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

8 IN RE: PHENYLPROPANOLAMINE
9 (PPA) PRODUCTS LIABILITY
10 LITIGATION,

MDL NO. 1407

11 _____
12 This document relates to all
13 cases

ORDER REGARDING SUPPLEMENTAL
EXAMINATIONS OF MDL GENERIC
EXPERTS

14 THIS MATTER comes before the court on the MDL Plaintiffs'
15 Steering Committee's motion to adopt Proposed Case Management
16 Order ("CMO") No. 12A regarding Procedures Applicable to the
17 Depositions of MDL Generic Experts on Supplements to Rule 26
18 reports. Having reviewed the pleadings filed in support of and
19 in opposition to this motion, and having held a telephonic
20 hearing regarding the motion on Friday, October 22, 2004, the
21 court finds and rules as follows:

22 I. BACKGROUND

23 Plaintiffs claim that in June of this year they were made
24 aware for the first time of a study performed by the Seoul
25 National University concerning phenylpropanolamine ("PPA")
26 (hereinafter the "Korean Study"). Plaintiffs were given

1 permission by the court to pursue additional discovery regarding
2 the Korean Study. As a result of this discovery, several of
3 plaintiffs' generic expert witnesses have supplemented their
4 initial Rule 26 reports in order to address the study. A dispute
5 arose between the parties regarding what procedures should govern
6 the deposition of those experts concerning their supplemental
7 reports. Unable to resolve the dispute, the Plaintiffs' Steering
8 Committee proposed a new CMO setting forth procedures that would
9 govern the depositions.

10 The manufacturing defendants have a three-fold objection to
11 the proposed CMO: (1) the CMO improperly combines defendants'
12 discovery depositions of plaintiffs' generic experts with
13 plaintiffs' trial preservation depositions of those same experts;
14 (2) the proposed two hour time limit allotted for the defendants
15 at each deposition is inadequate; and (3) the CMO should require
16 each expert to furnish any documents responsive to the categories
17 set forth in Exhibit A to CMO 12 that have come into his or her
18 possession since the expert's prior MDL deposition, regardless of
19 whether or not the documents relate specifically to the Korean
20 study.

21 II. ANALYSIS

22 Defendants argue that the proposed CMO 12A improperly
23 "combines defendants' discovery depositions of plaintiffs'
24 generic experts with plaintiffs' trial preservation depositions
25 of those experts...." The defendants argue that any preservation
26 deposition should be conducted subsequent to the expert's

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1 discovery deposition, with the opposing party given an
2 appropriate interval of time between the two within which to
3 prepare. Defendants point out that such a procedure is
4 consistent both with federal case law and the existing CMOs in
5 this MDL.

6 Plaintiffs argue that defendants erroneously assume that
7 should plaintiffs decide to introduce expert testimony at trial
8 by way of deposition testimony, they are obligated to conduct
9 preservation depositions of those experts. Plaintiffs claim that
10 no such obligation exists and, quite to the contrary, under the
11 Federal Rules of Civil Procedure and the existing CMOs in this
12 case, trial preservation depositions of experts or fact witness
13 are not mandatory; they are an option of the party proffering the
14 testimony. In fact, plaintiffs argue, all parties to this
15 litigation have been on notice from the outset of the possibility
16 that discovery depositions of experts may be used at trial.
17 Plaintiffs claim that the case law on which defendants rely for
18 support for their proposition that preservation and discovery
19 depositions should be separate and distinct depositions has been
20 rejected by a majority of the courts who have reviewed the issue.
21 This court disagrees.

22 The majority of courts that have addressed the distinction,
23 if any, between discovery and preservation depositions have
24 concluded that the federal rules do not set forth any definitions
25 or distinctions between the two. Estenfelder v. Gates
26 Corporation, 199 F.R.D. 351, 353 (D. Colo. 2001). However,

1 despite the federal rules' silence on this matter, a number of
2 courts have recognized that as a practical matter differences do
3 exist. Id. at 354 (stating that courts treating all depositions
4 the same and attempting to regulate them all under one bright-
5 line rule are simply ignoring reality). The courts that do
6 recognize a distinction have done so in the context of
7 determining whether a party is entitled to depose a witness for
8 preservation purposes when the party learns that the witness is
9 not available for trial but after the discovery deadline has
10 expired. In that situation, the courts have allowed preservation
11 deposition to go forward. The courts have not addressed whether,
12 when possible, a party should take a discovery deposition¹ and
13 then later follow up with a preservation deposition.

14 It is axiomatic that any expert's direct testimony should be
15 accompanied by cross examination. When a party decides to
16 introduce its expert's testimony by way of deposition testimony
17 rather than live testimony, it is essential that there be an
18 adequate opportunity for the opposing party to prepare a cross
19 examination. This court believes that in the interest of fair
20 and complete presentation at trial, the parties should have the
21 opportunity to take a preservation deposition with sufficient
22 time subsequent to the discovery deposition to allow for adequate
23 preparation, including consulting with other parties or experts.

25 ¹This may be because the issue is usually considered in the
26 course of case management.

1 Existing CMO 12 also recognizes a distinction between
2 preservation and discovery depositions. While CMO 12 does not
3 require the party proffering an expert to take a preservation
4 deposition, it does contemplate that if indeed a preservation
5 deposition is noted, it will occur after the discovery
6 deposition. For instance, CMO 12, sec. D. states that "the
7 length of the deposition will not exceed a total of seven hours
8 of actual examination time by parties against whose interests the
9 opinion(s) of the expert may be offered" (Emphasis added.)
10 This section does not contemplate, or allot for, questioning by
11 the proffering party. Therefore, it is disingenuous to argue
12 that the parties expected a preservation deposition to occur at
13 the time that the expert is first deposed. In addition, the
14 section that sets forth the procedure for preservation
15 depositions, CMO 12 sec. F(2), is listed under the heading
16 "Further Depositions." The plain language of this heading
17 demonstrates that the parties had contemplated that a
18 preservation deposition would be in addition to, not simply part
19 of, the original discovery deposition.

20 III. CONCLUSION

21 Therefore, the court rules as follows:

22 (1) If a party intends to introduce an expert's supplemental
23 testimony at trial by way of deposition testimony, that party
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1 must conduct a preservation deposition of that expert;²

2 (2) In the event that a party intends to take a preservation
3 deposition of one of its experts, the discovery deposition of
4 that same expert must conclude at least one week prior to the day
5 on which the preservation deposition is scheduled to begin;

6 (3) With regard to the discovery deposition of an expert on
7 his or her supplement, the party against whom the opinion is
8 offered shall have four hours within which to examine the expert,
9 and the party proffering the expert shall have two hours within
10 which to conduct an examination;

11 (4) Since plaintiffs have made it clear that they are
12 complying with their obligation to update discovery, defendants'
13 request that experts produce all documents in their file
14 regardless of whether or not the documents relate to the
15 supplement is unnecessary. Experts are only required to produce
16 any new materials on which they base their opinions;

17 (5) For the foregoing reasons, plaintiffs' motion to adopt
18 proposed CMO 12A is DENIED. The parties are instructed to conduct
19 supplemental examinations of MDL generic experts in accordance
20 with the terms of this order and existing CMOs in this
21 litigation.

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25 ²The court is not intending to exclude the use of a
26 discovery deposition in an emergency situation, or for
impeachment purposes.

1 DATED at Seattle, Washington this 29th day of October, 2004.
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4 s/ Barbara Jacobs Rothstein

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BARBARA JACOBS ROTHSTEIN
6 UNITED STATES DISTRICT JUDGE
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