

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:08-MD-01928-MIDDLEBROOKS/JOHNSON

**IN RE TRASYLOL PRODUCTS
LIABILITY LITIGATION – MDL-1928**

This Document Relates to All Actions.

**PRETRIAL ORDER NO. 35 ESTABLISHING PRETRIAL DISCLOSURES
AND MOTIONS SCHEDULE FOR ALL REMAINING CASES WITH DATES FOR
FINAL DISPOSITION/REMAND/COMMENCEMENT OF TRIAL
UNDER PRETRIAL ORDER No. 28**

This matter is before the Court because the parties have moved jointly to modify two prior Pretrial Orders in order to remove ambiguities in the application of one and to improve the efficiency of the other. [D.E. 12469 in 1:08-md-01928.] Earlier in this litigation, the Court entered Pretrial Order No. 22 (“PTO 22”) (July 9, 2010) which set forth certain procedures and schedules for preparation of cases for trial. These procedures and schedules were intended to apply to all the remaining cases in this MDL, except for cases governed by specially entered orders. PTO 22 was consistent with this Court’s stated intention of not recommending remand of any case to its transferor district until the case was substantially trial ready. Pretrial Order No. 28 (“PTO 28”) (February 1, 2011) set forth, *inter alia*, the case-specific fact and expert discovery, dispositive and *Daubert* motion schedule, and the “final disposition/ remand/ commencement of trial” date (“trial ready date”) for all the cases then remaining in this MDL. The trial ready dates in PTO 28 were intended to trigger the trial readiness schedule in Section II of PTO 22 such as service of witness lists, deposition designations, exhibit lists, motions *in limine* and other pretrial matters.

Based on the experience of the parties since PTO 22 and PTO 28 were entered, counsel for defendants and the PSC have agreed that a modification of PTO 22 as set forth below would assist in meeting its goal, and reduce ambiguity about its applicability. One change the parties recommend is to have the pretrial preparation dates commence with the disposition of any dispositive motions filed in accordance with the schedule in PTO 28. Under PTO 22 and PTO 28 as they exist today, the pretrial preparation dates apply even if there is a fully briefed dispositive motion on file. With the change recommended by the parties, both sides may avoid unnecessary pretrial preparation work in the cases where those motions are granted.

The Court, having reviewed the joint submission of the defendants and the PSC, and good cause appearing, GRANTS the parties joint motion and ORDERS as follows:

This Order applies to all remaining cases which have trial ready dates determined by PTO 28, whether or not they will be tried by this Court. This Order supersedes Section II of PTO 22. In addition, as to any case in which defendants file or have filed a dispositive and/or *Daubert* motion in accordance with the schedule in PTO 28, this Order vacates the trial ready date for such case. Section I below applies to cases in which defendants file or have already filed a dispositive and/or *Daubert* motion in accordance with PTO 28. Section II below applies to any case in which defendants have not filed a dispositive and/or *Daubert* motion. Any due date in this Order falling on a weekend or holiday shall be adjusted to the next business day.

I. PRETRIAL SUBMISSIONS SCHEDULE FOR CASES IN WHICH BAYER HAS FILED A SUMMARY JUDGMENT MOTION.

If Bayer files or has filed a dispositive and/or *Daubert* motion in accordance with the schedule in PTO 28, and that motion is denied in whole or in part, the following schedule for pretrial submissions applies:

The parties must file and serve a notice of whether they agree to waive venue objections and objections based on *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523

U.S. 26 (1998), 14 days after entry of the Court's order deciding Bayer's dispositive and/or *Daubert* motion unless the case is dismissed.

If the case has not already gone through mediation, the parties shall engage in mediation within 30 days after the Court's order deciding Bayer's dispositive and/or *Daubert* motion unless the case is dismissed.

Each plaintiff must serve his/her witness list, consistent with the requirements of Federal Rule of Civil Procedure 26(a)(3)(A)(i) and (ii), within 21 days of the entry of the Court's order deciding Bayer's dispositive and/or *Daubert* motion, including, without limitation, separate identification of those witnesses plaintiff expects to present and those plaintiff may call if the need arises, as well as those witnesses plaintiff expects to present by deposition and those witnesses plaintiff expects to call live at trial.

Defendants must serve their witness list, consistent with the requirements of Federal Rule of Civil Procedure 26(a)(3)(A)(i) and (ii), 10 days after service of the applicable plaintiff's witness list, including, without limitation, separate identification of those witnesses defendants expect to present and those defendants may call if the need arises, as well as those witnesses defendants expect to present by deposition and those witnesses defendants expect to call live at trial.

Witnesses not included on a party's witness list shall not be called at trial absent agreement of the parties or a showing of good cause as to why the witness was not included on the witness list.

Each plaintiff must serve any page/line designations of deposition testimony within 21 days of the entry of the Court's order deciding Bayer's dispositive and/or *Daubert* motion.

Defendants must serve any page/line counter-designations of deposition testimony, objections to plaintiff's deposition designations and affirmative page/line designations of deposition testimony within 21 days of service of plaintiff's page/line designations of deposition testimony.

Plaintiff must serve any page/line counter-designations of deposition testimony and objections to defendants' deposition designations within 18 days of service of defendants' page/line designations of deposition testimony.

Defendants must serve any objections to plaintiff's deposition counter-designations within 8 days of service of plaintiff's counter designations of deposition testimony.

Each plaintiff must serve his/her exhibit list, including a description of each document or other exhibit, document production number (if applicable), and an electronic copy of the exhibits (except demonstrative exhibits), as required by the Federal Rule of Civil Procedure 26(a)(3)(A)(iii), within 28 days of the entry of the Court's order deciding Bayer's dispositive and/or *Daubert* motion.

Defendants must serve objections to plaintiff's exhibits, and serve their exhibit list, including a description of each document or other exhibit, document production number (if applicable) and an electronic copy of the exhibits (except demonstrative exhibits), consistent with the requirements of Federal Rule of Civil Procedure 26(a)(3)(A)(iii), within 21 days of service of plaintiff's exhibit list.

Plaintiff must serve objections to defendants' exhibit list within 21 days of service of defendants' exhibit list.

Exhibits not included on a party's exhibit list (except exhibits used for impeachment) shall not be received into evidence absent agreement of the parties or a showing of good cause as to why the exhibit was not included on the exhibit list.

Any motions *in limine* must be filed and served within 42 days of the entry of the Court's order deciding Bayer's dispositive and/or *Daubert* motion.

Responses to motions *in limine* must be filed and served 14 days after service of the corresponding motion *in limine*.

Replies in support of a motion *in limine* must be filed and served 7 days after service of a response to the corresponding motion *in limine*.

The schedule for any hearings on motions *in limine* and other pretrial motions will be determined by the Court.

The parties shall file a pretrial stipulation as required by S.D. Fla. L.R. 16.1(E) on a date to be determined by the Court.

Proposed jury instructions must be submitted within 63 days of the entry of the Court's order deciding Bayer's dispositive and/or *Daubert* motion.

The schedule for the final pretrial conference, if any is to be set, will be determined by the Court. The Court will determine at that time whether to recommend remand to the transferor district.

II. PRETRIAL SUBMISSIONS SCHEDULE FOR CASES IN WHICH BAYER HAS NOT FILED A SUMMARY JUDGMENT MOTION.

For any case in which Bayer does not file a dispositive and/or *Daubert* motion by the date set forth in PTO 28, the following schedule for pretrial submissions applies:

The parties must file and serve a notice of whether they agree to waive venue objections and objections based on *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), 63 days before the trial ready date (that is, the date applicable to the case shown as the Final Disposition/Remand/Commencement of Trials date on Exhibit A to PTO 28).

The parties shall engage in mediation at least 60 days before the scheduled trial ready date.

Each plaintiff must serve his/her witness list, consistent with the requirements of Federal Rule of Civil Procedure 26(a)(3)(A)(i) and (ii), 56 days before the scheduled trial ready date, including, without limitation, separate identification of those witnesses plaintiff expects to present and those plaintiff may call if the need arises, as well as those witnesses plaintiff expects to present by deposition and those witnesses plaintiff expects to call live at trial.

Defendants must serve their witness list, consistent with the requirements of Federal Rule of Civil Procedure 26(a)(3)(A)(i) and (ii), 10 days after service of the applicable plaintiff's witness list, including, without limitation, separate identification of those witnesses defendants expect to present and those defendants may call if the need arises, as well as those witnesses defendants expect to present by deposition and those witnesses defendants expect to call live at trial.

Witnesses not included on a party's witness list shall not be called at trial absent agreement of the parties or a showing of good cause as to why the witness was not included on the witness list.

Each plaintiff must serve any page/line designations of deposition testimony 56 days before the scheduled trial-ready date.

Defendants must serve any page/line designations of deposition testimony, objections to plaintiff's deposition designations and affirmative page/line designations of deposition testimony 35 days before the scheduled trial-ready date.

Each plaintiff must serve any page/line counter-designations of deposition testimony and objections to defendants' deposition designations 17 days before the scheduled trial-ready date.

Defendants must serve any objections to plaintiff's deposition counter-designations 7 days before the scheduled trial-ready date.

Each plaintiff must serve his/her exhibit list, including a description of each document or other exhibit, document production number (if applicable) and an electronic copy of the exhibits (except demonstrative exhibits), as required by the Federal Rule of Civil Procedure 26(a)(3)(A)(iii), 49 days before the scheduled trial-ready date.

Defendants must serve objections to plaintiff's exhibits, and serve their exhibit list, including a description of each document or other exhibit, document production number (if applicable) and an electronic copy of the exhibits (except demonstrative exhibits), consistent with the requirements of Federal Rule of Civil Procedure 26(a)(3)(A)(iii), 28 days before the scheduled trial-ready date.

Each plaintiff must serve objections to defendants' exhibit list 7 days before the scheduled trial-ready date.

Exhibits not included on a party's exhibit list (except exhibits used for impeachment) shall not be received into evidence absent agreement of the parties or a showing of good cause as to why the exhibit was not included on the exhibit list.

Any motions *in limine* must be filed and served at least 35 days before the scheduled trial-ready date.

Responses to motions *in limine* must be filed and served 14 days after service of the corresponding motion *in limine*.

Replies in support of a motion *in limine* must be filed and served 7 days after service of a response to the corresponding motion *in limine*.

The schedule for any hearings on motions *in limine* and other pretrial motions will be determined by the Court.

The parties shall file a pretrial stipulation as required by S.D. Fla. L.R. 16.1(E) 10 days before the scheduled trial-ready date.

Proposed jury instructions must be submitted 14 days before the scheduled trial-ready date.

The schedule for the final pretrial conference will be determined by the Court.

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This Order is without prejudice to the prerogative of the parties, either jointly or separately, to propose additional modifications to the pretrial procedures and schedules provided for herein. Specifically, on motion of any party, the Court will consider further revision of this Pretrial Order as it applies to any specific case or group of cases in the event of undue delay in the advancement of such individual cases. Except as modified by this Order, PTO 22 and PTO 28 remain unchanged.

DONE AND ORDERED in Chambers, at West Palm Beach, Florida, this 23rd day of May, 2012.

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DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE