

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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JOSHUA DELANEY,

Plaintiff,

- against -

PFIZER INC., PARKE-DAVIS, a division of
Warner-Lambert Company and Warner-Lambert
Company LLC, WARNER-LAMBERT
COMPANY and WARNER-LAMBERT
COMPANY LLC,

Defendants.

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Index No.: 76500~~006~~
Index No. 117852/04E

DECISION/CASE
MANAGEMENT ORDER
NO. 8

At a conference held on February 18, 2009, this court directed briefing on: 1) defendants' application for an order directing a certification procedure that would require plaintiffs' counsel to certify the merits of each individual case, prior to the selection of individual cases for discovery; and 2) plaintiffs' application for an order permitting plaintiffs to select the individual cases for discovery. On April 20, 2009, the court heard oral argument on these applications. The case selection application will be the subject of a separate order.

Certification

Defendants requested the following certification procedure requiring plaintiffs' counsel to certify that 1) they have conferred with the individual plaintiff; 2) the plaintiff intends to proceed with the litigation; 3) they have reviewed the identified and attached relevant medical and other records and allegations of the complaint; and 4) plaintiffs' counsel believes pursuit of the action



is warranted. (Defs.' Proposal Regarding Certification Process at 3 [Defs.' Certification Proposal].) Plaintiffs oppose any certification procedure. Subsequent to the oral argument, without waiving their opposition, plaintiffs entered in a stipulation, dated May 4, 2009, agreeing to a procedure for identification of records in the event the court were to direct a certification procedure.

The court is persuaded that a certification procedure is warranted prior to individual case discovery, based on the experience gained from the federal Neurontin MDL. (In Re Neurontin Marketing, Sales Practices, and Products Liability Litigation, US Dist Ct, D Mass, MDL Docket No. 1629 [MDL].) There, plaintiffs and defendants were each authorized to select two cases for individual case discovery and the court randomly selected six additional cases. After the selections were made, plaintiffs moved for a voluntary dismissal of one of defendants' selections and to withdraw in defendants' second case and one of the randomly selected cases. (Defs.' Certification Proposal at 8-9.) The federal court noted that the voluntary dismissal and motions to withdraw "significantly impeded the orderly management and adjudication of the Products Liability cases." (MDL Discovery Order No. 14, Sept. 27, 2007, Sorokin, M.J. at 6.) The court subsequently directed a certification procedure. (Products Liability Case Management Order, Nov. 9, 2007, Sorokin, M.J. at 2-3.) It is also undisputed that the MDL certification procedure resulted in the voluntary dismissal of approximately twenty percent of the MDL cases.

This court has the authority to craft a certification procedure in the exercise of sound case management and in order to avoid unnecessary expense and delays. (See CPLR 602[a]; Matter of Love Canal Actions, 145 Misc 2d 1076 [Sup Ct Niagara County 1989], affd as modified 161 AD2d 1169 [4th Dept 1990].) A certification procedure here will help to avoid the delays in

individual case discovery that occurred in the MDL. Moreover, the certification procedure requested by defendants is more narrowly drawn than certification procedures employed in some other pharmaceutical litigations, and requires certification based on medical records within plaintiffs' possession. (Compare Matter of Vioxx Prods. Liability Litigation, 557 F Supp 2d 741 [US Dist Ct, ED La 2008] [requiring provision of case-specific expert reports in connection with certification]; Matter of Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, US Dist Ct, ND Ca, Case No. M:05-CV-01699-CRB, MDL No. 1699, Pretrial Order No. 29, Aug. 1, 2008 [same].)

It is accordingly hereby ORDERED that defendants' application for a certification procedure is granted to the following extent. By July 13, 2009, plaintiffs' counsel shall certify that: 1) they have conferred with the individual plaintiff; 2) the plaintiff intends to proceed with the litigation; 3) they have reviewed the relevant medical records and allegations of the complaint; and 4) plaintiffs' counsel believes pursuit of the action is warranted. Plaintiffs' counsel shall identify and provide the records subject to the certification process, pursuant to the parties' stipulation dated May 4, 2009.

This constitutes the decision and order of the court.

Dated: New York, New York
June 5, 2009


MARCY FRIEDMAN, J.S.C.

