Brand Defendant is applicable (or is potentially applicable) to a plaintiff's claims, the Brand Defendant(s) may request that the Court issue an order directing such plaintiff(s) to show cause why the applicable previous Orders should not apply to such plaintiffs.

**E. Order to Show Cause Regarding Generic Defendants<sup>4</sup>** The Generic Defendants maintain, as pleaded in their Answers, that plaintiffs' claims against them are preempted in their entirety pursuant to *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011), and *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013), as well as the authority of *In re Darvocet, Darvon, and Propoxyphene Products Liab. Litig.*, 756 F.3d 917 (6th Cir. 2014) (affirming this Court's dismissal of similar claims in the MDL, *In re Darvocet, Darvon, and Propoxyphene Products Liab. Litig.*, No. 2:11-md-226-DCR, 2012 WL 718618, at \*6 (E.D. Ky. Mar. 5, 2012) (Dkt. No. 1305)).

The issues of generic drug preemption and its application to propoxyphene claims like those at issue in the present actions were fully briefed and argued before this Court in the MDL proceedings. Following this Court's order granting the Generic Defendants' Motion to Dismiss in the MDL, this Court instituted a show cause process applicable to later-filed

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<sup>4</sup> For purposes of this Order, the Generic Defendants include Teva Pharmaceuticals USA, Inc., Teva Biopharmaceuticals USA, Inc., Endo Pharmaceuticals Inc., Endo Pharmaceuticals Holdings Inc., Generics International (US Parent), Inc., Generics International (US), Inc., Generics Bidco I, LLC, Generics Bidco II, LLC, and Vintage Pharmaceuticals, LLC, Watson Pharmaceuticals, Inc., Mylan Inc., Mylan Pharmaceuticals Inc., Covidien Inc., Mallinckrodt Inc., Cornerstone Biopharma, Inc., Cornerstone Biopharma Holdings, LLC (formerly known as and sued herein as Cornerstone Biopharma Holdings, Inc.), Aristos Pharmaceuticals, Inc., and Brenn Pharmaceuticals, Inc. f/k/a Vintage Pharmaceuticals, Inc.

MDL cases requiring MDL plaintiffs “to SHOW CAUSE why the Court’s Memorandum Opinion and Order Regarding Generic Defendants’ Motions to Dismiss [Record No. 1305] is not applicable to their claims against the Generic Defendant(s) and why any and all claims pending against the Generic Defendants as of the date of this Order should not be dismissed, with prejudice, in their entirety.” *In Re Darvocet, Darvon and Propoxyphene Products Liability Litigation*, No. 2:11-md-02226-DCR, Dkt. No. 1645 (Apr. 10, 2012). Pursuant to this show cause process, the remaining claims against the Generic Defendants were subsequently dismissed.

This Court finds that further briefing on generic drug preemption is neither necessary nor desired in the present cases, and that a similar show cause process would obviate the need of the parties to submit additional, duplicative briefing. Accordingly:

1. The Generic Defendants’ Motion to Dismiss [MDL Dkt. No. 383] and First Supplemental Motion to Dismiss [MDL Dkt. No. 458], and briefs in support, are adopted and incorporated in these actions as if filed herein. On or before April 18, 2016, plaintiffs in each case with any remaining claims pending against any Generic Defendant are directed to SHOW CAUSE why the Court’s Memorandum Opinion and Order Regarding Generic Defendants’ Motions to Dismiss [MDL Dkt No. 1305] is not applicable to their claims against the Generic Defendant(s) in these cases and why any and all claims pending against the Generic Defendants as of the date of this Order should not be dismissed, with prejudice, in their entirety.

2. For any new action consolidated on or after the date of this Order which purports to assert a claim against a Generic Defendant, the Clerk of the Court shall immediately provide a copy of this Order to the plaintiffs in said action, and the plaintiffs

shall comply with the above SHOW CAUSE Order by April 18, 2016, or within thirty (30) days after the date on which this Order is served, whichever is later.

3. It is not necessary for plaintiffs subject to this Order to submit papers addressing the same arguments raised in Plaintiffs' Consolidated Memorandum in Opposition to Generic Defendants' Motion to Dismiss filed in the MDL. [MDL Dkt No. 568] That Memorandum shall be deemed to be adopted and incorporated in the present cases for all plaintiffs subject to this Order.

4. If the Court determines that a reply is needed from any of the Generic Defendants to the plaintiffs' response to this Show Cause Order, it will be directed by separate Order.

5. The Generic Defendants need not move, answer, or otherwise respond to any newly filed, transferred or docketed cases after the date of this Order, and Generic Defendants' responsive pleading deadlines are stayed until further Order of the Court. For any consolidated case to which this Show Cause Order applies, plaintiffs shall not voluntarily dismiss without prejudice such cases or claims against the Generic Defendants. Voluntary dismissals with prejudice are permitted against the Generic Defendants. Nothing in this paragraph affects dismissals against Brand Defendants.

**F. Dispositive Motions.** The defendants may otherwise file dispositive motions at the conclusion of Phase I, on or before July 15, 2016. Those motions may include, but are not limited to, dispositive motions for failure to provide the requisite prima facie proof that a defendant's product caused plaintiff's alleged injury.

**G. Phase I – Hearings and Status Conference**

The Court will hold a status conference on **Friday, May 20, 2016**, beginning at the hour of **1:30 p.m.**, at the United States Courthouse in **Covington**, Kentucky. Additional status conferences may be set by subsequent orders at times to be determined by the Court. Not less than seven (7) days prior to each conference, the plaintiffs and defendants shall submit proposed agendas that identify any issue that any party wishes to raise with the Court, including a brief statement of the respective position on such issue.

At the conclusion of Phase I, this Court shall have a hearing to discuss any outstanding issues in Phase I before moving to Phase II. At present, this Court anticipates that such hearing will occur in September 2016.

#### **VI. Phase II.**

The Court will reserve setting a Phase II case management schedule until Phase I is complete. Thirty (30) days after the final Phase I hearing referenced above, the parties, after meeting and conferring, should present to the Court a Proposed Case Management Order governing Phase II discovery and other pretrial matters for the remaining cases. As part of the meet and confer process, the parties may consider and propose to this Court a process for selecting the initial pool of trial cases to be worked up in Phase II. The Phase II Case Management Order should also include provisions and deadlines for the following: Plaintiffs' Identification of All Fact Witnesses, Defendants' Identification of All Fact Witnesses, 30(b)(6) Depositions, Plaintiff Phase II Depositions, Prescribing Physician Depositions, Treating Physician Depositions, Other Healthcare Provider Depositions, Other Fact Witness Depositions, Plaintiffs' Identification of Expert Witnesses and Submission of Expert Reports, Defendants' Depositions of Plaintiffs' Expert Witnesses, Defendants' Identification of Expert Witnesses and Submission of Expert Reports, Plaintiffs' Deposition

of Defendants' Expert Witnesses, Daubert Motions/Briefing/Hearing, Additional Dispositive Motions/Briefing/Hearing, and Alternative Dispute Resolution.

**VII. Newly Filed or Transferred Cases.**

If after the date this Order is entered, any lawsuit alleging injury from use of a propoxyphene-containing product is filed in or transferred to the Eastern District of Kentucky and consolidated herein, the following deadlines shall apply:

- The plaintiff must comply with the requirements of Case Management Order No. 5 (including, but not limited to, the Plaintiff Fact Sheet, physician certification, and proof of acquisition provisions) above within 60 days of the date plaintiff's case is assigned to this Court.
- Defendants may notice a Phase I deposition of such plaintiffs in accordance with Case Management Order No. 6 (Abbreviated Deposition Protocol).

All other provisions of this Order, and the Court's other Case Management Orders, shall apply to subsequently-filed cases.

This 26<sup>th</sup> day of January, 2015.



**Signed By:**

**Danny C. Reeves** DCR

**United States District Judge**