

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS : MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE, :
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :
:

THIS DOCUMENT RELATES TO: :
:

MELODY DAVOUST and LESLIE MASSARO :
:

v. :
:

WYETH AYERST LABORATORIES COMPANY, :
DIVISION OF AMERICAN HOME PRODUCTS :
CORPORATION, et al. :
:

FILED JAN 11 2000

CIV. NO. 98-20558

BONNIE HUGHES :
:

v. :
:

AMERICAN HOME PRODUCTS CORPORATION, :
et al. :
:

CIV. NO. 98-20501

THOMAS HOWARD :
:

v. :
:

A.H. ROBINS COMPANY INC., et al. :
:

CIV. NO. 98-20219

JIMMIE FENTON and STEVEN FENTON :
:

v. :
:

AMERICAN HOME PRODUCTS CORPORATION, :
et al. :
:

CIV. NO. 98-20454

MEMORANDUM AND PRETRIAL ORDER NO. 1056th

BECHTLE, J.

JANUARY 11, 2000

This memorandum concerns the following four civil actions:
Davoust, Civil Action No. 98-20558 ("Davoust"); Hughes, Civil
Action No. 98-20501 ("Hughes"); Howard, Civil Action No. 98-20219
("Howard"); and Fenton, Civil Action No. 98-20454 ("Fenton").

Presently before the court are four motions which all relate to plaintiffs in this MDL No. 1203 who have sought to amend their Complaints in order to add phentermine defendants in various cases. Said motions were all listed for argument at a status conference held by the court on January 6, 2000 at 10 a.m. in Philadelphia. While the postures of these motions are somewhat different,¹ each motion is similar in that the phentermine defendants object to their being added at a late stage in the case where discovery is nearly complete. In each case, the principal argument advanced by the phentermine defendants is that they will be unduly prejudiced by being forced to initiate discovery after various discovery deadlines in this MDL No. 1203 have passed.² In addition, the phentermine defendants point out that plaintiffs in the above-captioned actions failed to promptly

¹ In Davoust, plaintiffs seek an amendment in order to, among other things, add Eon. In Hughes, the court allowed plaintiff to add Eon by amendment pursuant to Pretrial Order 869. The instant motion before the court is Eon's motion for reconsideration of Pretrial Order No. 869, which seeks to disallow plaintiff's amendment to its Complaint adding Eon. In Howard, the court allowed plaintiff to add Eon by amendment pursuant to Pretrial Order No. 873. The instant motion before the court is Eon's motion for reconsideration of Pretrial Order No. 873, which seeks to disallow plaintiff's amendment to its Complaint adding Eon. In Fenton, the court allowed plaintiffs to add Fisons, Medeva and SmithKline Beecham by amendment pursuant to Pretrial Order No. 868. The instant motion before the court is the phentermine defendants' motion for reconsideration of Pretrial Order No. 868, which seeks to disallow plaintiffs' amendment of their Complaint adding the phentermine defendants.

² See Eon's Opp. (Document #201197) in Davoust, at 3-5; Eon's Opp. (Document # 201198) in Hughes, at 3-5; Eon's Mem. (Document #201132) in Howard, at unnumbered pp. 3-5; and Phen. Defs.' Mem. (Document #201112) in Fenton, at 5-6.

undertake product identification of phentermine defendants.³ Plaintiffs' principal response to these arguments is that the particular phentermine defendant is involved in many cases throughout the country and is fully aware of the issues involved in this litigation, and thus, will not be prejudiced in being added.⁴ In addition, plaintiffs often point to discovery that has not yet gone forward in which the phentermine defendants could participate, thereby further diluting any prejudice in having them added to the Complaints.⁵

The court has established procedures in this MDL No. 1203 in order to assist the parties to efficiently and timely identify any claims that may exist in a particular case. Pursuant to Pretrial Order No. 418, plaintiffs were "expected to promptly undertake product identification discovery." Pretrial Order No. 418. Special Discovery Master Memorandum No. 7 required plaintiffs to notify the Special Master by February 15, 1999 if product identification was uncertain. Additionally, pursuant to Pretrial Order No. 19, plaintiffs are required to serve "their Complaint and a Summons on each defendant not served previously

³ See Eon's Opp. (Document #201197) in Davoust, at 2; Eon's Opp. (Document # 201198) in Hughes, at 5; Eon's Mem. (Document #201132) in Howard, at unnumbered pp. 4-5; and Phen. Defs.' Mem. (Document #201112) in Fenton, at 3.

⁴ See Pls.' Mem. (Document #201223) in Davoust, at 1; Pl.'s Reply Mem. (Document #201190) in Hughes, ¶ 4; Pl.'s Am. Reply Mem. (Document #201200) in Hughes, ¶ 5.

⁵ See Pls.' Mem. (Document #201223) in Davoust, at 1; Pl.'s Reply Mem. (Document #201190) in Hughes, ¶ 3; Pl.'s Am. Reply Mem. (Document #201200) in Hughes, ¶ 6.

no later than 30 days after the date on which their action is docketed in the Eastern District of Pennsylvania." Pretrial Order No. 19. Diligence of the parties is required in order for these procedures to be effective.

In general, the court has made reasonable efforts to accommodate plaintiffs who later identify defendants through the product identification process by allowing them to amend their Complaints. However, in each of the above-captioned civil actions, except for the Howard case, plaintiffs sought to add phentermine defendants at an extremely late stage in the process of discovery.⁶ In addition, in each of the above-captioned civil actions, Plaintiffs have set forth no explanation for their late attempt to amend their Complaints.⁷ Lastly, in two cases, Howard and Fenton, even after the court initially allowed plaintiffs to

⁶ In Davoust, plaintiffs sought amendment at the close of 13 months of core witness discovery. (Eon's Opp. (Document #201197) in Davoust, at 3.) In Hughes, plaintiff sought amendment one week before the close of core witness discovery. (Eon's Opp. (Document #201198) in Hughes, at 1-2.) In Fenton, plaintiffs sought amendment less than one month before the close of core witness discovery. (Phen. Defs.' Mem. (Document #201112) in Fenton, at 2.)

In Howard, however, plaintiff sought amendment in March 1999, several months before the close of core witness discovery. (Eon's Opp. (Document #201132) in Howard, at unnumbered p. 2.)

⁷ In Hughes, plaintiff did assert that obtaining the pharmacy records by which Eon was identified was a difficult task. (Pl.'s Am. Reply Mem. (Document #201200) in Hughes, ¶ 2.) However, plaintiff did not explain why it was a difficult task. Nor did plaintiff document the attempts made to properly identify Eon as a defendant in her case. Nor did plaintiff appear at the status conference held on January 6, 2000 to explain before the court any difficulties she experienced in identifying Eon as a defendant. Thus, the court is only able to conclude that plaintiffs' delay in seeking to add Eon is unexplained.

amend their Complaints to add phentermine defendants, plaintiffs failed to timely serve those amended Complaints upon the phentermine defendants pursuant to Pretrial Order No. 19.

IV. CONCLUSION

For the foregoing reasons, the court will not allow the plaintiffs in the above-captioned civil action to amend the complaints by adding phentermine defendants.

An appropriate Pretrial Order follows.

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CIV. NO. 98-20454

PRETRIAL ORDER NO. 1056

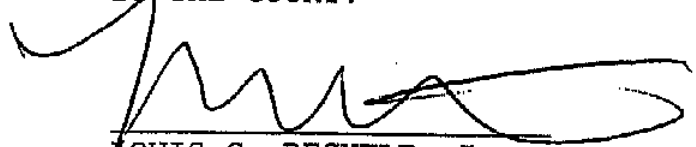
AND NOW, TO WIT, this 11th day of January, 2000, upon
consideration of plaintiffs' motion to amend in Davoust, Civil
Action No. 98-20558, defendant Eon Labs Manufacturing, Inc.'s
motion for reconsideration of Pretrial Order No. 869 in Hughes,
Civil Action No. 98-20501, defendant Eon Labs Manufacturing,

Inc.'s motion for reconsideration of Pretrial Order No. 873, or in the alternative, motion to dismiss in Howard, Civil Action No. 98-20219 and defendants Fisons Corporation's, Medeva Pharmaceuticals Inc.'s and SmithKline Beecham's motion for reconsideration of Pretrial Order 868 in Fenton, Civil Action No. 98-20454 and the responses thereto, IT IS ORDERED that:

1. plaintiffs' motion to amend in Davoust, Civil Action No. 98-20558 is GRANTED IN PART and DENIED IN PART. The motion is GRANTED in as much as it seeks to delete the Class Action Injunctive and Equitable Relief Claims and DENIED in as much as it seeks to add defendant Eon Labs Manufacturing, Inc.;
2. defendant Eon Labs Manufacturing, Inc.'s motion for reconsideration of Pretrial Order No. 869 in Hughes, Civil Action No. 98-20501 is GRANTED. Pretrial Order No. 869 is hereby VACATED. Upon reconsideration, plaintiff's Motion for Leave to Amend Complaint adding defendant Eon Labs Manufacturing, Inc. is DENIED;
3. defendant Eon Labs Manufacturing, Inc.'s motion for reconsideration of Pretrial Order No. 873, or in the alternative, motion to dismiss in Howard, Civil Action No. 98-20219 is GRANTED. The claims against defendant Eon Labs Manufacturing, Inc. are DISMISSED WITHOUT PREJUDICE due to plaintiff's failure to timely serve defendant Eon Labs Manufacturing, Inc. pursuant to Pretrial Order No. 19; and

4. defendants Fisons Corporation's, Medeva Pharmaceuticals Inc.'s and SmithKline Beecham's motion for reconsideration of Pretrial Order 868 in Fenton, Civil Action No. 98-20454 is GRANTED. Upon reconsideration, plaintiffs' Motion to File an Amended Complaint adding defendants Fisons Corporation, Medeva Pharmaceuticals Inc. and SmithKline Beecham is DENIED.

BY THE COURT:



LOUIS C. BECHTLE, J.

JAN 12 2000

ENTERED: _____

CLERK OF COURT