UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

This document relates to: ALL CASES.

PRETRIAL ORDER NO. 25

Plaintiffs' Motion to Modify Case Management Order Nos. 3 and 4

This matter is before the Court on Plaintiffs' Motion to Modify Case Management Order No. 4 Regarding Plaintiff Fact Sheets and Records Authorizations and to Modify Case Management Order No. 3 Regarding Service of Plaintiffs' Complaints, Defendant's Abbreviated Answer and Affirmative Defenses, Initial Disclosures ("Plaintiffs' Motion") (ECF No. 655), DuPont's Opposition to Plaintiffs' Motion (ECF No. 711), and Plaintiffs' Reply (ECF No. 765). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion.

I.

In their Motion, Plaintiffs ask the Court to modify Case Management Order ("CMO") Nos. 3 and 4 in the following ways: (A) to allow for an abbreviated Plaintiff Fact Sheet ("PFS"); (B) to allow 180 days from service of DuPont's answer for Plaintiffs to serve the abbreviated PFS; and (C) to revoke and/or withdraw DuPont's right to file an abbreviated answer.

Alternatively, Plaintiffs ask the Court to modify CMO No. 4 to permit Plaintiffs to serve the originally drafted PFS 180 days from the service of DuPont's answer, as opposed to the agreed-upon 45 days.

A. Abbreviated PFS

Plaintiffs support their first request with the following argument:

> As the Court is aware, Plaintiffs' counsel were forced to file thousands of cases over the last five months after DuPont refused to enter any tolling agreements with Plaintiffs' counsel (following months of discussion on the topic) for any claims alleging a 'probable link' disease resulting from exposure to C-8 from DuPont's Washington Works Plant, even though Plaintiffs' counsel had repeatedly offered to provide DuPont with a spreadsheet, with specific accompanying records, containing certain basic, key information regarding each such case, in exchange for such a tolling agreement.

(Pls.' Mot. at 2.) Plaintiffs maintain that as a "result of DuPont's long-drawn out discussions, and ultimate refusal, to enter a tolling agreement with Plaintiffs' counsel," *id.* at 5, Plaintiffs are "now required to serve thousands of Plaintiff Fact Sheets within 45 days of the service of DuPont's Short Form Answer," *id.* at 2. Plaintiffs posit that, while an abbreviated PFS is of enormous practical benefit to them, DuPont will suffer no prejudice from the requested modifications because "almost all of the information that is written out in the lengthy Plaintiff Fact Sheet can easily be obtained directly from a review of the medical records for which duly executed authorizations will still be provided in connection with the abbreviated Plaintiff Fact Sheet." *Id.* at 5.

DuPont responds that they were under no obligation to enter into a tolling agreement and that, since the inception of this MDL, Plaintiffs were aware, as they made known to the Court on numerous occasions, that there would be thousands of cases filed. DuPont further argues that, "as this Court is aware, the form, substance, and timing of the PFS were heavily negotiated by the Parties." (DuPont's Mem. in Opp. at 6.) The parties ultimately agreed upon the current PFS.

Additionally, DuPont contends that Plaintiffs are attempting to unfairly shift their typical litigation burdens and costs on DuPont. *Id.* at 8 ("Indeed, the PFS is intended to provide basic information that is readily known or ascertainable by the plaintiff, and DuPont should not be forced to spend the time and resources to try to identify that information by making an exhaustive review of each plaintiff's medical records.").

In Reply, Plaintiffs assert that DuPont "glosses over the manageability problems that have been created by DuPont's failure to agree to a simple tolling of the statute of limitations." (Pls.' Reply at 1.) Plaintiffs conclude that their "Motion simply suggests a pragmatic solution to a problem created solely by DuPont's unwillingness to work cooperatively with Plaintiffs." *Id.* at 2. Plaintiffs' arguments are not well taken.

The parties worked diligently on behalf of their clients to draft an agreement as to the content of the PFS. This Court adopted the agreement in CMO No. 4. The Court is not inclined to modify that Order, or any other, without a good reason that was not known, nor could have been reasonably anticipated, at the time of the agreement and subsequent Order. In this instance, at the time the parties negotiated the content of the PFS, they knew, as Plaintiffs state, that "almost all of the information that is written out in the lengthy Plaintiff Fact Sheet" could be "easily be obtained directly from a review of the medical records." Moreover, the possibility that DuPont would not agree to a tolling provision could have been reasonably anticipated. As DuPont correctly states, it was not under any legal obligation to enter into a tolling agreement. Accordingly, the Court finds no sufficient reason to modify CMO No. 4 related to the content of the PFS.

B. Extension of Time to Serve the PFS

Plaintiffs next ask the Court to modify CMO No. 4 to permit them to file the originally drafted PFS 180 days from the service of DuPont's answer, as opposed to the agreed-upon 45 days. Plaintiffs contend that DuPont will suffer no prejudice from the requested modifications since "the bellwether discovery case selection and discovery process is now complete, and trial case selection process is underway, there is no urgency with respect to individual case review of other plaintiffs." (Pls.' Mot. at 5.)

DuPont, however, disagrees with this assessment. DuPont argues that it needs the PFS, "and it needs it over the next several months – not six months or more from now" because, "[a]mong other things, under recently entered CMO 7, DuPont needs to analyze by January 2015 the entire population of plaintiffs and determine whether there are better candidates beyond the initial 20 discovery pool plaintiffs to be representative trial plaintiffs for trials 3, 4, 5, and 6." (DuPont's Mem. in Opp. at 1.) DuPont's arguments are well taken.

CMO Nos. 6 and 7 establish that the first two bellwether trials will be chosen from the initial group of twenty discovery pool plaintiffs. The procedure established ultimately provided six plaintiffs' cases that are representative of the cases filed in the MDL from which the Court is in the process of selecting the first two trial cases. "The Court has indicated a presumption to select the trial plaintiffs for [trials three through six] from the remaining four plaintiffs after the selection for the first two trials . . . . The plan and process for how the trial plaintiffs for trials 3, 4, 5, and 6 will be chosen and/or determined will be subject to a separate Case Management Order to be presented to the Court by January 30, 2015." (CMO No. 7, ¶ 6.) The Court finds that this presumption is exactly why DuPont needs to continue to assess the newly added cases.

While Plaintiffs may attempt to rebut the presumption because they are privy to the information related to their clients, DuPont cannot do so without the PFS.

There have been hundreds of cases filed since the discovery pool plaintiffs were chosen and hundreds more are expected within the next few months. If any one of the remaining four plaintiffs chosen from the discovery pool plaintiffs is no longer somewhat representative of the cases that make up this MDL, utilizing that plaintiff would not be the most efficient use of a bellwether trial. Hence, the Court rendered the decision to fashion a presumption rather than directing the remaining four plaintiffs to be designated *the* trial plaintiffs for trials three through six.

For these reasons, the Court is not inclined to grant Plaintiffs' request for an extra 135 days to serve the PFS. Plaintiffs have made clear to this Court on numerous occasions that they knew of the number of potential cases that would be added to this MDL at the time they negotiated a 45-day period in which to provide the PFS. Plaintiffs simply miscalculated DuPont's willingness to enter into a tolling agreement. That being said, the Court has consistently permitted the parties short extensions of time to account for these types of uncertainties. Therefore, the Court shall provide to Plaintiffs an additional two weeks to serve the PFS.

C. Abbreviated Answer

Plaintiffs' last request is for the Court to revoke and/or withdraw DuPont's right to file an abbreviated answer. DuPont contends that the only reason Plaintiffs make this request is to punish it because it would not agree to a short form of the PFS. In their Reply, Plaintiffs confirm that DuPont's assessment is correct. That is, Plaintiffs note that *The Manual of Complex*

Litigation directs, *inter alia*, that "counsel act cooperatively and professionally" and that DuPont is not acting accordingly. (Pls.' Reply at 6, n.1.) Plaintiffs continue:

> Here, it is likely that a few thousand more cases will be filed in this litigation, and thus appropriate procedures need to be instituted to handle these filings. Plaintiffs' counsel, like was done in Wood County, will work with the Clerk of the respective Court to facilitate the best plan for filing. However, the only entity not willing to accommodate or understand the give and take process of mass tort litigation is DuPont. Indeed, it is for this reason that should they remain unwilling to acquiesce to more time to serve PFSs, or allow the abbreviated PFS, that the Court should withdraw the Abbreviated Answer permitted by CMO 3 . . . .

(Pls.' Reply at 5 – 6 n.1.) To punish DuPont for Plaintiffs' determination that its counsel is not cooperative or professional is not sufficient reason to modify CMO No. 3.

In this same vein, the Court notes that an undue amount of Plaintiffs' briefing recounts the professional courtesies DuPont's counsel refused to extend even though Plaintiffs' counsel consistently provided similar courtesies. In similar fashion, DuPont reports the professional courtesies it has extended to Plaintiffs' counsel that it maintains have not been reciprocated. The Court finds this area of argument ineffective. It is clear to the Court that on many occasions Plaintiffs' counsel and DuPont's counsel have accommodated each other. Both sets of counsel are professional, well-seasoned advocates. The Court suggests that each side seek to present their positions without drudging through the details of each failed negotiation to place blame or to point out a perceived unfairness or unprofessionalism.

II.

For the reasons stated above, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion. (ECF No. 655.) Specifically, the Court:

1. **DENIES** Plaintiffs' request to modify CMO No. 4 to provide for a short-form PFS;

2. **GRANTS** Plaintiffs' request for additional time to provide the PFS to DuPont and hereby **MODIFIES** CMO No. 4, paragraph 17 to provide for 60 days after service of the answer to provide the PFS to DuPont; and

3. **DENIES** Plaintiffs' request to modify CMO No. 3 to revoke and/or withdraw DuPont's right to file an abbreviated answer.

IT IS SO ORDERED.

9-8-2014
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

ELIZABETH A. PRESTON DEAVERS
UNITED STATES MAGISTRATE JUDGE