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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 IN RE: PHENYLPROPANOLAMINE (PPA)
11 PRODUCTS LIABILITY LITIGATION:

MDL NO. 01-1407

12 This document relates to all cases

13 ~~PROPOSED~~ ORDER CLARIFYING
14 ORDER RE EFFECT OF SERVICE OF
15 A PLAINTIFF'S FACT SHEET

16 On motion of Co-Defense Liaison Counsel for the Manufacturing Defendants' motion
17 on behalf of Defendants for clarification of the Order Re Effect of Service of a Plaintiff's Fact
18 Sheet, the Court rules as follows.

19 On January 21, 2005, this Court entered an Order Re Effect of Service of a Plaintiff's
20 Fact Sheet, which provides:

21 Service of a Plaintiff's Fact Sheet ("PFS") upon a plaintiff who has
22 failed to serve his or her complaint shall not waive a defendant's right to
23 move for dismissal of an action on this basis pursuant to Fed. R. Civ. P.
24 4(m). The court expects any motion to dismiss based on a failure to
25 serve to be made promptly upon transfer of an appropriate case into
MDL 1407.

~~PROPOSED~~ ORDER CLARIFYING ORDER RE EFFECT OF
SERVICE OF A PLAINTIFF'S FACT SHEET - 1
(MDL 01-1407)

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1 The Order addresses only the situation where the Defendants' Liaison Counsel serves a
2 PFS¹; it does not address the situation where Liaison Counsel does not serve a PFS. The Order
3 does not purport to impose a duty on Defendants' Liaison Counsel to serve a PFS in cases
4 where none of the named defendants have been served in a timely and proper fashion.

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6 When there has been no service of process (and no waiver of service of process), the
7 named defendant is not a party to the action and the court "may not exercise power" over the
8 named defendant. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350
9 (1999). It follows that the Court may not impose a duty on a named but unserved defendant to
10 serve discovery, i.e., a PFS, through Liaison Counsel. Under FRCP 4(m), a case is subject to
11 dismissal "if service of a Summons and Complaint is not made upon a Defendant within 120
12 days after the filing of the Complaint." Thus, if service is not timely made, the case is subject
13 to dismissal under FRCP 4(m), and the court "shall," on motion or on its own initiative, either
14 dismiss the action or extend the time for service. FRCP 4(m). As such, a named defendant is
15 not a party unless and until it has been timely served with process, and cannot be expected or
16 compelled to participate in discovery.

17
18 With respect to the last sentence of the Order, which requires that any FRCP 4(m)
19 motion to dismiss be made promptly upon transfer to MDL 1407, the Order does not require
20 named defendants who have not been timely served with process (and likely are not even
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23 ¹ CMO 6 requires Defendants' Liaison Counsel to serve a PFS upon the docketing of a case in MDL 1407 and
24 requires the plaintiff to serve a completed PFS on Defendants' Liaison Counsel and counsel of record in the case
25 within 45 days after service of the PFS. The CMO implicitly assumes that at least one of the named defendants in
the case has been served prior to docketing in the MDL and that it has counsel of record. Moreover, the Order
Appointing Lead and Liaison Counsel, filed November 20, 2001, appoints "Liaison counsel for *defendants*"
(emphasis added), not for non-party named defendants. These Orders do not purport to require Liaison Counsel to
do anything on behalf of a non-party.

1 aware of the action) to file a Rule 4(m) motion, or to do anything else, inasmuch as they are not
2 parties to the action. Rather, it only requires that should a named defendant elect to make a
3 Rule 4(m) motion, the motion should be filed promptly.

4 SO ORDERED, this 27th day of March, 2005.

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6 
7 UNITED STATES DISTRICT JUDGE
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9 Presented by:

10 WILLIAMS, KASTNER & GIBBS PLLC

11 s/ Douglas A. Hofmann, WSBA# 06393

12 Arissa M. Peterson, WSBA #31875

13 Co-Liaison Counsel for Defendants and
14 Counsel for Bayer Corporation
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~~PROPOSED~~ ORDER CLARIFYING ORDER RE EFFECT OF
SERVICE OF A PLAINTIFF'S FACT SHEET - 3
(MDL 01-1407)

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