UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

CIVIL ACTION NO. 5:13-cv-405-GFVT

MODERN HOLDINGS, LLC, et al., PLAINTIFFS,

V. **ORDER**

CORNING, INC., et al., DEFENDANTS.

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This matter is before the undersigned on Defendant Philips Electronics North America Corporation's Motion for Entry of a Lone Pine Case Management Order [R. 127], requiring that Plaintiffs first come forward with prima facie evidence indicating that they suffered some medical injury or property damage reasonably traceable back to Defendants' manufacturing facility operations, before Defendant must respond to Plaintiffs' substantial discovery requests. [R. 127-1]. For the reasons stated herein, the Court will grant Defendant's Motion for Entry of a Lone Pine Case Management Order. Where a combination of a Lone Pine Order and a timely resolution to the class certification question will work in tandem, to maximize efficiency and resource preservation while still allowing all meritorious claims to proceed, the Court will grant Defendants' Motion to Bifurcate Discovery [R. 131].

I. LEGAL STANDARD FOR LONE PINE ORDERS

Federal Rule 16(c) allows courts to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems." FED. R. CIV. P. 16(c)(2)(L). Designed to handle particularly complex issues and reduce potential burdens on both the parties and the courts

involved in mass tort litigation cases, "Lone Pine" Orders serve as a practical application of the principles underlying Rule 16. See generally Lore v. Lone Pine, L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Div. Nov. 18, 1986). Issued under the broad discretion of federal district judges, Lone Pine Case Management Orders are granted for the desirable purpose of eliminating frivolous claims, managing complex issues, and lessening the burdens of complex litigation upon both the parties and the court. Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000); In re Digitek Prod. Liab. Litig., 264 F.R.D. 249, 255–56 (S.D.W.Va. 2010); see also Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006).

Specifically within the realm of complex toxic tort litigation, Lone Pine Orders can provide three particular case management benefits: (1) they dispose of meritless claims before parties expend substantial resources on discovery and trial preparation; (2) they narrow the issues and allow the remaining parties to focus on dispute resolution while avoiding the time-consuming, financially burdensome discovery process of filtering meritless issues and claims on a plaintiff-by-plaintiff basis; and (3) they promote speedy settlements of litigation by identifying potentially meritorious claims and assessing their values early on, before the lengthy discovery process begins. Acuna, 200 F.3d at 340; Baker v. Chevron USA, Inc., No. 105-CV-227, 2007 WL 315346 at *1 (S.D. Ohio Jan. 30, 2007); Baker v. Anschutz Exploration Corp., No. 11-CV-6119, 2013 WL 3282880 at *2 (W.D.N.Y June 27, 2013); Kinnick v. Schierl, Inc., 541 N.W.2d 803, 806 n.1; see also Scott A. Steiner, The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort, 6 Hastings W.-Nw. J. Envt'l. L. & Pol'y 71, 85 (1999). In evaluating whether to enter a Lone Pine Order, courts have found five factors relevant: (1) the type of injury alleged and its cause; (2) any particular case management needs; (3) the

availability of other procedural devices; (4) external agency decisions; and (5) the posture of the litigation. In re Digitek, 264 F.R.D. at 256; Steering Comm., 461 F.3d at 604 n.2.

In those toxic tort cases involving personal injury claims, these orders will generally require each plaintiff to make a prima facie showing of causation via expert affidavits and other pertinent evidence identifying: (1) the plaintiff's precise illness suffered; (2) the identity and dose of each chemical to which plaintiff was exposed; (3) the dates and duration of exposure; (4) the pathway of the chemical exposure to plaintiff; and (5) any evidence to support the expert's opinion that exposure to the chemical caused plaintiff's illness. Acuna, 200 F.3d at 338. In toxic tort cases involving both personal injury and property claims, the orders may additionally require the submission of expert reports and/or studies which (1) establish the allegedly harmful substance's identity; (2) establish the precise location of exposure; (3) explain causation; (4) locate contamination on the property; and (5) identify and quantify the real property's contamination. See, e.g., Baker v. Anschutz Exploration Corp., No. 11-CV-6119, 2013 WL 3282880 at *4 (W.D.N.Y June 27, 2013). Plaintiffs who fail to offer sufficient evidence to indicate exposure, causation, and injury are subject to having their claims dismissed as a result. Acuna, 200 F.3d at 340.

II. ANALYSIS

In this case as in all cases, this Court has a significant interest in facilitating the efficiency of case management to resolve the dispute and preserve resources where possible, and as Plaintiffs' complaint approaches its two-year anniversary, case management efficiency is now as important as ever. This Court is convinced that the most efficient way to proceed with discovery and class certification is in two separate phases. In the first phase, Plaintiffs will make

prima facie evidentiary disclosures pursuant to this Court's Lone Pine Order. In the second phase, bifurcation of discovery will take place; discovery will be limited at first to only those issues relevant to class certification per Rule 23, at which point parties may file all motions related to the class certification issue. Only upon resolution of the class certification question will full merits discovery then proceed.

A. FIRST PHASE: ENTRY OF LONE PINE ORDER

In the first phase, Plaintiffs will proceed by adhering to the specific terms of this Court's Lone Pine Order provided below, and each claimant will present prima facie evidence of their specific claim(s) and entitlement to relief, whether based upon personal injury or property damage claims. Despite Plaintiffs' concerns, a Lone Pine Order in the present case will help to dispose of any meritless claims while allowing all potentially meritorious claims to proceed, and will also promote a quicker resolution by narrowing and grouping the issues upon discovery, a central management benefit of Lone Pine Orders in large-scale toxic tort cases such as this. See Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000).

Additionally, a Lone Pine Order will save costs and preserve resources for both the parties and the Court over the long term, and although Plaintiffs strongly object to the Order for fear it will require a greater pre-discovery effort on their part, the benefits would seem to outweigh the burden. Plaintiffs have cited to various cases such as Simeone v. Girard City Board of Education to illustrate courts' general disfavor towards Lone Pine Orders, but this Court notes the present case's distinguishing features that justify an Order here; the Simeone court, for one, noted that the vast majority of cases granting Lone Pine motions did so only when there was a refusal to comply with discovery requests or when plaintiffs failed to allege a prima facie case,

Simeone v. Girard City Bd. of Educ., 171 Ohio App.3d 633, 872 N.E.2d 344, 351 (2007), and in this Court's opinion, the present case has presented such a scenario. Despite their references to academic authorities and numerous reports tentatively linking their injuries to those hazardous substances allegedly traceable to Defendants' operations, Plaintiffs have yet to adequately allege prima facie cases to support all of their property damage and personal injury claims. Moreover, the five factors[1] typically considered by courts in assessing the need for a Lone Pine Order further weigh in favor of granting the Order; the claimants' types and locations of injuries are numerous and diverse, the need for case management is particularly apparent where the alleged injuries span entire decades of Defendants' Facility operations, and the case's chronically stagnant posture – originally filed nearly two years ago – all weigh in favor of the case management order.

In short, there is no one currently in as great a position to offer evidence regarding the strength of their claims as the Plaintiffs themselves, and where Plaintiffs will presumably have to produce this same evidence at some point in the near future, a Lone Pine Order should not impose much of an additional burden upon them, whereas it may very well spare Defendants the substantial burden of engaging in review of over 100 boxes of documents and nearly one million electronic files. [R. 135 at 7-8]. Plaintiffs' motions in opposition to the Lone Pine Order generally misconstrue the Order as a circumvention of the discovery process entirely, when in fact the Order will only serve to clarify, simplify, and facilitate the merits discovery process in the future. In the meantime, this Court feels "it is not too much to ask a Plaintiff to provide some

[1] Courts weigh (1) type and cause of injury alleged; (2) particular case management needs; (3) availability of other procedural devices; (4) external agency decisions; and (5) posture of the litigation. See In re Digitek Prod. Liab. Litig., 264 F.R.D. 249, 256 (S.D.W.Va. 2010).

kind of evidence to support their claim that [Defendant] caused them personal injury." In re Vioxx Prods. Liab. Litig., MDL No. 1657, 2012 U.S. Dist. LEXIS 56309, at *5 (E.D. La. Apr. 23, 2012).

B. SECOND PHASE: BIFURCATION OF DISCOVERY

The second phase will begin with bifurcation of discovery, separating discovery into class certification and merits discovery, in order to first resolve the class certification issue before the parties move on to full merits discovery. Where the outcome of the class certification question will almost certainly and significantly impact the entire scope of merits discovery, the Court believes the most efficient way to manage this case at this juncture, in combination with the aforementioned Lone Pine Order, involved resolving class certification as early as possible.

Class certification should be resolved first, pursuant to Federal Rule of Civil Procedure 23 which requires class certification be resolved at "an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). Serving as a counterpart to the Lone Pine Order, this Court hopes bifurcation will conserve further judicial resources and minimize expenses for all involved, will prevent the use of disproportionate expenses suffered by one party as leverage used by the other [R. 143 at 5], and will provide Defendants the reasonable opportunity to conduct merits discovery regarding those claims that are able to proceed to trial. The Sixth Circuit has routinely ordered similarly limited pre-certification discovery on the issue of class certification. See generally Burkhead v. Louisville Gas & Elec. Co., 250 F.R.D. 287, 292 (W.D. Ky. 2008); Brockman v. Barton Brands, Ltd., No. 3:06-CV-332-H, 2007 WL 4162920, at *4 (W.D. Ky. Nov. 21, 2007); Gevedon v. Purdue Pharma, 212 F.R.D. 333, 334 (E.D. Ky. 2002); Graham v. Champion Int'l Corp., 1997 WL 33487768, at *4 (E.D. Tenn. May 16, 1997); Jackshaw Pontiac, Inc. v. Cleveland Press

Publishing Co., 102 F.R.D. 183, 187 (N.D. Ohio 1984). "Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof. . ." See Manual for Complex Litigation § 21.14 (4th ed.). More specifically, Rule 23 sets forth four requirements for the Court to initially consider when ruling on any class certification motion: numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a)(1)-(4).

Accordingly, once phase two has begun and discovery has been separated into class-based and merits-based claims, the parties shall provide all relevant evidence either in support of or opposition to claimants' certification as a class under Rule 23; Plaintiffs will seek to indicate why they properly constitute a "class" per Rule 23(a)'s requirements, while Defendants will be afforded the opportunity at this phase to raise class certification objections. Such bifurcation will allow the Court to prioritize "discovery into certification issues pertain[ing] to the requirements of Rule 23," as instructed by the Manual for Complex Litigation, before determining whether to certify Plaintiffs' action as a class action. Manual for Complex Litigation § 21.14 (4th ed.); Fed. R. Civ. P. 23(c)(1)(A). Once this Court has issued its final order reflecting this determination, the parties may then proceed with merits discovery.

Plaintiffs have expressed additional concerns that class certification discovery evidence – that is, Plaintiffs' evidence which illustrates their collective numerosity, commonality, typicality and adequacy of representation and supports their certification as a class – will inevitably overlap with later merits discovery to some degree. [R. 134 at 8-10]. Although the Sixth Circuit does recognize that district courts must "consider at the class certification stage only those matters relevant to deciding if the prerequisites of Rule 23 are satisfied," In re Whirlpool Corp.

Front-Loading Washer Products Liab. Litg., 722 F.3d 838, 851, the mere fact that certification issues may involve "some overlap with the merits of the underlying claim" does not, in and of itself, justify full merits discovery at the early certification stage. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). Rather, Plaintiffs may rest assured that the Court's decision to sequence discovery will not deprive them of their opportunity to receive all evidence to which they are entitled per the federal discovery rules.

Where appellate courts have generally recognized that "a district judge must be afforded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements," In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006), this Court now exercises such discretion and mandates that, following the Lone Pine Order entry at phase one, the class certification issue shall be settled at phase two, before the parties may proceed with full discovery on the merits.

Having considered the matter fully, and being otherwise sufficiently advised,

IT IS ORDERED that Defendant's Motion for Entry of a Lone Pine Case Management Order [R. 127] shall be GRANTED.

Additionally, IT IS ORDERED that Defendants' Motion to Bifurcate Discovery [R. 131] shall be GRANTED.

Signed September 28, 2015.

Signed By:
Edward B. Atkins EBA
United States Magistrate Judge