

**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
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers**

This document relates to: ALL CASES.

PRETRIAL ORDER NO. 35

May 6, 2015 Conference Order

This matter came before the Court for an in-person status conference on May 6, 2015.

This Order memorializes the results of the conference as follows:

Initially the parties informed the Court that they had submitted an agreed proposed Case Management Order (“CMO”) setting out the pretrial schedule for the first two trials in this MDL. The Court will review the proposed CMO for approval.

The parties next addressed the selection of the cases to be scheduled as the third and fourth trials. CMO 6 provides the process for selecting the plaintiffs’ cases from which the first trials will be chosen (“Discovery Pool Plaintiffs”). The Court anticipated that the parties would each submit a Discovery Pool Plaintiff and the Court would determine in which order the cases would be tried. DuPont selected Discovery Pool Plaintiff Terry Pugh and the Plaintiffs’ Steering Committee (“PSC”) chose Tina Dowdy. The PSC objected to DuPont’s choice of Mr. Pugh. In Mr. Pugh’s Complaint, he alleges that he suffers from ulcerative colitis and high cholesterol. Mr. Pugh’s recent medical tests reflect that he has Crohn’s disease, not ulcerative colitis. There

has been no Probable Link Finding between C-8 and Crohn's disease. This leaves Mr. Pugh with only one disease (*i.e.*, high cholesterol) for which a Probable Link Finding has been made. The PSC argued that CMO 6 excludes from the Discovery Pool Plaintiffs any plaintiff who has alleged only high-cholesterol as the disease for which a Probable Link Finding has been made. (CMO 6 at § (A)(4)(a); ECF No. 194) ("Excluded Injuries. Neither party will identify a plaintiff who is alleging diagnosed high-cholesterol only . . ."). The PSC concluded that Mr. Pugh now fits that description and is, therefore, excluded as a trial plaintiff at this juncture. DuPont's counsel disagreed with the PSC's assessment of the language in CMO 6, arguing that it did not exclude Mr. Pugh. The Court found the PSC's assessment of CMO 6 correct and excluded Mr. Pugh as a Discovery Pool Plaintiff.

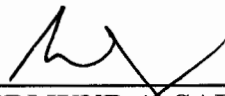
After discussion, the parties and the Court agreed that Ms. Dowdy's case would be the third one tried. The parties will meet and confer in an effort to determine the process by which the next three trial plaintiffs will be chosen. The parties will also confer regarding disposition of Mr. Pugh's assertion in his Complaint that he has ulcerative colitis. Those issues will be addressed at the next in-person status conference.

The Court next initiated discussion about *Lexecon* Waivers. *See Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (holding that a multidistrict litigation transferee court has no authority to retain transferred cases for trial). That issue, as it relates to the Discovery Pool Plaintiffs, is addressed in CMO 6 at section (A)(2). That section provides for a process by which the Discovery Pool Plaintiffs chosen for trial will provide *Lexecon* Waivers, if necessary, so that their cases may be heard in this jurisdiction. The Court asked the parties to consider the feasibility of determining whether the remaining plaintiffs will be providing *Lexecon* Waivers. This issue too will be considered at the next in-person status conference.

Finally, the Court set the next in-person status conference for June 11, 2015, at 1:30 p.m. in Room 301 of the United States District Court, Joseph P. Kinneary United States Courthouse. As set forth in the Court's April 12, 2013 Order (ECF No. 2), the parties must confer prior to the conference and file with the Court, no later than two business days prior to the conference, an agenda of issues to be addressed. If any of those issues relate to proposed orders or other documents the parties plan to discuss with the Court during the conference, those proposed orders or other documents should be submitted with the agenda. The parties should add to the agenda the three issues this Order indicates will be addressed at the next conference.

IT IS SO ORDERED.

5-18-2015
DATE



EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE



ELIZABETH A. PRESTON-DEAVERS
UNITED STATES MAGISTRATE JUDGE