

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

IN RE: AQUEOUS FILM-FORMING) MDL No. 2:18-mn-2873-RMG
FOAMS PRODUCTS LIABILITY)
LITIGATION) CASE MANAGEMENT ORDER NO. 26
)
) This Order Relates to All Actions

SECOND BELLWETHER PROGRAM: INITIAL PERSONAL INJURY CLAIMS

The Court hereby issues the following initial Case Management Order (“CMO”) to govern a second set of Bellwether cases alleging certain personal injuries in this complex MDL.¹

As with the Water Provider Bellwether cases, to address the complexities of the cases in general, the Court will implement a two-step process for this category of Bellwether cases. The first step will consist of identifying and selecting certain “Initial Personal Injury Bellwether Discovery Pool Plaintiffs.” These Initial Personal Injury Bellwether Discovery Pool Plaintiffs will be selected by the Parties and undergo additional discovery (beyond the Plaintiff Fact Sheet (“PFS”) and Defense Fact Sheet (“DFS”) processes and the general liability discovery of Defendants), which shall be referred to as “Core Discovery.” This process and the cases in this process will also be referred to as “Personal Injury Tier One.” Following Core Discovery (a/k/a Tier One) in the Initial Personal Injury Bellwether Discovery Pool Plaintiffs’ cases, the Parties and Court will narrow the Initial Personal Injury Bellwether Discovery Pool Plaintiffs to a set of “Initial

¹ These include any individual personal injury plaintiffs who may have also alleged and/or served a separate Plaintiff Fact Sheet seeking medical monitoring or property damage. For clarity purposes, excluded from these Initial Personal Injury Bellwether Discovery Pool cases is any case in which a plaintiff submitted a Plaintiff Fact Sheet(s) only for medical monitoring and/or property damage. This pool also excludes any case in which class certification is sought.

Personal Injury Bellwether Trial Pool Plaintiffs” or “Personal Injury Tier Two” cases. Thereafter, the Tier Two cases will undergo additional discovery to become trial ready, including expert reports, expert discovery, and dispositive motions practice, with the Court setting a trial date for the first personal injury bellwether trial. The process shall proceed as follows:

A. Eligibility Requirements for Initial Personal Injury Bellwether Discovery Pool Plaintiffs.

1. The Initial Personal Injury Bellwether Discovery Pool Plaintiffs shall be limited to those who claim exposure from AFFF use at the following sites:

- i. Peterson Air Force Base and/or Colorado Springs Municipal Airport
- ii. Naval Air Station Joint Reserve Base Willow Grove and/or Naval Air Warfare Center Warminster

2. Only plaintiffs alleging the following diseases in their Personal Injury PFS shall be eligible for selection as an Initial Personal Injury Bellwether Discovery Pool Plaintiff:

- i. Kidney Cancer
- ii. Testicular Cancer
- iii. Hypothyroidism/Thyroid Disease
- iv. Ulcerative Colitis

3. In addition, for a plaintiff to be eligible for selection as an Initial Personal Injury Bellwether Discovery Pool Plaintiff, the plaintiff must allege exposure to PFAS from an AFFF source in their drinking water and may not allege PFAS exposure from direct exposure to AFFF.

4. On or before April 14, 2023, Defendants will identify the cases currently pending that are eligible as Bellwether Discovery Pool cases (i.e., filed, served and PFS submitted) and provide a list of same to the PEC (“Eligibility List”). In order to be eligible

for inclusion on the Eligibility List, a plaintiff must have filed and served his or her complaint on all named defendants and that plaintiff must have served a substantially complete Personal Injury PFS pursuant to CMO 5 by March 31, 2023. In addition to other potential deficiencies, a plaintiff's failure to provide a specific disease/diagnosis in answer to Personal Injury Plaintiff Fact Sheet Question 24 or a list of medical providers in answer to Question 25 shall render that fact sheet per se inadequate and not "substantially complete" within the meaning of CMO 5. For the avoidance of doubt, inclusion on the Eligibility List does not waive any defense in such cases, to include without limitation defenses set forth in Federal Rules of Civil Procedure 8 and 12, such as service of process and subject matter or personal jurisdiction.

5. On or before May 5, 2023, the PEC will review the Eligibility List provided by Defendants pursuant to paragraph A.3, above, and either agree to the list as provided by Defendants, identify any case(s) on the list which the PEC believes are not eligible and/or identify any cases which the PEC believes are eligible but not on the Eligibility List.

6. On or before May 19, 2023, the Parties will meet and confer to reconcile the Eligibility List.

7. Within fourteen (14) days of the Parties' reconciliation of the Eligibility List, counsel for the Plaintiffs on the Eligibility List will provide Defendants (via email at AFFFMDL.Authorizations@nelsonmullins.com) (1) to the extent not previously provided, any medical, property, water, and utility records called for by the Plaintiffs' Fact Sheets that are in each eligible plaintiff's possession, custody, or control and (2) new duly executed medical record and water and utility company record authorizations. To be clear,

new authorizations shall be provided if the previously served authorizations are greater than six months old.

8. All Initial Personal Injury Bellwether Discovery Pool Plaintiffs (including any Replacement Plaintiffs as described below) shall cooperate in good faith with Defendants as necessary to ensure reasonable access to plaintiffs' medical, property, water, and utility records, regardless of whether Core Discovery has yet commenced.

9. Any deficiencies for the Defense Fact Sheets at issue for the Sites identified in Paragraph A.1 above shall be identified by the PEC to defendants by no later than April 28, 2023, and cured by May 18, 2023, or subject to motion practice by no later than May 25, 2023, absent agreement by the parties to extend.

B. Selection of Initial Personal Injury Bellwether Discovery Pool Plaintiffs

1. The Initial Personal Injury Bellwether Discovery Pool Plaintiffs shall be selected by the Parties by July 28, 2023. For the avoidance of doubt, selection shall be of individual plaintiffs and not entire cases where plaintiffs may have been part of multiple-plaintiff complaints. (However, an individual plaintiff named in a multi-plaintiff complaint can be selected). All claims brought by the selected individual plaintiff, including any dependent or derivative claims (*e.g.*, loss of consortium), shall be litigated in this process, including, for example, claims for property damage or diminution in value.

2. The Parties shall select 28 Initial Personal Injury Bellwether Discovery Pool Plaintiffs, including eight plaintiffs alleging each of (i) kidney cancer, (ii) testicular cancer, (iii) hypothyroidism/thyroid disease, and (iv) four plaintiffs alleging ulcerative colitis. For the avoidance of doubt, a plaintiff alleging more than one of the above injuries shall be counted toward the total number of plaintiffs selected for each injury alleged.

3. In the event the Parties cannot agree on the plaintiffs to be selected in one or more disease categories—and the Parties are strongly encouraged to agree and to make their best efforts to select representative cases in each category—by August 4, 2023, the Parties shall exchange a list of proposed plaintiffs to fill the remaining slots.

4. Should any plaintiff voluntarily dismiss his or her action following selection as an Initial Personal Injury Bellwether Discovery Pool Plaintiff, such dismissal shall be with prejudice, absent agreement of the Parties or some special circumstances that may be presented to the Court if the Parties cannot agree. Further, should any Initial Personal Injury Bellwether Discovery Pool Plaintiff dismiss his/her case for any reason prior to September 22, 2023, Defendants may (but are not required to) select a replacement plaintiff (“Replacement Plaintiff”) for each dismissed Initial Personal Injury Bellwether Discovery Pool Plaintiff by no later than October 6, 2023.

5. To the extent not already accomplished, each plaintiff selected as a Replacement Plaintiff, if any, shall provide to Defendants (via email at AFFFMDL.Authorizations@nelsonmullins.com) within seven calendar days of selection updated medical record and water and utility company record authorizations dated no earlier than three months prior to selection as a Replacement Plaintiff, as well as all medical, property, water or utility records in their possession, custody, or control.

Any defenses under Rules 12(b)(1) and/or 12(b)(2) that Defendants may have in any of the Initial Personal Injury Bellwether Discovery Pool Cases are expressly preserved and not waived. Defendants shall not file 12(b)(1) or 12(b)(2) motions directed to the Initial Personal Injury Bellwether cases. They may raise these defenses by motion at a

later date, including in Rule 56 summary judgment motions in accordance with the schedule to be determined by the Court for the filing of such motions.

6 By no later than August 11, 2023, the Parties shall jointly submit to the Court a list with each selected or proposed case, including the following information: (1) Plaintiff's counsel information, (2) list of all defendants in the case (and counsel information), (3) a certification that all parties have waived *Lexecon* rights,² (4) a brief summary of the alleged injury(ies) and site(s) from which exposure occurred, (5) ECF references to the proposed Bellwether Plaintiff's operative Complaint and relevant Defendants' statements of affirmative defenses, and (6) if a plaintiff is not agreed, a brief explanation for why the proponent contends that plaintiff is representative and why the opponent contends that plaintiff is not representative. The Court shall select the 28 Initial Personal Injury Bellwether Discovery Pool Plaintiffs from this submission, and these Plaintiffs shall be subject to the provisions of Paragraphs B.4–5 above.

7. Should the Court disapprove of any case proposed for inclusion in the Initial Personal Injury Discovery Bellwether Pool, the Parties shall meet and confer to select a replacement case or cases and promptly propose such additional case(s) to the Court in accordance with the procedures set forth above.

C. Further Proceedings With Regard to Personal Injury Cases

1. The Parties shall meet and confer regarding Core Discovery and will endeavor to submit a draft Case Management Order (or competing proposed orders) in

² For the avoidance of doubt, if a party waives *Lexecon* as to a specific case in the Initial Personal Injury Discovery Bellwether Pool, such waiver will not apply to any other case in the MDL.

advance of the June 2023 case management conference or, in the absence of such a conference, the July 2023 case management conference.

2. The Parties are directed to meet and confer on a process for addressing personal injury claims not included in Part A above, including the potential dismissals of certain categories of injuries or other mechanisms for management of such claims that the Parties may determine are appropriate. The Parties will endeavor to submit a draft Case Management Order in advance of the June 2023 case management conference or, in the absence of such a conference, the July 2023 case management conference.

AND IT IS SO ORDERED.

May 5, 2023
Charleston, South Carolina

s/Richard Mark Gergel
Hon. Richard M. Gergel
United States District Judge