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ATLANTIC COUNTY
LAW DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC COUNTY

FILED

CASE NO: 299

OCT 11 2016

CIVIL ACTION **NELSON C. JOHNSON, J.S.C.**

**CASE MANAGEMENT
ORDER NO. 6**

IN RE: BENICAR
(Olmesartan Medoxomil)

DEPOSITION GUIDELINES

THIS MATTER, having come before the Court, upon the submission by Plaintiffs of the final version of the Order entered in the Benicar (Olmesartan) Products Liability Litigation MDL Master Docket No. 15-2606, and in furtherance of State and Federal Court coordination;

IT IS on this 11th day of October, 2016 **ORDERED** as follows:

A. General Provisions and Conduct

1. This order shall govern and control the conduct of depositions of all fact witnesses deposed in the above-captioned matter. The purpose of this Order is to gain the highest degree of efficiencies in the taking of these depositions. A protocol to address expert discovery will be addressed in a separate Order.
2. Counsel and all parties (both represented and pro se) shall comply with this order, and to the extent consistent with this Order, with the applicable Court Rules. Unless specifically modified herein, nothing in this order shall be construed to abrogate the New Jersey Court Rules.
3. Counsel are reminded that the Court considers depositions to be official court procedures, and the conduct of all participants in depositions shall be in accordance with the customs and practices expected of lawyers and witnesses appearing before these Courts, as if each was appearing personally before the Court at the time of the depositions. Counsel shall

not engage in conduct during a deposition that would not be appropriate in the presence of a judge. Counsel shall not at any time conduct himself or herself in a manner not becoming an officer of the court and not in full compliance with the civil rules of practice and all other orders of the Court. Neither counsel nor witnesses shall, at any time, engage in conduct that obstructs, impedes, delays, or frustrates the examination of the witness. All counsel and the deponent must be treated with civility and respect.

4. Counsel will not abuse or indulge in offensive conduct directed to other counsel, parties or witnesses. Counsel will abstain from disparaging personal remarks or acrimony toward other counsel, parties or witnesses. Counsel will treat adverse witnesses and parties with fair consideration.
5. Counsel will take depositions only when actually needed. Counsel will not take depositions for the purposes of harassment or other improper use. Further, counsel will not use scheduling depositions as a means of harassment.
6. Counsel will make good-faith efforts to resolve by agreement objections before presenting them to the Court.
7. Counsel will consult with each other regarding scheduling matters in a good faith effort to avoid scheduling conflicts. Counsel will promptly notify other counsel when depositions are to be canceled.
8. Counsel will not obstruct questioning during a deposition, or object to deposition questions unless permitted under applicable law.
9. During depositions, counsel will only ask those questions that are reasonably believed to be necessary and appropriate for the prosecution or defense of the action.

10. There shall be no smoking or use of other tobacco products in any room in which a deposition is being conducted, including before, during or after a deposition, or in the deposition room during the deposition recess.

B. Notice

1. Content and Notice. Each deposition notice shall include the name of each deponent, or description of the deponent where a designated corporate representative, the general occupational description of each deponent, if known, the address and telephone number of an attorney point of contact designated by the party noticing the deposition, as well as the date, time and place of the deposition. Each deposition notice absent consent or Court order, shall be served forty-five (45) days prior to the scheduled deposition. This order, in its entirety, shall be attached to any subpoena or deposition notice.
2. Adequacy of Notice. After counsel, through consultation, have agreed upon a date and location for a deposition, the Noticing Party shall serve an amended Notice reflecting the agreed upon date and location. Third-party witnesses subpoenaed to produce documents only shall be served with the document subpoena at least calendar thirty (30) days before a scheduled deposition.

C. Scheduling

1. Cooperation and Scheduling. Absent extraordinary circumstances, counsel shall consult with opposing counsel and counsel for the proposed deponents in an effort to schedule depositions at mutually convenient times and locations. Counsel are expected to cooperate and coordinate the scheduling of depositions on a good faith basis. This shall not preclude the service of a deposition notice scheduling a deposition with a placeholder date prior to such consultation, however the parties shall be expected to meet and confer regarding scheduling as necessary following service of the deposition notice.

2. Only one deposition of a current or former employee of the defendants shall be taken per day, until such time as there is a demonstrated need to multitrack depositions of the employees of defendants. At that time, the parties shall meet and confer on the establishment of a reasonable schedule for the multi-tracking of depositions of employees of the defendants, where necessary.
3. Location. To the extent reasonably possible, depositions of witnesses (other than plaintiffs who shall be deposed in New Jersey) located in the United States will take place in the deponent's home district, or, if counsel for the deponent agrees, in another district convenient to the deponent, counsel and the parties. The location of the deposition shall be as consistent as possible within each city so that videotape equipment, if being used, can be left in place. The parties shall cooperate and attempt to accommodate a request to conduct a deposition of witnesses in the United States via videoconference, through a hard wired facility if reasonably practicable.
4. Members of the PSC law firms may listen to depositions by telephone, but may not question or object. The identities of those who will participate by phone shall be provided to counsel 48 hours before the deposition. The costs of such participation shall be borne by the party requesting to participate.

D. Postponements

Once a deposition has been scheduled, it shall not be taken off the calendar, rescheduled or relocated less than three (3) calendar days in advance of the date it is scheduled to occur, except upon agreement between Liaison Counsel for each side or counsel for the witness (if the witness is not a party or a current or former employee) or by leave of Court for good cause.

E. Coordination with the MDL/Cross-Noticing of Depositions/Corporate Representative Depositions

1. The parties and the court desire to minimize the expense and inconvenience of this litigation by, *inter alia*, providing for joint depositions of witnesses within the time limits set forth in this Order in this coordinated litigation and the MDL relating to medications containing Olmesartan Medoxomil. Cross notices between this litigation and the MDL will not be necessary.
2. Plaintiffs' counsel shall use their best efforts to coordinate the scheduling of depositions and the duties for examination of the deponent. Given the unity of interest and overlap of counsel between the MDL and the coordinated NJ state court litigation, absent consent or court order, only one plaintiff or defense attorney may question a witness.
3. Corporate Representative Depositions. The notice for the deposition of a corporate representative shall describe with reasonable specificity the matters for examination and the questioning shall be limited to those specific matters.

F. Attendance

1. Who May be Present. Unless otherwise ordered, depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party (including in-house counsel and insurers), court reporters, videographers, interpreters, the deponent, and counsel for the deponent. Upon application, and for good cause shown, the Court may permit attendance by a person who does not fall within any of the categories set forth in the preceding sentence. While the deponent is being examined about any stamped confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Stipulated Amended Discovery Protective

Order (hereinafter "Protective Order") shall be excluded from the deposition. Requests to mark all or a portion of deposition transcript as confidential shall follow the Procedures set forth in the Protective Order.

2. Unnecessary Attendance. Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the Court. Counsel who have only marginal interest in a proposed deposition or who expect their interests to be adequately represented by other counsel should elect not to attend.
3. Notice of Intent to Attend a Deposition. In order for counsel to make arrangements for adequate deposition space, whenever feasible, plaintiffs' counsel who intend to attend a deposition noticed by plaintiffs should provide notice to Plaintiffs' Liaison Counsel of their intention to attend at least five (5) days prior to the deposition. Defense counsel who intend to attend a deposition noticed by defendants should provide notice to Defendants' Liaison Counsel of their intention to attend at least five (5) days prior to the deposition. Liaison Counsel for each party shall confer regarding the expected attendance at least 24 hours before the scheduled date, when necessary.

G. Duration of Depositions

Unless otherwise ordered by the Court, or agreed to by the parties and counsel for any deponent, the following provisions shall govern the depositions subject to this order:

1. A deposition shall be up to seven (7) hours of testimony and shall ordinarily commence at 9:00 am and terminate no later than 6:00 pm, including a one-hour break for lunch. Breaks shall be taken on an as needed basis, not to exceed 15 minutes each. No breaks shall be taken while a question is pending, except to confer about an issue relating to privilege. The time limits agreed to by the parties shall be the actual time spent

examining the witness. Time spent on breaks or lunch shall not be counted toward the time limits.

2. Counsel shall be efficient in depositions. Counsel shall confer about the time required to depose a particular witness. Absent agreement of the parties or order of this Court based on a showing of good cause, a deposition shall not exceed one (1) day. Time spent by defending counsel for direct examination of the witness shall not count against the time allotted to questioning counsel. Time for cross-examination following the direct examination shall count as part of the seven hours permitted for the deposition. Where a witness is a non-party, and is not a current or former employee, agent, or consultant for a party or a subsidiary or affiliate of a party, the parties shall meet and confer to reach agreement on an equitable division of the available time to depose the witness.
3. In the event that a deposition involves a translator, the maximum length of a deposition shall be increased by 75%, however the length may be further increased for good cause.

H. Conduct

1. Examination
 - a. Once a witness has fully answered a question that same or substantially the same question shall not be asked again.
2. Objections and Directions not to Answer
 - a. Unless otherwise specified by any defendant, an objection by a single defendant shall be deemed an objection by all defendants and, unless otherwise specified by any plaintiff, an objection by a single plaintiff shall be deemed an objection by all plaintiffs. However, unless otherwise specified, an instruction not to answer by one defendant should not be deemed an instruction not to answer by all defendants and an

instruction not to answer by one plaintiff shall not be deemed an instruction not to answer by all plaintiffs.

- b. Counsel shall comply with the Court Rules concerning objections at a deposition. Counsel shall not engage in colloquy in objecting to a question or an answer, or responding to an objection. Any objections to an examiner's questions or to the deponent's answer, shall be made in a concise manner and counsel shall not suggest an answer to the witness or instruct the witness on how to answer a question. The phrases "objection as to form", "objection as to foundation", or similar language are sufficient and shall preserve all objections as to form and foundation until a party seeks to use a deposition. However, to determine whether there is a need to cure a defect in a question, the examiner may ask the attorney lodging the objection to identify the specific defect in the question. In the absence of such a request, the basis for the objection shall not be explained. When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of the communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself believed in good faith to be privileged.
- c. All objections are reserved until trial or other use of the deposition, except those objections regarding the form of the question or the existence of a privilege.
- d. Counsel shall not direct or request that a witness refuse to answer a question, unless that counsel has objected on the ground that the question seeks privileged information, information that the Court has ordered may not be discovered, or a

deponent seeks to present a motion to the Court for termination or limitation of the deposition on the ground that it is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress the party or deponent. Objections shall not be made in a manner that obstructs the questioning of a witness or the answering of the question, or suggests or signals that a witness should or should not answer in a particular manner. If during a deposition a party in good faith intends to present an issue to Judge Johnson by telephone pursuant to paragraph H.3 *infra*, and if Judge Johnson is not immediately available, the party may instruct the witness temporarily to defer answering the question until Judge Johnson is available to issue a ruling.

- e. Private consultations between deponents and their attorneys during the actual taking of the deposition are improper, except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, conferences may be held during normal recesses, adjournments, or if there is a break in the normal course of interrogation and no questions are pending.
 - f. Objections as to the relevance of documents are not waived, and are reserved for later ruling in each of the coordinated proceedings or by the trial judge.
3. Disputes during the deposition.
- a. Disputes relating to depositions shall be resolved jointly, by the parties, wherever possible. Disputes that arise during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental deposition if not immediately resolved shall be presented to Judge Johnson by telephone or writing. If the parties elect to present the dispute to the Court

in writing following the deposition, each side must submit a one (1) page summary of its position and any authority relevant to the dispute. The Court will issue a prompt ruling, as schedule permits. In the event the Court is not available by telephone to resolve the dispute, the deposition shall continue with full reservation of rights of the examiner for a ruling at the earliest possible time. Nothing in this Order shall deny counsel the right to suspend a deposition pursuant to the Court Rules, file an appropriate motion with the Court at the conclusion of the deposition, and appear personally before the Court.

- b. If a dispute arises before or after a deposition: Promptly upon filing a motion, the moving party will email a copy of the motion to Judge Johnson and his law clerk as follows. Copies of the request, together with supporting documents, shall be emailed to the counsel involved in the immediate dispute. Judge Johnson will coordinate conferral among the parties for resolution of the issue.

I. Means of Recording

1. Stenographic Recording. A certified Court reporter shall stenographically record all deposition proceedings and testimony with “real time feed” capabilities. The Court reporter shall administer the oath or affirmation to the deponent. A written transcript by the Court reporter shall constitute the official record of the deposition for purposes of the Court Rules addressing filing, retention, certification and the like.

J. Documents Used in Connection with Depositions

1. Production of Documents. Third-party witnesses subpoenaed to produce documents shall, to the extent possible, be served with the document subpoena at least thirty (30) calendar days before a scheduled deposition, with a copy of the subpoena served as required by the

Court Rules. Depending upon the quantity of documents to be produced, sometime may be needed for inspection of the documents before the examination commences.

2. Copies. Extra copies of documents about which deposing counsel expects to examine a deponent should be provided to primary counsel for the parties and the deponent during the course of the deposition.
3. Marking of Deposition Exhibits. Each document referred to at a deposition shall be referred to by its alpha-numeric production number except in the case of documents which have not yet received production numbering at the time of the deposition. Documents that are produced in native format shall have the slip sheet with the Bates number affixed to the front of the document. Once an exhibit has been numbered, it shall retain that number throughout the case. The court reporter for each deposition will include in each deposition transcript a list of the exhibits referenced in the deposition. The court reporter shall assign exhibit number blocks for each deposition and shall make sure that duplicative or overlapping exhibit numbers are not assigned. Exhibit numbers shall be consecutive to the extent practicable. All documents marked at depositions must be done so in accordance with the Protective Order.
4. Objections to Documents. Objections to the relevance or admissibility of documents used as deposition exhibits are not waived and are reserved for later ruling by the Court or by the trial judge.
5. Translation of Documents. Objections as to the accuracy of translations shall be preserved unless a stipulation is reached by the parties in advance of the deposition.

K. Interpreters.

1. Where a witness indicates his or her intention to respond to questions in a language other than English, translators will be employed to interpret and translate between the foreign

language and English. An interpreter selected by the questioning attorney may also attend the deposition for the purpose of verifying the interpretation or translation provided by the interpreter. Each interpreter shall swear under oath or affirm prior to each deposition to provide honest and truthful interpretations and translations. A monitor displaying “real time” transcription will be placed in front of the interpreter to assist in the interpretation. Defendants and plaintiffs will each be responsible for all fees and costs incurred to secure the attendance and services of their respective interpreters.

2. Counsel for the deponent shall notify the Noticing Party at least 14 days in advance of the deposition that the examination will require the involvement of a translator.

L. Copies of Transcripts and Recordings

1. Each side shall bear its own costs in securing copies of the deposition transcript, videotape or DVD, except that in the event a party chooses to videotape the questioning attorney, all costs in connection with that second video shall be borne by the party who chose to videotape the questioning attorney.
2. Subject to the terms of the Protective Order entered in these proceedings, any party may, at its own expense, obtain a copy of the videotape and the stenographic transcript by contacting the Liaison Counsel for the party noticing the deposition or the court reporter.

M. Video Depositions

By so indicating in its notice of deposition, a party may record a deposition by videotape or digitally-recorded video pursuant to the Court Rules subject to the following rules:

1. Simultaneous Stenographic Recording. All videotaped depositions shall be simultaneously stenographic ally recorded in accordance with paragraph I, supra.
2. Cost of Deposition. The party requesting the videotaping of the deposition shall bear the expense of both the videotaping and the stenographic recording, except as set forth above

with regard to a party's decision to videotape the questioning attorney. Requests for the taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

3. Video Operator. The operator(s) of the video record equipment shall be subject to the provisions of the Court Rules. At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.
4. Index. The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the depositions on the tape at which examination by different counsel begins and ends, at which objections are made and examination resumes, at which exhibits are identified, and at which an interruption of continuous tape-recording occurs, whether for recesses, "off-the-record" discussions, mechanical failure, or otherwise.
5. Attendance. Each witness, attorney, and other person attending the deposition shall be identified on the record at the commencement of the deposition.
6. Standards. Unless physically incapacitated, the deponent shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent and the interpreter, if one is participating. The witness shall appear in ordinary

business attire (as opposed to, for instance, a lab coat) and without objects such as a bible, medical equipment, or other props, except those used for demonstrative purposes.

7. Interruptions. No attorney shall direct instructions to the video operator as to the method of operating the equipment, except where necessary, for example a request for a close up view of an object or document as necessary. The video camera operation will be suspended during the deposition only upon stipulation by counsel and “off the record” discussions. The video operator shall record on camera the time of suspension and any subsequent reconvening of the deposition. However, during a de bene esse deposition for use at trial, the video may be suspended so that objections are not placed on the video, in order to enable more efficient editing for trial.
8. Additional Cameras. Any party, at its own expense and with notice no less than seven (7) days in advance of the deposition to defending counsel, may arrange for an additional camera at videotaped depositions to film the examining attorney. The parties shall share the expense of the synchronization of the videotapes, in any editing of the tapes, on a 50/50 basis. If more than one camera is employed, the party arranging for the additional camera shall pay for the expense of synchronization of the videotapes from the additional camera if the party intends to show videotape from the additional camera(s) at trial. Nothing in this order shall be construed as a ruling whether the videotapes of the lawyers may be shown at trial. Counsel’s objections to showing the videotape of counsel at the time of trial are reserved .
9. Filing. After the deposition is completed, the video operator shall certify on camera the correctness, completeness, and accuracy of the videotape recording in the same manner

as a stenographic court reporter, and file a true copy of the videotape, the transcript, and certificate with Liaison Counsel for whomever noticed the deposition.

10. Technical Data. Technical data such as recording speeds and other information needed to replay or copy the tape shall be included on copies of the videotaped deposition
11. Objections. Objections and instructions not to answer at videotape depositions are subject to the provisions of section H.2, *supra*. If the objection involves matters peculiar to the videotaping, a copy of the videotape and equipment for viewing the tape shall also be provided to the Court.
12. Plaintiffs have advised Defendants of the intention to videotape all depositions taken by Plaintiffs, subject to Plaintiffs choosing not to do so for particular depositions in Plaintiffs' discretion. Defendants have advised Plaintiffs of the intention to videotape the questioner in all depositions where the witness is being videotaped.

N. Use and Admissibility of Depositions

1. Depositions of employees and former employees of Defendants taken in this MCL proceeding, the MDL proceeding, or in any state action, where cross-noticed in this MCL or the MDL, relating to medications containing olmesartan medoxomil in which any Defendant is a party may be used in this proceeding in accordance with the New Jersey Rules of Court and Evidence and case law by or against any person (including parties later added and parties in cases subsequently filed in, remanded to or transferred to this Court as part of this litigation):
 - a. who was a party to this litigation;
 - b. who was present or represented at the deposition;
 - c. who was served with prior notice of the deposition or otherwise had reasonable notice thereof; or

- d. who, within thirty (30) calendar days after the transcription of the deposition (or, if later, within sixty (60) calendar days after becoming a party in this Court in any action that is part of this MCL proceeding), fails to show just cause why such deposition should not be useable against such party.
2. This order does not address the admissibility of any deposition at trial.
3. This order does not address whether a separate trial preservation deposition may be required for admission of a witnesses' testimony. Nor does it address the timing of such trial preservation deposition. Such determinations shall be made in each coordinated proceeding.

O. Avoidance of Duplicative Depositions.

1. An individual witness that is designated as a witness under Rule 4:14-2 is subject to being deposed again in an individual capacity in a separate deposition as the Rule 4:14-2 deposition should be limited to the extent practicable, to the issues on which the witness has been designated.

P. Rules and Orders

1. The New Jersey Rules of Court and Rules of Evidence shall apply in all MCL proceedings unless specifically modified herein.

IT IS FURTHER ORDERED that a true and correct copy of this order shall be served on all parties within (7) days of the date hereof.


NELSON C. JOHNSON, J.S.C.

Dated: October 11th 2016