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 Preston Deavers

This document relates to: ALL NEWLY-FILED CASES.

CASE MANAGEMENT ORDER NO. 24

June 20, 2018 Conference

Management of Newly-Filed Cases

This matter came before the Court for an in-person status conference on June 20, 2018. This Order memorializes the results of that conference as follows:

The Plaintiffs' Steering Committee ("PSC") initially reported that the global settlement is nearly complete. The PSC expects that the matter will be concluded by the end of summer 2018. The parties indicated that they would work together to propose a dismissal entry that will be sufficient to establish dismissal of the 3,500-plus cases that are the subject of the global settlement.

The Court next discussed the management plan for the newly-filed cases. Without a meet and confer with the PSC, DuPont filed a motion the day before the conference requesting that the Court adopt its proposed Case Management Order ("CMO") directed at the approximately 33 newly-filed cases. (Defendants' Motion for Proposed Case Management Order No. 24, ECF No. 5139.) In DuPont's motion, defendants ask for the entry of a CMO that would require the individual plaintiffs in the newly-filed cases to provide additional causation evidence before

opening discovery. DuPont provides to the Court a proposed CMO, which included a different Plaintiff's Fact Sheet ("PFS") and authorizations than the ones previously utilized in this multidistrict litigation ("MDL"). DuPont posits:

> In light of the multiple cases within this MDL, the proposed CMO, which requires a physician's certification or *Lone Pine*, as well as other basic protocols, will ensure that the critical aspects of each case are explored early, will allow for culling of non-viable claims, will deter specious filings in the future, and will drive prompt adjudication of each of the individual claims and defenses of the cases.

(Defs.' Mot. at 2–3) (citing to *Lore v. Lone Pine Corp.*, 1986 N.J. Super. LEXIS 1626 (N.J. Super Ct. Nov. 18, 1986)).

"*Lone Pine* orders 'are pre-discovery orders designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation by requiring plaintiffs to produce some evidence to support a credible claim.'" *Adkisson v. Jacobs Eng'g Grp., Inc.*, 2016 U.S. Dist. LEXIS 99350, 2016 WL 4079531 (E.D. Tenn. 20016) (referring to *Lone Pine* orders as "an extraordinary case management order" and citing *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604, n.2 (5th Cir. 2006)). DuPont asserts that if this Court were to issue DuPont's proposed CMO, it would adopt a *Lone Pine* order, which is designed to weed out frivolous or otherwise non-viable claims as early as possible, and alleviate potential burdens on defendants and the Court. *Id.* at 3 (citing *Lone Pine* and *Modern Holdings, LLC v. Corning, Inc.*, 2015 U.S. Dist. LEXIS 145181, at *3, 12-13 (E.D. Ky. Oct. 27, 2015) ("each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing the named defendants were responsible for his injuries in order to join in the suit in the first place")).

Further, DuPont argues that "courts have found that case management orders which require each plaintiff to support key aspects of his or her claim, including a physician's

statement, are particularly appropriate in the later stages of an MDL." *Id.* at 4 (citing as an example *In re Fosamax Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 166734, at *5-6 (S.D. N.Y. Nov. 20, 2012) (noting that "the posture of the litigation" is a relevant factor and finding that entry of a *Lone Pine* order was appropriate in later stage of the MDL)).

At the in-person status conference, the Court entertained the idea that it would allow the parties to engage in motions practice to determine new procedures for moving forward, setting a briefing schedule for the PSC to respond to DuPont's motion. Upon reflection, the Court here changes the directions given at the conference.

A brief overview is necessary to reach the issues presently before the Court. The litigation between the parties in this MDL began in 2001 in a class action in West Virginia state court captioned *Leach v. E. I. du Pont de Nemours & Co.*, No. 01-C-698 (Wood County W. Va. Cir. Ct.) ("*Leach* Case"). The *Leach* Case ended in November 2004 when the parties entered into a class-wide settlement ("*Leach* Settlement Agreement"). In the *Leach* Settlement Agreement, the parties fashioned a unique procedure to determine whether the approximately 80,000 members of the class ("*Leach* Class") would be permitted to file actions against DuPont based on any of the human diseases they believed had been caused by their exposure to ammonium perfluorooctanoate ("C-8" or "PFOA") discharged from DuPont's Washington Works plant.

The procedure required DuPont and the plaintiffs to jointly select three completely independent, mutually-agreeable, appropriately credentialed epidemiologists ("Science Panel") to study whether there is a connection between C-8 and human disease among the *Leach* Class. (*Leach* Settlement Agreement "S.A." at §§ 12.2.1, 12.2.2; ECF No. 820-8.) The *Leach* Settlement Agreement provides that the results of the Science Panel's study would be issued in

either a "Probable Link Finding" or a "No Probable Link Finding" for each human disease the Panel studied. (S.A. § 12.2.3.) The *Leach* Settlement Agreement provides the following definition:

> "Probable Link" shall mean that based upon the weight of the available scientific evidence, it is more likely than not that there is a link between exposure to C-8 and a particular Human Disease among Class Members.

(S.A. § 1.49.)

In 2011 and 2012, the Science Panel delivered No Probable Link Findings for over forty human diseases and Probable Link Findings for the following six human diseases ("Linked Diseases"): kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol (hypercholesterolemia), and pregnancy-induced hypertension and preeclampsia.

The *Leach* Settlement Agreement permits the individual members of the *Leach* Class who have or had any Linked Disease to pursue claims "for personal injury and wrongful death, including but not limited to any claims for injunctive relief and special, general and punitive and any other damages whatsoever associated with such claims, that . . . relate to exposure to C-8 of Class Members" and DuPont agreed not to contest general causation in those actions. (S.A. § 3.3.) DuPont retained the right to contest specific causation and to assert any other defense not barred by the *Leach* Settlement Agreement.

This MDL consists of approximately 3542 cases, each filed by a plaintiff who asserts that he or she is a member of the *Leach* Class and was diagnosed with one of the Linked Diseases. The MDL was filed in this Court in April 2013 and was globally settled on February 14, 2017. (ECF No. 5086.) At that point, the parties had engaged in extensive discovery and negotiations leading to many agreed-upon, Court-approved, procedures. Additionally, the parties filed hundreds of motions, which the Court grouped into its decisions resulting in the issuance of 19

Dispositive Motions Orders, 22 Case Management Orders, 9 Evidentiary Motions Orders, 12 Discovery Orders, and 47 Pretrial Orders. Not a single one of the plaintiffs' personal injury cases was dismissed through this motions practice. When the parties reached global settlement, the Court was in the middle of the fourth trial, the first three of which resulted in verdicts in favor of the plaintiff, including two awards of punitive damages assessed against DuPont. Each trial exceeded four weeks in length.

The global settlement was administered by a special master, with procedures that required evidence of each plaintiff's *Leach* Class membership and evidence of a medical diagnosis of a Linked Disease. Over 3500 individual plaintiffs received an award through these procedures.

With these facts in mind, the Court finds that the *Lone Pine* case upon which DuPont relies could not be more inapposite to the facts presented in this MDL. The *Lone Pine* case was "instituted by the plaintiffs against some 464 defendants . . . . [t]he first named defendant, Lone Pine Corporation, is alleged to have operated a landfill; the remaining defendants are alleged to have been generators and/or haulers of toxic materials." *Lone Pine*, 1986 N.J. Super. LEXIS 1626, *2, 1986 WL 637507. The *Lone Pine* court started its opinion as follows:

> This matter having come before this Court for the purpose of case management, and the Court having determined that, upon the face of the Complaint, no prima facie claim for personal injuries or property damage appears, the Court having ordered plaintiffs to provide sufficient information to establish the existence of a prima facie case . . . .
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> The information submitted as to personal injury claims was so inadequate as to be deemed unbelievable and unreal. Plaintiffs merely listed a variety of illnesses such as allergies, itching, dryness of skin, and the like. No records were submitted to substantiate any physical problems, their duration or severity. No doctors' reports were provided.
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> . . . .

> Sixteen months after the start of the suit, plaintiffs' counsel has failed to provide anything that resembles a prima facie cause of action based upon property diminution or personal injuries.

Lone Pine Corp., 1986 N.J. Super. LEXIS 1626, *1, *6, *7 1986 WL 637507 (emphasis added).

In the case *sub judice*, no such predicate findings can be made. No case was dismissed upon a defense motion for failure to state a claim or for failure to raise any genuine issue of material fact as to whether their injury resulted from DuPont's conduct. And, even DuPont cannot say that the plaintiffs who are *Leach* Class members and who have Linked Diseases have not set forth prima facie evidence of personal injury.

Similarly, of little if any relevance is *Fosamax*, relied upon by DuPont *supra*, for the proposition that because this case is in its later stages the Court should enter a *Lone Pine* order. The *Fosamax* court entered a limited *Lone Pine* order, noting the following with regard to the six years the approximately 1,000 cases comprising the MDL were before it:

> [T]he Court has reason to believe that spurious or meritless cases are lurking in the some 1,000 cases on the MDL docket. As Merck points out, more than 50% of the cases set for trial have been dismissed, and some 31% of cases that have been selected for discovery have been dismissed. Plaintiffs' habit of dismissing cases after both parties have expended time and money on case-specific discovery demonstrates that this MDL is ripe for a *Lone Pine* order.
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> . . . .
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> As Merck noted in its 2010 letter requesting that the Court consider a Lone Pine order, "It is Merck's position that there is no medical or scientific evidence or opinion that Fosamax® may cause jaw injuries other than ONJ." (Letter of Jan. 27, 2010 at 1.) In its letter dated January 3, 2011, Merck reiterated its position: "[U]nlike the cases involving alleged ONJ or osteomyellitis, the Non-ONJ Jaw Cases . . . have not been subject to the same level of scrutiny . . . regarding the medical and scientific basis [for their claims.]" (Letter of Jan 3, 2011 at 2.)

In re Fosamax Prods. Liab. Litig., 2012 U.S. Dist. LEXIS 166734, *7, 2012 WL 5877418. Even under these conditions, the *Fosamax* court allowed only a limited *Lone Pine* order directed only to "non-ONJ and non-osteomyellitis plaintiffs [so to] target potentially spurious claims without

imposing undue obligations upon other plaintiffs." *Id.* at *9–10.

Again, in the instant MDL, the conduct of the PSC and the survival of nearly 98% of the individual personal injury claims through awards by the settlement special master show the dissimilarity to the facts in *Fosamax*. There have been no spurious or meritless claims presented to this Court, and therefore, no reason to target spurious or meritless claims from being filed.

Moreover, the Science Panel's Probable Link Findings make the evidence before this Court totally unlike Merck's description of the evidence in *Fosamax* related to injuries other than ONJ, *i.e.*, that there was no medical or scientific evidence or opinion that Fosamax® may cause jaw injuries other than ONJ. The Science Panel found that based upon the weight of the available scientific evidence, it is more likely than not that there is a link between exposure to C-8 and a Linked Disease among the *Leach Class* Members. Each of the pending cases has alleged a linked condition.

In sum, this Court has no reason to believe that spurious or meritless cases are lurking in 33 newly-filed cases on the MDL docket. Thus, there is simply no need for this Court to enter the extraordinary *Lone Pine* order in an attempt to weed out frivolous or otherwise non-viable claims as early as possible. In other words, entry of a *Lone Pine* order under the circumstances here amounts to an unprecedented condition precedent to filing a claim and insertion of defense counsel screening of a plaintiff's claims. There is simply no justification for such conditions, none of which is required by the Federal Rules of Civil Procedure or this Court's Local Rules.

Accordingly, the Court declines DuPont's invitation to enter a *Lone Pine* order, and hereby **DENIES** Defendants' Motion for Proposed Case Management Order No. 24. Further, as can be seen by the brief overview offered above, the procedures this Court has utilized to date in this MDL have been, by any measurement, successful. Thus, the Court will continue to utilize

those procedures. Of import to the current CMO, the PFS that are established in CMO 4, will be utilized for the newly-filed cases. Any modification, upon which the parties jointly agree, may be instituted. The Court, however, will not entertain briefing on the issue.

The Court, therefore, sets the following schedule:

- Plaintiffs shall provide the PFS from the newly-filed cases to DuPont within 45 days of the date of this CMO.
- DuPont shall inform this Court the cases it believes have issues with statute of limitations and/or *Leach* Class disputes 45 days after it receives the PFS.

After review of DuPont's submissions, the Court will set a schedule for motions practice and for trials. The first trial will be scheduled in October 2019, with each remaining trial to start every other month until completion.

Last, the next in person status conference is now scheduled for **September 28, 2018 at 1:00 p.m.** as opposed to the November date discussed at the conference. As set forth in PTO 1, the parties must confer prior to the status conference and send to 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.

IT IS SO ORDERED.

6-22-2018
DATE

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