

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

)	
)	MDL No. 2226
)	ALL CASES
IN RE: DARVOCET, DARVON AND)	
PROPOXYPHENE PRODUCTS)	
LIABILITY LITIGATION)	
)	CASE MANAGEMENT AND
)	SCHEDULING ORDER NO. 1
)	
)	
)	
)	

*** **

The Court conducted a hearing on Monday, September 26, 2011, to establish a case management schedule and to discuss the various pending motions in the cases consolidated before it by the Judicial Panel on Multidistrict Litigation. After considering the parties' submissions and statements during the hearing, the Court adopts the following rules regarding the case management schedule.

1. Scope

This Order will govern the practice and procedure in those actions transferred to this Court by the Judicial Panel on Multidistrict Litigation ("JPML") pursuant to its Order of August 16, 2011. This Order will also govern the practice and procedure in any tag-along actions transferred to this Court by the JPML pursuant to Rules 7.1 and 7.2 of the Rules of Procedure of that Panel ("JPML Rules") and any related actions subsequently transferred or removed to this

Court or, if appropriate, filed in this Court. Cases may not be filed directly into this Court unless otherwise appropriate. Related cases, if any, must be filed in an appropriate jurisdiction and then transferred in accordance with 28 U.S.C. § 1407 or reassigned in accordance with JPML Rule 7.2.

Counsel should familiarize themselves with the Local Rules of this Court. The provisions of this Order, and any subsequent Scheduling Order, supersede any inconsistent provisions of the Court's Local Rules.

2. Status Conferences

The Court will hold status conferences at approximately 60-day intervals, at dates set by the Court. The first status conference will occur on **Monday, December 19, 2011, at 1:30 p.m. EST**. To minimize costs and facilitate manageable conferences, all parties need not attend any of these status conferences unless directed to do so by the Court. Instead, parties may be represented by a member of the Plaintiffs' Steering Committee ("PSC") or the Defendants' Steering Committee ("DSC"). A party will not, by designating an attorney to represent its interests at a status conference, be precluded from other representation during the litigation, and attendance at the conference will not waive objections to jurisdiction, venue, or service.

To aid the Court and the parties in preparing for future conferences, not less than seven (7) days prior to each conference, the PSC and DSC shall submit proposed agendas that identify any issue that any party wishes to raise with the Court, including a brief statement of the party's respective position on such issue. The agendas are intended to inform the Court of matters that the parties desire to raise at the status conference, and the Court may amend or augment the

proposed agendas as it deems appropriate. For the December 19, 2011, hearing, the parties should be prepared to address: (i) briefing, scheduling oral argument, and/or other resolution of any motions to dismiss or for summary judgment pending at that time; (ii) class certification issues; and (iii) a schedule for merits discovery.

Except for emergencies or unless otherwise agreed by the parties, motions shall not be brought for hearing at any time other than a regularly-scheduled status conference. To be heard at a regularly scheduled status conference, a motion must be filed and served by 5:00 p.m. EST, at least sixty (60) days before that conference. Any motion filed and served less than sixty (60) days before a status conference or not fully briefed seven (7) days before the status conference shall not be heard at the upcoming status conference, but at the status conference thereafter.

3. Service of Process

Service of all papers filed with the Court shall be accomplished by electronic filing, and no other type of service is permitted or required. The Court modifies Paragraph 6 of its August 30, 2011, Order Regarding Practice and Procedure Upon Transfer and Setting Initial Conference in the following respect: Filings that pertain only to an individual case pending in the MDL should be served only upon all counsel of record in the docket for that individual case, rather than on each attorney who has appeared in the MDL.

Service of all papers that pertain to the MDL docket that are not filed with the Court shall be accomplished by plaintiffs serving each individual defendant's national counsel, and by the defendants serving Plaintiffs' Co-Lead Counsel, 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' Co-Lead Counsel, as applicable, of any documents 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.

4. Discovery and Motions

a. General Provisions

No motion (other than under Federal Rule of Civil Procedure 12) will be filed unless it includes a certification that the movant has conferred with opposing parties and made a good faith effort to resolve the matter without court action. No motions for class certification may be filed until further order of this Court. Discovery requests and responses will not be filed with the Court except when specifically ordered by the Court or to the extent needed in connection with a motion.

All disclosure obligations and discovery proceedings in these actions are **STAYED**, except as provided in this Order. However, cases may proceed with *limited* discovery prior to the December 19, 2011 hearing, as set forth below.

b. Defendants' Discovery: Product Identification

Defendants contend that they have been named in lawsuits by plaintiffs who did not actually ingest a product that the defendants manufactured, sold, or distributed. Defendants further contend that if they did not manufacture, sell, or distribute the particular product(s) the plaintiff ingested, the claims against them should be dismissed with prejudice.

Defendants may proceed with limited discovery regarding the issue of product identification, through the use of document requests and interrogatories. Product-identification evidence is any evidence that identifies the manufacturer, seller, or distributor of the product(s) that the plaintiff(s) ingested. With regard to any case currently docketed in this District as of the date of this Order, defendants must submit their requests within fifteen (15) days of this Order, and plaintiffs must submit their responses no less than thirty (30) days after receiving the request(s). With regard to any case transferred to and docketed in this District after the date of this Order, defendants must submit their requests within fifteen (15) days of the ECF docketing of the case in the District, and plaintiffs must submit their responses no less than thirty (30) days after receiving the request(s).

Product-identification evidence that defendants may seek through document requests and/or interrogatories may include one or more of the following: (i) pharmacy or medical records that contain the National Drug Code (“NDC”) and/or the manufacturer, seller, or distributor’s name for the product; (ii) an original or photocopy of the pill bottle that contains the NDC and/or the manufacturer, seller, or distributor’s name for the product; (iii) an affidavit or declaration from an authorized representative of the pharmacy or pharmacies at which the plaintiff(s) filled his or her prescriptions, which sets forth the NDC and/or manufacturer, seller, or distributor’s name for the product(s) dispensed to the plaintiff(s); and/or any other circumstantial evidence that a plaintiff may seek to rely on in support of its claim relating to a particular defendant.

c. Plaintiffs’ Discovery: Ownership Interest Information

A related issue in this case is the sequence and timing of ownership interests in the products ingested by the plaintiffs. Plaintiffs may proceed with limited discovery regarding the issue of ownership interests in the products at issue, as well as retention and/or transfers of any ownership interests to other parties. Plaintiffs may proceed with limited discovery regarding ownership interests through the use of document requests and interrogatories

Discovery conducted by plaintiffs related to acquisition and transfer information will be conducted as coordinated discovery on behalf of all plaintiffs. All discovery initiated on behalf of the plaintiffs shall be conducted and coordinated through the Plaintiffs' Executive Committee ("PEC"). The PEC shall manage all plaintiffs' discovery to ensure that such discovery is conducted on a coordinated and, where practical, consolidated basis.

If a party exceed the scope of discovery permitted, the party subject to the request may file a motion for a protective order. If granted, the party seeking discovery will not be allowed to seek information concerning product information or ownership interests until the Court allows the parties to proceed with discovery on the merits.

5. Communications

Unless otherwise ordered by this Court, 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.

This 4th day of October, 2011.



Signed By:

Danny C. Reeves DCR

United States District Judge