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WESTERN DISTRICT OF LOUISIANA
LAFAYETTE, LOUISIANA

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA**

IN RE ACTOS (PIOGLITAZONE)
PRODUCTS LIABILITY LITIGATION

MDL No. 6:11-md-2299

JUDGE DOHERTY

This Document Applies to:
All Cases

MAGISTRATE JUDGE HANNA

CASE MANAGEMENT ORDER:
PROTOCOL FOR *IN EXTREMIS* DEPOSITIONS

Many plaintiffs in these proceedings have alleged that they suffer from serious health conditions. Should any counsel (for a plaintiff or for the defendants) become aware that a party's or witness' health has deteriorated to the point that his or her competency or survival is at risk, counsel is under a good faith obligation to comply with the terms of this Order. As set out more fully below, this obligation specifically extends to cooperating in scheduling and preparing for a deposition, in the event that such a deposition is sought by either party.

I. SCOPE OF ORDER

This Order shall apply to all cases currently pending in MDL No. 2299 and to all related actions that have been or will be originally filed in, transferred to, or removed to this Court and assigned hereto as "MDL" cases (collectively, "the MDL proceedings"). This Order is binding on all parties and their counsel in all cases currently pending or subsequently made part of these proceedings and shall govern each case in these MDL proceedings. This Order is not intended to interfere with, undermine, or contradict the procedures established in Rule 27(a) of the Federal Rules of Civil Procedure.

II. IN EXTREMIS

This Court intends to ensure that all parties are given a fair opportunity to take perpetuation or preservation deposition testimony where it is reasonably practicable to do so.

For purposes of this Order, a person will be considered “*in extremis*” when he or she:

- has reached, or is expected to reach within the next six months, the state or condition of being no longer capable of testifying competently in a deposition; or
- is not expected to survive beyond the next six months.

III. NOTICE

A. Counsel shall give notice to opposing lead counsel as soon as possible upon learning of a plaintiff’s or witness’ *in extremis* condition. The notice must be made in writing, with a certification by noticing counsel as to the nature of the person’s *in extremis* condition and his or her competency to testify. If the person in question is a plaintiff, the notice shall be accompanied by a letter from the treating physician briefly describing the plaintiff’s condition and providing a prognosis. The notice also shall contain a suggested date, time, and location for the person’s *in extremis* deposition, which will serve as the starting point for negotiations between counsel for the parties.

B. Within five (5) calendar days of receiving such notice, counsel receiving notice shall inform noticing counsel as to whether or not there is agreement on the need to take the deposition. If there is no agreement, counsel shall jointly contact this Court, through the Special Masters, to bring the dispute to the attention of this Court as soon as reasonably possible.

PLEASE NOTE: This order is not intended to create additional obligations on the part of any counsel to these proceedings – beyond those imposed by the ethical and professional obligations assumed by any counsel anytime they agree to participate in litigation – to monitor

the health and well-being of the plaintiffs or witnesses in these proceedings. Nor is this Order intended to create any obligation linked to constructive notice, but is triggered only when actual notice occurs. This Court intends, instead, to establish rules for what will happen when counsel become aware that a person's condition has become *in extremis*, or is approaching that status.

IV. PREPARATION FOR *IN EXTREMIS* DEPOSITION

A. *In Extremis* Plaintiffs. As soon as practicable after providing the notice, Plaintiff's counsel shall provide to Defendants' Lead Counsel any and all medical and pharmacy records in their possession, as well as current signed medical authorizations and a Plaintiff Fact Sheet, to the extent that those documents and records have not previously been produced in this litigation. In those cases where a Plaintiff Fact Sheet and medical records and documents have been produced, Plaintiff's counsel shall provide any new medical or pharmacy records in his or her possession, as well as an updated Plaintiff Fact Sheet, if the information in that Plaintiff Fact Sheet has changed since its initial production.

B. *In Extremis* Witnesses. As soon as practicable after providing notice, noticing counsel shall provide to receiving counsel all medical information in his or her possession about the witness' condition (except if protected by privacy laws) and shall cooperate with receiving counsel to obtain as much current, accurate information as possible about the witness' physical and mental condition.

C. **Timing.** Except for good cause shown, counsel shall comply with this Section at least seven (7) days before the date on which the *in extremis* deposition is noticed to proceed. In the event that good cause exists and the requisite 7-day notice cannot be provided, counsel shall meet and confer about the person's competency to testify. If the person in question is a plaintiff, the Plaintiff's counsel certifies that Plaintiff is competent and is agreeable to testify during this

meet-and-confer, Plaintiff's counsel shall provide any and all medical records in their possession, including medical records or other proof to indicate that the Plaintiff used Actos and experienced the alleged injury set forth in the Complaint or Plaintiff Fact Sheet, at least two (2) days before the date on which the deposition is noticed to proceed.

D. Cooperation to Obtain Records. Should Defendants' counsel encounter difficulty in timely securing medical and pharmacy records before a Plaintiff's deposition, Plaintiff's counsel will, upon request, provide reasonable assistance to Defendants' Lead Counsel in securing such records.

V. SCHEDULING

Upon receiving notice of a plaintiff's or a witness' *in extremis* condition and competency to testify, and once agreement is reached that a deposition will be taken, the parties shall meet and confer in good faith to confirm the date, time, and location of the deposition. Counsel who elects to take the deposition shall be responsible for securing and providing a court reporter and, if desired, a videographer for the deposition.

VI. OBJECTIONS

A. If Plaintiff's counsel follows the procedures set forth in the Case Management Order, Plaintiff's counsel need not notice an emergency hearing in order to proceed with a Plaintiff's *in extremis* deposition. Should the non-noticing party have a good faith objection to the deposition, however, counsel shall notify opposing counsel and the Court (through the Special Masters), in writing, of their objection and request immediate assistance in either resolving the dispute or presenting the matter to Magistrate Judge Hanna as quickly as possible.

B. Any objections shall be brought to the Court's attention as soon as practicable, but, in any event, no less than two (2) business days before the Plaintiff's deposition is noticed to

proceed. If the objection(s) are overruled, the deposition shall proceed at the date, time, and location at which it was initially noticed.

VII. ASSISTANCE

This Court is aware of, and sensitive to, the emotional difficulties that attend circumstances such as those discussed in this Order and does not intend to force counsel to exacerbate those difficulties. In the event that counsel finds that the terms of this order create insurmountable barriers to proceeding as this Court expects, counsel are encouraged to contact this Court, through the Special Masters, for assistance in achieving the goals described herein.

THUS DONE AND SIGNED this 8th day of January, 2013.



HONORABLE PATRICK J. HANNA
UNITED STATES MAGISTRATE JUDGE