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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED

AUG 08 2003

ROBERT A. SHEMPELL, CLERK
BY: msk
DEPUTY

MICHAEL T. DIAMOND, ET AL.

NO. CV03-0564-LC

VERSUS

JUDGE: TRIMBLE

IMMUNEX CORPORATION, ET AL.

MAG. JUDGE: WILSON

**PROPOSED PLAN FOR DISCOVERY ON BEHALF
OF DEFENDANTS**

Defendants Amgen Inc., and Immunex Corporation (hereinafter collectively referred to as "Immunex Defendants"), in accordance with this Court's July 1, 2003 Scheduling Conference Order, submit this Proposed Plan for Discovery. Wyeth also agrees with this Proposal and will file a statement joining with it. The Immunex Defendants and Wyeth are collectively referred to here as "Defendants."

The parties conferred to consider scheduling and discovery but did not reach an agreement. Consequently, Defendants submit this report outlining their proposal and the reasons for it.

I. PRELIMINARY STATEMENT

This is a pharmaceutical product liability case that may present potentially difficult and complex issues and justifies the adoption of special rules to facilitate the just and efficient disposition of the action pursuant to Fed. Rule Civ. Proc. 16(c)(12).

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Based on a review of medical records provided by plaintiffs which show that the decedent suffered from serious health problems prior to his use of Enbrel®, Defendants believe that it is unlikely plaintiffs can make even a threshold showing that the decedent's death was, more probably than not, caused by the decedent's brief use of Enbrel®.

A. Summary of Medical Records Provided

The decedent was diagnosed with rheumatoid arthritis in 1985. His medical history since that time is filled with multiple, serious health problems, including:

- Cardiomyopathy (organic heart disease) – diagnosed in 1991, with numerous episodes of treatment and/or hospitalization, and likely caused by chronic alcohol abuse
- History of leucopenia (low white blood cell count) dating back to at least October, 1998
- Atrial fibrillation
- Hypertension
- hypothyroidism
- Heavy smoker
- Alcohol abuse
- Obesity
- Felty's Syndrome, which is a common syndrome in rheumatoid arthritis patients involving enlargement of the spleen (splenomegaly) and leucopenia (low white blood cell count)
- Mild glucose intolerance/diabetes mellitus type II
- Multiple orthopedic problems, including cervical spine fusion, lumbar laminectomy and lumbar reconstruction, and left hip replacement
- Chronic steroid use
- Chronic obstructive sleep apnea

See, September 10, 1998 Consultation Report of Dr. John M. Winterton; September 18, 1998 Short Stay Summary from Dr. Richard Gilmore; March 31, 2000 Consultation Report of Dr. Michael Bergeron; November 14, 2000 Consultation Report of Dr. John M. Winterton (seeing the decedent for “congestive heart failure and abnormal cardiac

enzymes,” and noting the decedent “... is known to have a nonischemic dilated cardiomyopathy which he has had for many years ... [which is] ... thought to be secondary to alcohol use and hypertension,” and also noting that the decedent has “questionable steroid induced diabetes....”)

In contrast with the multiple medications the decedent was taking for approximately 20 years, he was treated with Enbrel® for only five (5) months, from October 25, 1999 to March 28, 2000. Original Petition, ¶ 9.

In August, 2000, the decedent had his spleen removed due to the Felty’s Syndrome. According to an entry in the St. Patrick Hospital’s rehabilitation unit admit report on April 25, 2001, “... as per the chart, [the decedent] states that his health has been going down hill ever since [the splenectomy in August, 2000].”

In December, 2000, the decedent fell and fractured his humerus, which required a lengthy hospital stay and multiple drugs for pain control.

On April 8, 2001, the decedent was admitted into the hospital due to prolonged vomiting. The records note that he had “a known history of : “1. cardiomyopathy with decreased urine output over the last two weeks; 2. elevated potassium, possibly secondary to decreased renal perfusion secondary to cardiomyopathy; 3. hyponatremia [low concentration of sodium ion in circulatory blood], possibly secondary to Paxil, as selective serotonin reuptake inhibitors are known to cause hyponatremia; 4. possible adrenal insufficiency; 5. hypothyroidism; 6. obstructive sleep apnea; 7. rheumatoid arthritis.” The History & Physical notes of Dr. Ronald Lewis, Jr., note that his past history is “significant for Felty’s syndrome, cardiomyopathy secondary to ethanol,

rheumatoid arthritis, atrial fibrillation, chronic pain control secondary to chronic back pain, [and] obstructive sleep apnea.” He was in intensive care for approximately 3 weeks before being discharged to the rehabilitation unit of the hospital. His ICU discharge summary on April 25, 2001 notes the decedent had “bilateral pneumonia,” “terrible cardiomyopathy,” “chronic steroid use and many complications from this,” and “acute renal failure.” His rehabilitation unit admit report on April 25, 2001 notes that “... as per the chart, [the decedent] states that his health has been going down hill ever since [the splenectomy in August, 2000].”

In September, 2001, the decedent was hospitalized due to fever and neutropenia (low white blood cells in the circulating blood). His treating physician stated the condition was “secondary to Felty Syndrome.” Note of Dr. Bergeron, 9/10/2001.

The decedent had several other instances in which he had to be hospitalized, some of which are outlined in his Petition and Amended Complaints. The decedent ultimately passed away on December 5, 2001, approximately twenty (20) months *after* he stopped using Enbrel®. Plaintiffs did not provide Defendants with medical records concerning the decedent’s hospital stay just prior to his death. However, the medical records that were produced clearly show that the decedent had a litany of serious medical conditions pre-dating his use of Enbrel®, and that all of the symptoms and conditions he experienced after he stopped using Enbrel® can be related to his long-standing medical problems.

B. Requiring a Threshold Showing of Medical Causation is Warranted

A finding of medical causation is critical to any finding of liability under the Louisiana Products Liability Act, La. R.S. 9:2800.51, *et seq.*, (hereafter, "LPLA"). Full discovery on all issues potentially relevant under the LPLA will be very expensive and time consuming. Before the parties and the court embark on full discovery on issues that may never need to be addressed, plaintiffs should be required to provide a minimum level of evidentiary support on the critical issue of medical causation. Requiring such a showing now is fair and will not present an undue burden on plaintiffs because much of it is simply information plaintiffs should have obtained prior to filing the lawsuit. Equally important, requiring production of the information now will serve to ensure that a case lacking factual support for a critical element of liability will not consume the resources of this Court or the parties. It will also assist to streamline and focus future discovery should plaintiffs succeed in making the requisite showing.

The discovery management order proposed here is analogous to orders that are often referred to as "*Lone Pine* orders," named for *Lore v. Lone Pine Corp.*, No. L-33606-85 (N.J.Super.Ct.1986). The Fifth Circuit in *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir., 2000), recognized that *Lone Pine* orders are useful in complex litigation to assist in streamlining and managing the litigation. There, the district court in toxic tort litigation required the plaintiffs to produce at the beginning of the lawsuit expert affidavits identifying for each plaintiff, among other things, the injury suffered, the identity of the substance that purportedly caused the injury, and an affidavit from a qualified expert opining that the plaintiff's injuries were caused, more probably than not,

by exposure to the substance. The Fifth Circuit upheld the district court's order requiring this showing before allowing any additional discovery to proceed. *See also, Claar v. Burlington Northern Railroad Co.*, 29 F.3d 494 (9th Cir. 1994) (district court, concerned that plaintiffs might not be able to make a causal connection between their workplace chemical exposure and their injuries, issued a case management order requiring, among other things, that plaintiffs submit affidavits from physicians listing the scientific basis for the physician's opinion that the injuries were caused by exposure to the chemical); *Turner v. Firestone Tire & Rubber Co.*, No. 5-95CV-152 (E.D. Tex. May 31, 1996) (copy of order attached: district court enters order requiring each plaintiff to file an affidavit from medical or other qualified expert that to a reasonable degree of medical probability, the plaintiff's injuries were caused by exposure to a particular substance); *In Re: 2000 ExxonMobil Release Litigation*, Master Docket Number 00-MD-1-C, C.A. Nos. 01-1047, 01-1048, 01-1074, 01-1090, 01-1112 (M.D. La. March 3, 2003) (copy of order attached; orders plaintiffs to produce, among other things, an affidavit of a qualified treating or other physician identifying the substance to which exposure is claimed, the diagnosis of the plaintiff's alleged injury, and stating to a reasonable medical probability that the injury was caused by exposure to the substance).

II. DEFENDANTS' PROPOSED PLAN FOR DISCOVERY

For these reasons, and pursuant to Fed. Rules Civ. Proc. 16(c) and 26(f), Defendants propose that a discovery management order with the following provisions be entered :

(1) By no later than August 25, 2003, Plaintiffs shall produce to Defendants: (a) a certified copy of the death certificate for the decedent; (b) a list of all health care providers who treated the decedent for any reason in the last twenty-five (25) years and a brief description identifying the condition(s) for which each health care provider treated the decedent; (c) An Authorization for Release of Medical Records; and (d) all medical records in Plaintiffs' or their counsel's possession relating to the treatment of the decedent for any condition.

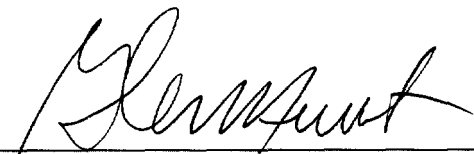
(2) By no later than August 25, 2003, Defendants shall make available for inspection and copying the documents identified in Defendants' Initial Disclosures.

(3) By no later than September 30, 2003, Plaintiffs shall produce to Defendants affidavit(s) or declaration(s) of qualified treating or other physicians stating: (a) to a reasonable degree of medical probability the cause of decedent's death; and (b) to a reasonable degree of medical probability that the decedent's use of Enbrel caused the decedent's death. Each affidavit or declaration shall specify all medical examinations, testing, treatment, records, and information relied upon by the physician to support his/her conclusions.

(4) By no later than October 15, 2003, each party shall submit to the Court a report advising whether the affidavits or declarations produced by Plaintiffs provide a sufficient factual basis to justify the continued prosecution of the litigation and, if necessary, a proposed scheduling order to govern future proceedings. The Court will hold a status conference on October 22, 2003, or as soon thereafter as the Court's docket allows, to decide how to proceed.

(5) All other discovery is stayed, except upon written agreement of all parties or court order. This restriction on discovery is not intended to limit any party from obtaining public records from any source through any lawful means or from obtaining medical records from health care providers.

Dated: August 7, 2003

By: 
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Attorneys for Immunex Corporation
and Amgen Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served on all counsel of record via facsimile transmission and by depositing same in the United States Mail, properly addressed and postage prepaid, this 7th day of August, 2003.



Glenn M. Farnet

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION**

NOTICE OF DOCUMENTATION NOT FILED IN RECORD

CASE# 2:03CV0564

MICHAEL T. DIAMOND

VS.

IMMUNEX CORP

ATTACHMENTS TO:

DOCUMENT#: 39

DESCRIPTION: PROPOSED PLAN FOR DISCOVERY

FILED BY: DEFENDANTS

FILE DATE: AUGUST 8, 2003

HAVE BEEN PLACED IN AN ACCORDIAN FOLDER

MAVICE H. THIGPEN

DEPUTY CLERK

KEAN, MILLER, HAWTHORNE, D'ARMOND, McCOWAN & JARMAN, L.L.P.

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August 7, 2003

VIA FEDERAL EXPRESS

Honorable Robert H. Shemwell
Clerk of Court
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AUG 08 2003

ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

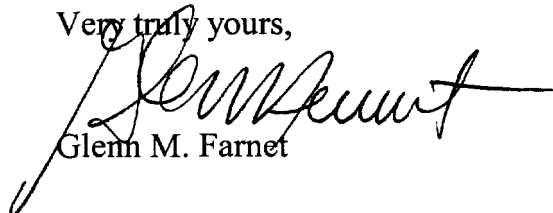
RE: *Michael T. Diamond, et al v. Immunex Corporation, et al*
No. 2:03-CV-546
Judge Tremble
Magistrate Judge Wilson
File No.: 17102-1

Dear Mr. Shemwell:

Enclosed is defendants' proposed plan of discovery to be filed in the record of these proceedings. Please return a file stamped copy to us in the enclosed envelope. I thank you for your cooperation.

Please feel free to contact me should you have any questions.

Very truly yours,



Glenn M. Farnet

GMF/cpl
Enclosures

cc: Mr. Cary B. Bryson (via fax and U.S. Mail w/encl.)
Ms. Ann De Groff Levine (via fax and U.S. Mail w/encl.)
Mr. G. William Jarman (w/encl.)
Magistrate Judge Wilson (w/encl.)

Handwritten initials: GMF