IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

EDWARD S. WILSON, Plaintiff,	)	
vs.	)	CJ-96-564
PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma Corporation,	)	And Cases Consolidated Under this Case Number
Defendant.	)	Judge Shallcross

PUBLIC SERVICE COMPANY OF OKLAHOMA'S MOTION FOR SCHEDULING ORDER REQUIRING PLAINTIFFS TO ESTABLISH *PRIMA FACIE* CASE OF INJURY AND CAUSATION

Defendant Public Service Company of Oklahoma ("PSO") hereby moves the Court to enter a Scheduling Order requiring each Plaintiff in these consolidated cases to produce, prior to further discovery in this case, medical evidence establishing a *prima facie* case of injury and causation. PSO has attached hereto as Exhibit "A" a proposed form of Scheduling Order embodying this requirement.

I. Summary

All of the Plaintiffs herein allege injury from exposure to polychlorinated biphenyls ("PCBs") which escaped in 1982 from a malfunctioning transformer, owned by PSO, and located in an underground vault at the Page Belcher Federal Building (the "Incident"). A comprehensive, independent Medical Surveillance Program studying over 1,100 of the building occupants was conducted from 1986 to 1988 to determine any adverse health effects which may have been caused by exposure to PCBs from the Incident. In 1993, at the conclusion of the Program, a report was issued which found no medical link between the medical conditions in

the group studied and exposure to PCBs. One hundred and seventy of the 185 Plaintiffs who are involved in this case participated in the Medical Surveillance Program.

To succeed on any of their claims in this case, Plaintiffs must establish, *inter alia*, to a reasonable degree of medical probability, that exposure to PCBs in the Federal Building caused them illness or injury and that such exposure resulted from PSO's negligence. Responses to PSO's discovery requests indicate that approximately three-fourths of the Plaintiffs herein have not yet seen a doctor who has opined that exposure to PCBs has caused an illness or injury in them.

In toxic tort litigation involving large numbers of parties, such as these cases, courts have required plaintiffs to produce medical evidence on injury and causation prior to full discovery as part of a scheduling or case management order. Courts utilize such orders, commonly referred to as "Lone Pine Orders," to prevent a waste of judicial and litigant resources on frivolous, unmeritorious, or premature claims. A Lone Pine Order is particularly applicable to this case where a comprehensive medical study on many of the Plaintiffs showed no link between their medical conditions and exposure to PCBs. Oklahoma constitutional, statutory and case law gives this Court authority to enter a Lone Pine Order in this case prior to the expenditure of significant litigant or judicial resources associated with full discovery.

A Lone Pine Order is not unfair to Plaintiffs or unreasonable. Plaintiffs have known about the incident and possible PCB exposure for almost fifteen years. They have been involved in litigation arising from the Incident for almost twelve years. They have had the benefit of the results of the Medical Surveillance Program report for about four years. Further, Plaintiffs will be required to disclose expert medical evidence prior to trial. Moreover, it appears that because Plaintiffs' Petitions were filed *pro se*, their claims were not subjected to the strictures of Oklahoma Rule 11.

PSO has acted responsibly with respect to the Incident. It immediately responded and performed initial cleanup. It performed additional cleanup of the building as recommended by the National Institute of Occupational Safety and Health. PSO paid for the Medical Surveillance Program and for annual follow-up exams pursuant to the recommendations of the Medical Committee. It would be unfair in the circumstances of this case to subject PSO to substantial discovery expenses unless Plaintiffs can demonstrate they meet a *prima facie* burden of causation and injury.

For these reasons as more fully set forth below, PSO requests the Court to enter a scheduling order in this case requiring Plaintiffs to produce medical evidence sufficient to establish a *prima facie* case of injury and causation prior to full discovery in this case.

II. Background

A. Description of Incident

On April 16, 1982, a component to an electrical transformer containing PCBs, located in a vault adjacent to the Page Belcher Federal Building in Tulsa, malfunctioned and overheated. As a result, PCBs and smoke escaped from the vault into one of the heating and ventilation system air intake grilles of the building. Some of this material was distributed by air handling units and deposited residues on surfaces in some portions of the building. Insulating fluid containing PCBs also spread from the floor of the vault along a floor drain in the boiler room.

At the time of the Incident, the building's occupants were evacuated while local fire department personnel responded. After a few hours, officials permitted the building to be reoccupied, and employees continued to perform their usual functions. At the time of the Incident and thereafter, the Page Belcher Federal Building was primarily used as a mail processing facility by the U.S. Postal Service but also provided office space for other

government functions including courtrooms and court chambers on the third and fourth floors. PSO personnel performed an inspection of the electrical equipment and closed off the transformer vault. During the weeks that followed the Incident, PSO removed PCB fluid from the boiler floor and cleaned the transformer vault.

B. NIOSH Assessment

In April 1985 and February 1986, researchers from the National Institute for Occupational Safety and Health ("NIOSH") conducted an assessment of potential contamination associated with the Incident. The assessment involved measuring both airborne and surface concentrations of PCBs, as well as the combustion products, polychlorinated dibenzofurans ("PCDFs") and polychlorinated dibenzo-p-dioxins ("PCDDs") through the entire building (sub-basement through fourth floor inclusive). Surface measurements for PCBs also were made in the interior of the heating, ventilation, and air-conditioning ("HVAC") System.

The surface concentrations measured in the primary occupancy areas of the building (basement through fourth floor) were below the respective NIOSH surface guidelines for 214 out of 216 samples. The two sample exceedances occurred on the second floor at elevated horizontal surfaces above six feet. Some surface samples from non-occupied areas of the building exceeded NIOSH guidelines. Surface concentrations from one portion of the HVAC interior surface exceeded NIOSH guideline levels, however, all air concentrations measurements taken by NIOSH in 1985 and 1986 were below NIOSH guidelines. NIOSH recommended that certain portions of the Building and the HVAC system be cleaned. Contractors hired by the U.S. Postal Service completed the recommended supplemental clean-up, which occurred from 1986 to 1988.

C. Prior Litigation Relating to the Incident

On April 15, 1985, a group of approximately 1,000 named plaintiffs brought claims against PSO relating to the Incident. *Abdo, et al. v. Public Service Company of Oklahoma*, No. 85-C-390-R, United States District Court for the Northern District of Oklahoma. This case was dismissed on jurisdictional grounds on December 20, 1985.

On May 5, 1986, Thomas Maier filed suit against PSO pertaining to the Incident. *Maier v. Public Service Company of Oklahoma*, No. CJ-86-2966, Tulsa County District Court. Maier purported to act as a Class Representative of persons allegedly exposed to PCBs as a result of the Incident; however, the case was ultimately settled in 1995, and no class was ever certified.

D. Medical Surveillance Program

As a result of negotiations between Maier and PSO and with the approval and assistance of the Court, members of the purported class were invited to participate in a Medical Surveillance Program (the "Program") established for the purpose of assessing exposure of persons in the Building to PCBs; offering physical examinations, specialized medical examinations and medical testing; and reporting on probable health effects of any exposure. Notices were prepared and sent to more than 1,400 persons, inviting participation in the Program. More than 1,100 members of the purported class participated in the Program at no cost to them, the $1.7 million cost having been borne by PSO.

The Program was designed and conducted by an independent Medical Committee consisting of Marcus Key, M.D. of Houston, Texas; Thomas Milby, M.D. of Walnut Creek, California; and Steven Pike, M.D. of Tucson, Arizona (the "Medical Committee"). The program included a focused medical examination program designed and directed to assess organ systems which have a potential for PCB health effects based on reports in the medical and

scientific literature, including the skin, liver, nervous system, blood, and general health of the major organ systems. Also performed was a review of cancer prevalence and a mortality study.

At the conclusion of the Program, the Medical Committee issued a report entitled *Page Belcher Building Study: Health Assessment and Correlation of Clinical and Laboratory Studies With PCB Exposure Indices* (the "Report"). The Medical Committee reported that serum PCB concentrations in the blood of the participants, measured during the study, were consistent with levels in the general population. Further, the Medical Committee found no correlation between serum PCB level or exposure and possible cases of chloracne, persistent abnormalities of liver enzymes, live birth or miscarriages in women, or persons with cancer diagnoses. The Medical Committee stated in the Report it could not make a conclusive statement about cancer incidence absent further study.

The Medical Committee recommended an annual preventative medical examination be conducted for about 216 of the participants in the study group.

E. Settlement of Maier v. PSO

After the Report was issued, Maier and PSO reached a settlement of Case No. CJ-86-2966. The Settlement Agreement, which was approved by the District Court on December 21, 1995, required PSO to pay $1.7 million for the release of claims of medical monitoring, only, and for attorneys fees and costs. Each person for which further study was recommended and who chose to participate in the settlement received $5,200.00 in lieu of further medical monitoring. The settlement did not affect the right of persons to pursue legal action for alleged personal injury arising from exposure to PCBs as a result of the Incident.

III. Procedural History of the Present Cases

In February, 1996, 216 lawsuits were filed in Tulsa County District Court involving Plaintiffs who alleged various, identical injuries and damages resulting from the Incident. PSO filed answers in all of these cases. All but two of the cases were filed *pro se*.

The *pro se* Plaintiffs filed a "form" petition that was provided to them by attorney J. Michael Busch, along with an instruction sheet dated February 7, 1996. Plaintiffs were instructed they must file a Petition by February 18, 1996 to "preserve individual claims against PSO." The instruction sheet did not inform Plaintiffs of their obligation to conduct a reasonable inquiry to ascertain whether their claims were well grounded in law and fact. Mr. Busch also provided Plaintiffs with a form of Motion to Stay Discovery, which some of them filed, requesting a stay of discovery until after the outcome of the test cases. This Court denied all such motions on July 18, 1996.

By order filed May 23, 1996, this Court consolidated all of the 213 then-remaining cases to promote efficiency for the Court and parties because the cases involved common issues of law and fact. In August, 1996, ten additional cases were filed, which were also consolidated in this Case for the purpose of scheduling and discovery.

In April, 1996, PSO filed and served discovery requests on each Plaintiff (discovery requests were served on the late-filing Plaintiffs in September, 1996). A number of Plaintiffs failed to serve discovery responses despite being notified of this obligation by a letter from this Court. On PSO's motion, these parties' claims were dismissed without prejudice. After these dismissals and other voluntary dismissals, 174 cases remain involving 185 different Plaintiffs. Sixteen Plaintiffs remain *pro se* and 170 are now represented by counsel.

The discovery requests filed by PSO sought information relating to Plaintiffs' injuries and any evidence that they may have showing their injuries were caused by exposure to PCBs. PSO

requested in Interrogatory No. 8 that Plaintiffs: "Identify every doctor or other medical or psychological care giver who has stated to you that you have an illness or injury that was caused by exposure to PCBs." According to discovery responses, approximately three-fourths of the Plaintiffs have not seen a doctor who has told them they have illnesses or injuries caused by exposure to PCBs.

IV. Argument and Authorities

A. Cases Requiring Plaintiffs to Establish *Prima Facie* Case in a Scheduling Order

There are a number of toxic tort cases involving multiple parties, such as in this case, where courts have required Plaintiffs to produce *prima facie* evidence of injury and causation early in the case as part of a scheduling or case management order. Courts have used this method of case management to distinguish between viable and non-viable claims prior to the large expenditure of judicial and party resources associated with full discovery. Although Oklahoma has no reported cases in this regard, both federal and state cases from other jurisdictions have used what came to be known as a "Lone Pine Order" to manage toxic tort cases. These cases are discussed below.

1. *Lore v. Lone Pine Corp.*, No. L 33606-85 (N.J. Superior Ct., Law Div. November 18, 1996) (copy in Appendix)

In *Lone Pine*, a number of plaintiffs instituted suit against 464 defendants including the owner of the Lone Pine Landfill and generators of materials that were disposed there. Prior to the suit, the Environmental Protection Agency ("EPA") had issued a Record of Decision, based upon numerous studies of the landfill that concluded the environmental contamination was limited to the landfill and immediate vicinity. The plaintiffs alleged personal injuries and property damages. Some of the plaintiffs lived miles away from the landfill.

About eight months after the case was filed, the Court entered an order requiring Plaintiffs to produce within a four-month period documentation in support of their personal injury claims as follows:

> (a) Facts of each individual plaintiff's exposure to alleged toxic substances at or from the Lone Pine Landfill;
>
> (b) Reports of treating physicians and medical or other experts, supporting each individual plaintiff's claim of injury and causation.

Lone Pine Corp., at 1. The plaintiffs failed to provide reports of treating physicians or medical experts showing a causal connection between their alleged condition and toxic materials from the landfill. As a result, the Court dismissed the case with prejudice as a sanction for Plaintiffs' failure to comply with its discovery orders, concluding that preliminary expert reports should have been obtained by Plaintiffs prior to filing suit. Orders similar to those used in *Lone Pine* have come to be known as "Lone Pine Orders."

2. ***Grant v. E.I. du Pont de Demours and Company, Inc.*, 1993 WL 146634 (E.D.N.C. Feb. 17, 1993), *aff'd*, 1993 WL 146638 (copy in Appendix)**

Grant involved 12 separate actions involving 22 plaintiffs who alleged property and personal injury damages resulting from the alleged release of certain chemicals into the air and water by du Pont de Demours ("Du Pont"). The cases were consolidated for the purposes of discovery. In light of the magnitude of the litigation, the United States Magistrate Judge entered a comprehensive case management order requiring the plaintiffs to produce affidavits of experts supporting both their alleged property and personal injuries. With regard to personal injuries, the Magistrate ordered the plaintiffs as follows:

> Plaintiffs are to have until May 31, 1993 to consult with and be examined by physicians, psychiatrists, psychologists, and any other health care providers regarding Plaintiffs' claims of potential future harm to their health, fear of harm to their health, stress, anxiety, or other emotional harm, or any other personal injury. On or before June 15, 1993, Plaintiffs are to provide Du Pont with all

> results, analyses and other data, and file with the Court and provide Du Pont with a physician's affidavit specifying the nature, duration, and amount of exposure (including blood levels) each Plaintiff has had to chemical contamination, when such exposure occurred, and the nature and extent of each such Plaintiff's personal injury. The physician's affidavit may be supplemented with the affidavits of other competent expert witnesses, but submission of such supplementary affidavits will not excuse the failure to submit the physician's affidavit, including the required contents, described in this paragraph. The physician's affidavit shall state his or her opinion, based on a reasonable degree of medical certainty, that the particular Plaintiff has suffered injuries as a result of exposure to chemicals from Kentec Inc.; shall specify any and every injury, illness or condition suffered by the Plaintiff that, in the opinion of the physician, was caused by the alleged exposure; shall specify the chemical or chemicals that, in the opinion of the physician, caused each and every specific injury, illness, and condition listed; shall include differential diagnoses which rule out alternative possible causes of Plaintiffs' injuries; and shall state the scientific and medical bases for the physician's opinions. With regard to future personal injury, the affidavit shall state the physician's opinion, based upon a reasonable degree of medical certainty, that the particular Plaintiff is more likely than not to suffer a particular injury in the future; shall identify such specific injury; shall state the time at which such future injury shall manifest itself; and shall comply with the remaining requirements of this paragraph as if the injury currently existed. The failure of any Plaintiff to comply with this paragraph may result in his or her claims for personal injury being dismissed.

Grant, 1993 WL 146634 at *4. The Magistrate's order was upheld on appeal by the United States District Court. *Grant v. E.I. Du Pont de Demours and Company*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993).

3. *Cottle v. Superior Court of Ventura County*, 3 Cal. App.4th 1367, 5 Cal. Rptr.2d 882 (Cal. Ct. App. 1992)

Cottle involved two actions by approximately 175 persons who owned or rented property in an area that had been formerly used as a hazardous waste dump, against the developers of the property. The plaintiffs alleged property damage, and physical and emotional injury resulting from exposure to chemicals. During the litigation, the California Department of Health Services issued a report which concluded that the development did not pose a significant health threat to the residents in the development.

The plaintiffs attempted to link virtually every illness or physical infirmity they had suffered to the alleged exposure. The court entered a case management order to "widdle [sic] down specific physical illnesses or condition or injuries that some medical person could testify to the appropriate medical degree . . . ." *Cottle*, 3 Cal. App.4th at 1375. The order provided:

> Each plaintiff shall file and serve a statement establishing a *prima facie* claim for personal injury and/or property damage. For personal injury claims, each plaintiff shall state the chemical or toxic substance to which that plaintiff was exposed; the date or dates and place of exposure; the method of exposure; the nature of plaintiff's injury; and the identity of each medical expert who will support the plaintiff's personal injury claim.

Id. at 1373. Further, the order provided that the court could exclude evidence at trial on personal injury claims for any plaintiff who did not comply with this requirement.

The plaintiffs offered several documents attempting to comply, however, the court found that no plaintiff showed to a reasonable medical probability that the hazardous chemicals from the development caused any physical injury. Accordingly, the court excluded all evidence on the plaintiffs' claims of physical injury at trial. In the reported mandamus action, the Court of Appeals upheld the lower court's action.

4. *Eggar v. Burlington Northern Railroad Co.*, 1991 WL 315487 (D. Mont. Dec. 18, 1991), *aff'd*, 29 F.3d 499 (9th Cir. 1994)

This case involved an action by 27 railroad employees against Burlington Northern Railroad Co. resulting from alleged injuries occurring from exposure to chemicals. The Court selected six test plaintiffs and entered a case management order requiring those plaintiffs to submit affidavits of physicians on the issues of injury and causation. *Id.* at 3. The order provided:

> The physician's affidavit shall specify, for each test plaintiff, the precise injuries, illnesses or conditions suffered by that plaintiff; the particular chemical or chemicals that, in the opinion of the physician, caused each injury, illness or condition; and the scientific medical bases for the physician's opinions. It will

not be sufficient for the affidavit to state a "laundry list" of injuries and chemicals; each injury, illness or condition must be itemized and specifically linked to the chemical or chemicals believed to have caused that particular injury, condition or illness. Moreover, the statement of scientific and medical bases for the opinion shall include specific reference to the particular scientific and/or literature forming the basis for the opinion.

Id. at 3-4.

The court granted summary judgment to the defendant, finding that the plaintiffs' proffered affidavits failed to meet the CMO requirements. Although the affidavits were over 150 pages each, they consisted merely of "laundry lists" of chemicals and injuries for each plaintiff and a conclusory opinion that the "chemicals resulted in a cumulative exposure [which] contributed to and together caused his present condition." *Id.* at 4. The court determined that the doctor's affidavits failed to set forth the reasoning process that led them to opine that each plaintiff's exposure caused the alleged injuries.

5. ***Schelske v. Creative Nail Design, Inc.*, 1997 WL 4811 (Mont. Jan. 2, 1997) (not yet released for publication in the permanent law reports)**

This case involved a beautician who alleged claims for various conditions and illnesses against 16 companies allegedly resulting from exposure to chemicals produced by the companies. About five months after the case was filed, the trial court entered a case management order designed to "help focus the extensive discovery and to aid in the handling of the complex, multi-party litigation." The Montana Supreme Court described the order as follows:

> The CMO then provided that within 90 days from the entry of the order, the Schelskes were required to provide a list of products, the circumstances of the alleged exposure, an identification of each specific chemical which allegedly caused harm, and a physician's opinion of a causal connection between exposure and injury. The CMO required that the affidavit from the physician stating his or her opinion must: (1) list all injuries, illnesses, or conditions suffered by Mischelle; (2) specify the chemical(s) that caused each illness, injury, or condition; and (3) state the scientific bases for the physician's opinion. Specifically, the court stated in its order that, it will not be sufficient for the affidavit to state a "laundry list" of injuries and chemicals. Each injury, illness,

> or condition must be itemized and specifically linked to the chemical or chemicals believed to have caused that particular injury, condition, or illness.

Schelske, 1997 WL at *1-2. The trial court stayed all discovery except for allowing discovery of the contents of products used by the plaintiff.

The plaintiff produced three physician affidavits in an attempt to comply with the order. The trial court found none of the affidavits linked the injuries to the exposure. The court granted summary judgment to defendants based upon the plaintiff's failure to comply with the order or to establish a *prima facie* case. The Supreme Court upheld the trial court, holding:

> The allegations made within the affidavits are vague and conclusory without providing the specific causation linking the product defect to an identifiable injury. This court has consistently held that speculative and conclusory statements are not a sufficient basis on which to raise a genuine issue of material fact.

Schelske, 1997 WL at *5 (citations omitted).

B. <u>This Court Has Authority to Require Plaintiffs to Establish a *Prima Facie* Case of Injury and Causation Prior to Full Discovery</u>

To succeed on a claim for personal injury here, each Plaintiff must prove with reasonable certainty and probability that PSO was negligent and that such negligence was the proximate cause of that Plaintiff's injury. *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 471 (Okla. 1987). A mere possibility that a defendant's negligence caused plaintiffs' harm is insufficient. *Hardy v. Southwestern Bell Telephone*, 910 P.2d 1024, 1027 (Okla. 1996); *Downs v. Longfellow Corp.*, 351 P.2d 999, 1004 (Okla. 1960).

Before the issue of causation can go to a jury, the Court must evaluate the sufficiency of the causation evidence. *McKellips*, 741 P.2d at 471. The Plaintiffs must demonstrate that "a reasonable person could believe in the existence of the causal link." *Id.* A plaintiff fails to

meet his burden of sufficiency of proof of evidence to establish a *prima facie* issue of causation where the probabilities are evenly balanced or less." *Id.*

The Court's entry of a *Lone Pine* Order in this case is consistent with trial court's role as a gatekeeper for scientific evidence. In a toxic tort case styled *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)[1], the United States Supreme Court held the Federal Rules of Evidence rather than the rigid "general acceptance"[2] test governed admissibility of expert opinions. In addressing the argument that such a relaxed standard may overwhelm juries, the Court emphasized a trial court's role in using other methods, such as summary judgment or directed verdict, to screen cases lacking sufficient evidence from reaching a jury. *Daubert*, 125 L. Ed. 2d at 484 (citing *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F. 2d 1349 (6th Cir. 1992)). Requiring Plaintiffs to demonstrate sufficiency of the evidence of injury and causation in a Lone Pine Order is another method by which this Court can review sufficiency of scientific evidence.

This Court has ample authority to require Plaintiffs to meet their burden of sufficiency of the evidence now in the interest of efficient management of the case. Under Oklahoma's consolidation statute, 12 O.S. § 2018(C), this Court may make such orders to avoid unnecessary costs or delay. Further, Rule 5(C) of the Rules for the District Courts of Oklahoma, 12 O.S. Ch.2, App. 1, gives this Court broad discretion to establish scheduling orders governing certain events, or "for accomplishing any other matters appropriate in the circumstances of the case."[3]

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1 Oklahoma has adopted the *Daubert* test for admissibility of expert opinions. *Taylor v. State*, 889 P.2d 319 (Okla. Cir. 1995).

2 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1293).

3 The Supreme Court has authority to prescribe such rules designed to "bring about a more speedy and efficient administration of justice within the state." 20 O.S. § 23(7); *Petuskey v. Cannon*, 742 P.2d 1117 (Okla. 1987).

Rule 5 empowers this Court to enter a scheduling order containing these deadlines, which the Court has broad authority to enforce. *Short v. Jones*, 613 P.2d 452, 457 (Okla. 1980) (excluding testimony from witness not disclosed as required by Rule 5); *Phillips v. Oklahoma Farmers Union Mutual Insurance Co.*, 867 P.2d 1361, 1363 (Okla. Ct. App. 1993) (finding no abuse of discretion in trial court's denial of request to amend pleadings after amendment deadline set forth in scheduling order had expired). Moreover, the Oklahoma Discovery Code gives the Court broad discretion to control the discovery process by entering protective orders to prevent undue burden or expense on a party. 12 O.S. § 3236(c).

In addition, Art. VII of the Constitution of Oklahoma gives this Court authority to hear and decide justiciable controversies. *Puckett v. Cook*, 586 P.2d 721, 723 (Okla. 1978). "Power to 'hear' a case includes power to make, and enforce, reasonable rules for orderly procedure before courts." *Id.* Further, this Court has inherent authority to manage cases before it. *See Thomas v. State ex. rel. Department of Public Safety*, 858 P.2d 113, 115-116 (Okla. Ct. App. 1993).

It is clear that Oklahoma constitutional, statutory, and case law vests this Court with broad discretion to manage cases before it to achieve efficient administration of justice. Certainly, Oklahoma law grants this Court as much or more discretion as the courts which have imposed Lone Pine orders, discussed in Section IV.A. above, in similar cases.

C. Entry of a Lone Pine Order Requiring Plaintiffs to Produce *Prima Facie* Evidence of Injury and Causation is Appropriate in this Case

To succeed on any of their claims, each Plaintiff in this litigation must establish by a reasonable medical probability that he or she has incurred an injury or illness caused by exposure to PCBs in the Page Belcher Federal Building as a result of the Incident and that such exposure resulted from PSO's negligence. *See McKellips*, 741 P.2d at 471. In this case, a

group of independent medical experts on chemical exposure have examined almost all of the Plaintiffs and found no link between their medical conditions and exposure to PCBs. According to discovery requests received by PSO to date, a majority of Plaintiffs herein have not seen a doctor who has opined that their medical conditions were caused by exposure to PCBs.

By the proposed Scheduling Order which is attached, PSO requests the Court to require Plaintiffs to produce physician or other expert affidavits showing that Plaintiffs' alleged injuries, illnesses, or conditions were more probably than not caused by exposure to chemicals resulting from the Incident. PSO submits that, in light of the Medical Surveillance Report and discovery responses, the Plaintiffs should come forward with this evidence before the case proceeds. PSO's proposed Scheduling Order has requirements that are consistent with the Lone Pine Orders in the cases discussed above.

A Lone Pine Order would not be unfair to Plaintiffs. They have known of the Incident and PCB release for more than ten years. They have had the benefit of the Medical Surveillance Report for four years. Plaintiffs have had ample opportunities to seek a doctor's opinion that their injuries were caused by exposure to PCBs. PSO is not requesting that an additional burden be placed upon Plaintiffs, merely that Plaintiffs demonstrate they can meet their burden of causation and injury prior to substantial and potentially unnecessary, expenditures of legal resources.

Moreover, it appears the cases herein have not been subjected to the screening process provided by Oklahoma law. 12 O.S. § 2011 requires an attorney to conduct a reasonable inquiry, prior to signing a petition, to determine if the client's claim is well grounded in fact and law. Here, only two of the Plaintiffs' petitions were signed by an attorney because practically

all of the cases were filed *pro se*.[4] Oklahoma's Rule 11 also applies to non-lawyers signing *pro se* petitions; however, it appears from the instruction sheet provided by Mr. Busch to the Plaintiffs that they were not informed of the duty to conduct a reasonable inquiry into whether their claimed illnesses or injuries were caused by PCBs. Given that most Plaintiffs have no doctor who can support this causation element, it appears such an inquiry was not conducted.

Allowing this case to proceed absent a *Lone Pine Order* will cause a tremendous burden on PSO. Full discovery in this case will require hundreds of depositions and take several years to complete. Each Plaintiff's medical conditions and history will be at issue. Alternate causes of any of Plaintiffs' existing injuries will also be at issue. This potentially could create a tremendous waste of legal and judicial resources if many of the Plaintiffs' cases fail because it is later discovered that no doctor can establish causation.

Moreover, PSO has acted responsibly with regard to the Incident. It initially responded to the Incident. It completed additional cleaning of the Building in accordance with NIOSH's recommendations. It paid for the Medical Surveillance Program to study the Building occupants that chose to participate. Further, it paid for annual follow-up exams in accordance with the Medical Committee recommendations. Under the circumstances in this case, it would be unfair to subject PSO to the tremendous expenses associated with full discovery without requiring Plaintiffs to establish that their claims are meritorious.

V. Conclusion

PSO requests the Court to enter a Scheduling Order requiring Plaintiffs to submit evidence showing a *prima facie* case of injury and causation prior to further proceedings in this

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4 These two cases were dismissed by this Court for failure to prosecute on November 25, 1996.

case as set forth in the proposed Scheduling Order attached hereto as Exhibit A. PSO requests such other and further relief as this Court deems appropriate.

Respectfully Submitted:

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: _____

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 7th day of February, 1997, a true and correct copy of the foregoing was sent by regular U.S. Mail to:

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_____
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