

MINUTE ENTRY
FALLON, J.
NOVEMBER 20, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: XARELTO (RIVAROXABAN) * MDL 2592
PRODUCTS LIABILITY LITIGATION *
* SECTION L
THIS DOCUMENT RELATES TO *
ALL CASES * JUDGE ELDON E. FALLON
*
* MAG. JUDGE NORTH

THIS DOCUMENT RELATES TO ALL CASES

A status conference was held on this date in the Courtroom of Judge Eldon E. Fallon. At the conference, Co-Plaintiffs’ Liaison Counsel (“PLC”), Lenny Davis, and Defendants’ Liaison Counsel (“DLC”), James Irwin, reported to the Court on the topics set forth in the Proposed Agenda. (Rec. Doc. 1168). This status conference was transcribed by Ms. Terry Hourigan, Official Court Reporter. Counsel may contact Ms. Hourigan at (504) 589-7775 to request a copy of the transcript. A summary of the status conference follows.

1. **PRE-TRIAL ORDERS**

The Court has issued the following Pre-Trial Orders:

Pre-Trial Order No. 1 [Rec. Doc. 2] entered December 17, 2014 – Setting initial conference;

Pre-Trial Order No. 2 [Rec. Doc. 38] entered January 16, 2015 – Appointing Plaintiffs’ Liaison Counsel;

Pre-Trial Order No. 3 [Rec. Doc. 39] entered January 16, 2015 – Appointing Defendants’ Liaison Counsel;

Pre-Trial Order No. 4 [Rec. Doc. 61] entered January 26, 2015 – Requiring Counsel to provide contact information to Liaison Counsel, and amending PTO No. 1 regarding docketing procedure;

Pre-Trial Order No. 4A [Rec. Doc. 62] entered January 26, 2015 – Approving and attaching Counsel Contact Information Form;

Pre-Trial Order No. 5 [Rec. Doc. 63] entered January 26, 2015 – Clarifying duties of transferor court under MDL Rule 1.6;

Pre-Trial Order No. 5A [Rec. Doc. 149] entered February 3, 2015 – Amending PTO No. 5 to allow transferor court to retain original file;

Pre-Trial Order No. 6 [Rec. Doc. 150] entered February 3, 2015 – Appointing Defendants’ Co-Lead Counsel;

Pre-Trial Order No. 7 [Rec. Doc. 169] entered February 9, 2015 – Appointing Plaintiffs’ Steering Committee (PSC); Appointing Plaintiffs’ Co-Lead Counsel; Ordering that PLC and Plaintiffs’ Co-Lead Counsel shall comprise PSC Executive Committee; Appointing Chair of the State Liaison Committee, to be *ex-officio* member of PSC; and Listing responsibilities of PSC;

Pre-Trial Order No. 7A [Rec. Doc. 830] entered April 29, 2015 – Appointing Michael Weinkowitz, Daniel Gallucci, and Gibson Vance to serve on the State Liaison Committee;

Pre-Trial Order No. 8 [Rec. Doc. 183] entered February 13, 2015 – Establishing standards and procedures for counsel seeking reimbursement for common benefit fees and costs;

Pre-Trial Order No. 9 [Rec. Doc. 356] entered March 24, 2015 – Providing for the Direct Filing of Complaints in the MDL;

Pre-Trial Order No. 10 [Rec. Doc. 357] entered March 24, 2015 – Providing for the Streamlined Service on Certain Bayer Defendants;

Pre-Trial Order No. 11 [Rec. Doc. 893] entered May 4, 2015 – Providing for Bundling of Complaints, Answers and Responsive Pleadings, with attached Attorney Instructions for Filing Individual Severed Xarelto Cases [Rec. Doc. 893-1];

Pre-Trial Order No. 11A [Rec. Doc. 923] entered May 20, 2015 – Providing exemplar Joint Complaint and exemplar Short Form Complaint;

Pre-Trial Order No. 11B [Rec. Doc. 1117] entered July 14, 2015 – Governing a Joined Plaintiff’s responsibility for a filing fee and modifies second sentence of paragraph 1(a) of Pre-Trial Order No. 11;

Pre-Trial Order No. 11C [Rec. Doc. 1118] entered July 14, 2015 – Clarification for some issues that have arisen since the Court issued Pre-Trial Order No. 11;

Pre-Trial Order No. 12 [Rec. Doc. 894] entered May 4, 2015 – Stipulated Protective Order;

Pre-Trial Order No. 13 [Rec. Doc. 895] entered May 4, 2015 – Governing the Form and Schedule for Service of Plaintiff Fact Sheets and Executed Authorizations for Release of Records;

Pre-Trial Order No. 14 [Rec. Doc. 896] entered May 4, 2015 – Governing the Form and Schedule for Service of Defendant Fact Sheets;

Pre-Trial Order No. 13A & 14A [Rec. Doc. 1040] entered June 23, 2015 – Regarding Plaintiff Fact Sheets and Authorizations and Defendant Fact Sheets;

Pre-Trial Order No. 14A [Rec. Docs. 1221] entered August 17, 2015 – Regarding Defendants Fact Sheets with attached Consent Letter from IMS Health Inc. for release of information and data.

Pre-Trial Order No. 15 [Rec. Doc. 897] entered May 4, 2015 – Consent Order Regarding the Preservation of Documents and Electronically Stored Information;

Pre-Trial Order No. 15A [Rec. Doc. 1301] entered September 17, 2015 – Consent Order Regarding Preservation of Voicemail, Text Messages and Instant Messages; [vacated by Pre-Trial Order No. 15B, *infra*]

Pre-Trial Order No. 15B [Rec. Doc. 1477] entered October 21, 2015 – Consent Order Regarding Preservation of Voicemail, Text Messages, and Instant Messages;

Pre-Trial Order No. 16 [Rec. Doc. 898] entered May 4, 2015 – Filing Requests for Summons and Summons Returns;

Pre-Trial Order No. 17 [Rec. Doc. 924] entered May 20, 2015 – Electronic Service/MDL Centrality for Plaintiffs Only;

Pre-Trial Order No. 18 [Rec. Doc. 925] entered May 20, 2015 – Science Day.

Pre-Trial Order No. 19 [Rec. Doc. 951] entered June 4, 2015 – Protocol for Treatment of Privileged and Work Product Materials;

Pre-Trial Order No. 20 [Rec. Doc. 1007] entered June 15, 2015 – Regarding the Format for Production of Hardcopy Documents and Electronically Stored Information;

Pre-Trial Order No. 21 [Rec. Doc. 1302] entered September 17, 2015 – Consent Order Regarding Document Production Protocol.

2. **CASE MANAGEMENT ORDER NO. 2**

On September 17, 2015, the Court issued Case Management Order No. 2 [Rec. Doc. 1305].

3. **PROPOSED CASE MANAGEMENT ORDER NO. 3**

In accordance with the Court's Order [Rec. Doc. 1511], the parties filed their respective, proposed versions of Case Management Order No. 3, with supporting briefs, on November 4, 2015, and filed their respective reply briefs on November 11, 2015. The parties presented oral argument on their competing versions of Case Management Order No. 3 immediately following the status conference on November 20, 2015

4. **COUNSEL CONTACT INFORMATION FORM**

All counsel in the MDL are required to complete the Counsel Contact Information Form attached to PTO No. 4A, and forward it to the appropriate Liaison Counsel. This information must be kept current by counsel providing the information, and will be relied upon throughout the litigation.

5. **MDL CENTRALITY**

The parties have been in communication with BrownGreer regarding the status, use and operation of MDL Centrality. The parties discussed this matter at the November 20, 2015 status conference.

6. **PLAINTIFF FACT SHEETS**

On May 4, 2015, the Court issued Pre-Trial Order No. 13 [Rec. Doc. 895], which governs the form and schedule for service of Plaintiff Fact Sheets (“PFSs”), as well as executed Authorizations for the release of records to be completed by plaintiffs in all individual cases. Pre-Trial Order No. 13A and 14A [Rec. Doc. 1040] provides the procedure for the online submission and service of Fact Sheets and Authorization forms through the BrownGreer MDL Centrality System.

On November 10, 2015, Defendants submitted to plaintiffs’ counsel proposed forms of Orders to Show Cause as to plaintiffs who have either: (1) failed to submit PFSs in accordance with the deadlines set by the Court; or (2) failed to provide records demonstrating proof of use of Xarelto® as required for their PFSs to be substantially complete. *See* PTO 14 ¶1. On November 13, 2015, the PSC responded to the above proposal, suggesting an alternative approach to the handling of cases believed by Defendants to be subject to dismissal for the failure to comply with PTO 13. Meet and confer discussions regarding this matter are continuing.

The medical records of plaintiffs obtained by Defendants are to be made “available to Plaintiffs’ Liaison Counsel ...at cost to Plaintiff.” PTO 13, ¶4. Meet and confer discussions are continuing as to the process by which this should occur, using the same vendor which had been retained by Defendants to procure and copy medical records.

An issue has arisen with regard to the deadline for the submission of Defendant Fact Sheets, in cases where plaintiffs amend or supplement their original Plaintiff Fact Sheet. Meet and confer discussions about this matter are continuing, but the Court’s assistance may be required to reach resolution.

At the November 20, 2015 status conference, the parties reported to the Court on these matters, as well as on the status of Plaintiff Fact Sheets.

7. **DEFENDANT FACT SHEETS**

On May 4, 2015, the Court issued Pre-Trial Order No. 14 [Rec. Doc. 896], which governs the form and schedule for service of Defendant Fact Sheets to be completed by defendant in all individual cases. Pre-Trial Order No. 13A and 14A [Rec. Doc. 1040] provides the procedure for the online submission and service of Fact Sheets and Authorization forms through the BrownGreer MDL Centrality System, as well as for the release of information and data from IMS Health, Inc. [Rec. Doc. 1221]. At the November 20, 2015 status conference, the parties reported to the Court on the status of Defendant Fact Sheets.

8. **BUNDLING OF COMPLAINTS/ANSWERS/RESPONSIVE PLEADINGS**

On May 4, 2015, the Court issued Pre-Trial Order No. 11 [Rec. Doc. 893], which addresses Bundling of Complaints, Answers, and Responsive Pleadings and on May 20, 2015, the Court issued Pre-Trial Order 11A [Rec. Doc. 923], which provided an exemplar Joint Complaint and an exemplar Short Form Complaint. On June 18, 2015, in accordance with PTO 11 [Rec. Doc. 893], Omnibus Answers with Jury Demands were filed by the following defendants: Bayer Healthcare Pharmaceuticals, Inc.; Bayer Pharma AG; and Janssen Pharmaceuticals, Inc., Janssen Research & Development, LLC, Janssen Ortho, LLC (collectively, “the Janssen Defendants”), and Johnson & Johnson.

Under paragraph 2(c) of PTO 11 [Rec. Doc. 893], the voluntary dismissal of cases in which Omnibus Answers are operative can occur only by stipulation of the parties or a Court order following a properly-noticed motion. Due to this requirement, the Court issued an Order on July 22, 2015 [Rec. Doc. 1143] vacating prior Orders of voluntary dismissal without prejudice which

had been granted *ex parte*, and further ordered that the motions to voluntarily dismiss these cases be scheduled for submission on August 6, 2015, with any opposition briefs filed on or before July 29, 2015. On August 17, 2015, the Court entered an order [Rec. Doc. 1237] setting out the standard for without prejudice dismissals.

9. **PRESERVATION ORDER**

On May 4, 2015, the Court issued Pre-Trial Order No. 15 [Rec. Doc. 897], a Consent Order Regarding the Preservation of Documents and Electronically Stored Information. Pre-Trial Order No. 15 modifies paragraph 13 of Pre-Trial Order No. 1 relating to preservation of evidence. Further, the Court issued Pre-Trial Order No. 15B on October 21, 2015 [Rec. Doc. 1477] regarding the obligation of all parties to preserve voicemail, instant messages sent or received on an instant messaging system, or text messages sent or received on a cellular phone, smartphone, tablet or other mobile device. Pre-Trial Order 15B vacated previously entered Pre-Trial Order 15A. [Rec. Doc. 1301]. The parties discussed this matter at the November 20, 2015 status conference.

10. **PROPOSED ORDER GOVERNING THE PARTIES' INTERACTIONS WITH MDL PLAINTIFFS' PRESCRIBING AND TREATING PHYSICIANS**

The parties have discussed a proposed Order governing interactions with MDL plaintiffs' prescribing and treating physicians. On November 13, 2015, Defendants sent Plaintiffs' Lead Counsel a proposed Order. The parties discussed this matter at the November 20, 2015 status conference.

11. **DISCOVERY**

On July 15, 2015, the Court issued an Order [Rec. Doc. 1119] setting telephone status conferences with Lead and Liaison Counsel of the parties on a bi-weekly basis. The purpose of these conferences is to report to the Court on discovery matters after the parties have met and conferred on these matters and have provided notice to the Court and to one another of the issues

which remain to be addressed with the Court. The Court issued Pre-Trial Order No. 21 on September 17, 2015 [Rec. Doc. 1302].

The parties have met and conferred regarding issues pertaining to Defendants' privilege logs and an ongoing bi-weekly meet and confer process has been established to address any issues.

On September 22, 2015, the PSC issued 30(b)(6) deposition notices to both the Janssen/J&J Defendants and the Bayer Defendants relating to corporate structure. On October 9, 2015, objections to the 30(b)(6) notices were provided by Janssen/J&J, as well as Bayer. On November 11, 2015, the PSC re-issued amended 30(b)(6) deposition notices to both the Janssen/J&J Defendants and the Bayer Defendants relating to corporate structure. The 30(b)(6) deposition relating to corporate structure of the Janssen/J&J Defendants has been set for December 11, 2015 in Princeton, New Jersey. The 30(b)(6) deposition relating to corporate structure of the Bayer Defendants has been set for December 15, 2015 in Pittsburgh, Pennsylvania. The parties discussed this matter at the November 20, 2015 status conference.

Lead and Liaison Counsel for the parties continue to discuss the appropriate means by which plaintiffs may obtain any and all "dear doctor" letters sent by Defendants to the treating/prescribing physicians of plaintiffs. Despite these meet and confer discussions, the matter remains unresolved, and the Court's guidance is required. The parties discussed this in detail at the status conference on November 20, 2015.

The parties continue to participate in the Court's bi-weekly discovery telephone status conferences and the next conference is set for December 10, 2015.

12. **DEPOSITION GUIDELINES**

The Plaintiffs' Steering Committee and Defendants continue to negotiate and prepare a proposed Pre-Trial Order governing the conduct of depositions in the Multidistrict Litigation.

While many of the terms have been agreed upon, there are a few provisions as to which the parties anticipate agreement will not be reached.

PLC and DLC reported to the Court on the status of this matter at the November 20, 2015 status conference.

13. **DISCOVERY ISSUED TO THIRD PARTIES**

On April 22, 2015, the Plaintiffs' Steering Committee ("PSC") issued a subpoena duces tecum to the United States Food and Drug Administration ("FDA"). The parties have met and conferred with representatives of the FDA and the FDA has begun producing documents responsive to the subpoena. On September 2, 2015, the parties had a follow up discussion with representatives of the agency during which counsel for plaintiffs explained that plaintiffs do not desire to receive duplicative FDA materials that have already been produced by Janssen and/or Bayer. On September 4, 2015, the FDA produced indices of its IND and NDA files of the FDA. The PSC intends on receiving additional materials from the FDA.

On June 4, 2015, the Plaintiffs' Steering Committee ("PSC") issued a Subpoena to Testify at Deposition to Duke Clinical Research Institute ("DCRI"). Representatives of the PSC and Defense Counsel met with representatives of DCRI on September 24, 2015. DCRI produced documents on November 10, 2015. However, the PSC believes further documents are to be produced under the subpoena.

The parties discussed both of these matters further with the Court at the November 20, 2015 status conference.

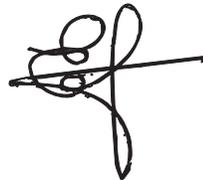
14. **STATE/FEDERAL COORDINATION**

In accordance with Pre-Trial Orders No. 7 and 7A, as well as Case Management Order No. 1, PLC and DLC have had, and will continue to have, communications regarding the State Liaison Committee, as well as the status of coordination of MDL and state court actions.

PLC and DLC reported to the Court on this matter at the November 20, 2015 Status Conference.

15. **NEXT STATUS CONFERENCE**

The Court has announced that the next status conference will be on Monday, December 21, 2015, at 9:00 a.m. in the Chambers of the Honorable Eldon E. Fallon. The Court has set up a conference line for auditing the conference. To audit, call (800) 707-9573, and enter access code 372126.

A handwritten signature in black ink, consisting of a stylized, cursive 'E' followed by a vertical line that curves at the bottom.