

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

**IN RE: SKECHERS TONING SHOE
PRODUCTS LIABILITY LITIGATION**

**Master File No. 3:11-MD-2308-TBR
MDL No. 2308**

**THIS DOCUMENT RELATES TO:
PERSON INJURY PRODUCT LIABILITY CASES**

**THOMAS B. RUSSELL
U.S. DISTRICT JUDGE**

SCHEDULING ORDER NO. 3

SCHEDULING ORDER FOR ACCELERATED CASES

The parties have submitted differing proposed schedules for selecting cases for early dispensation. Early mediation was held in many of the MDL cases, which resulted in settlement of several hundred cases. Several hundred cases are left in the MDL with numerous cases being filed or transferred in recent months. In addition, there are several hundred cases pending in California state court. The law firms of Wright & Schulte, LLC (represented by Richard Schulte) and Davis & Crump, PC (represented by Martin Crump and Trevor Rockstad) represent the majority of plaintiffs remaining in the MDL. The Magistrate Judge attempted a resolution of these cases without success. Counsel settled several cases without the involvement of the Magistrate Judge.

Pursuant to the motion of lead Plaintiffs' counsel the Court entered an order coordinating MDL proceedings with proceedings in the California Consolidated Actions (DN #1470).

Upon the motion of lead counsel for both parties the Court entered an order appointing Professor Francis McGovern as special settlement master to perform duties consented to by the parties. Professor McGovern spent considerable time conferring with counsel, as well as several carriers. He has also attempted to coordinate settlement of the California state cases. Professor

McGovern has made considerable headway with all of these groups. Professor McGovern is in the process of meeting separately with all groups in an attempt to achieve settlement.

Wright & Schulte and Davis & Crump (hereinafter, Schulte/Crump) represent the vast majority of the claims in this MDL case. An attempt to settle has not been successful, despite good faith efforts by all parties. The Court believes the best opportunity for settlement is to accelerate the trial of a significant number of these cases, either to be heard in Kentucky or be remanded.

To this end the Court directed the parties to submit proposed schedules. The Court held a hearing on November 14, 2014, at which time the parties argued the merits of their proposals. The disagreements mainly concerned case selection, tolling, and the type of fact sheet all plaintiffs be required to submit.

I. Tolling.

Plaintiffs have orally moved to continue tolling the statute of limitations. The statute of limitations will be tolled according to the parties' Tolling Agreement and any tolling shall expire according to the terms of that agreement.

II. Fact Sheets.

The Court will require all current plaintiffs to file a full fact sheet within sixty days of the entry of this Order, unless that plaintiff has already done so. If a shortened fact sheet was previously filed, plaintiffs must file a supplemental filing of the additional questions on the long form fact sheet. For any case filed or added to this MDL case after this Order, the plaintiff added shall file a full fact sheet within sixty days.

III. Case Selection and Schedule

In Defendants' proposal they selected the first 75 cases filed to be the pool from which the parties (Schulte/Crump and Defendants) were to make their selection of cases to be tried. The Court finds this unduly restrict the pool. The Court conducted a phone conference with lead counsel for Plaintiffs and Defendants on November 17, 2014. The Defendants have maintained a database of all cases filed in the order in which they were filed. In addition, the database included whether fact sheets have been submitted. The Court directed Defendant to provide this information to the Court and plaintiffs. That document was filed as DN #2066 (Ex. 1).

The Court determines that the pool shall consist of all cases pending in the MDL which were filed as of December 6, 2013 and for which a full length plaintiff's fact sheet has been submitted no later than March 1, 2014, as shown in DN #2066, Ex. 1, or otherwise agreed by the parties.

In order to promote the fair and efficient administration of this litigation and to comply with its continuing obligations as an MDL court, the Court enters the following Order establishing case-specific discovery deadlines for Accelerated Case Groups A, B, and C, as defined below, and establishing procedures for trial before the Court of those matters within the Accelerated Case Groups A, B, and C arising in the Western District of Kentucky and for recommending remand of the remaining cases in Accelerated Case Groups A, B, and C to the Judicial Panel on Multidistrict Litigation. The Court is well aware of *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). To promote judicial economy and reduce costs to the parties, for the cases filed in districts outside the Western District of Kentucky, if the parties consent, then the Court agrees to try these cases in the Western District of Kentucky. Alternatively, if the parties consent to and prefer, these cases will be remanded to their original district and the Court will seek inter-Circuit approval to try those cases. Considering judicial

economy and costs to the parties, counsel are encouraged, to the extent they feel it is consistent with their best interest of the clients, to designate cases with venue in the Western District of Kentucky or to which consented to be tried in Kentucky. It is apparent that after ruling on all *Daubert* and dispositive motions, the Court's familiarity with all the cases could avoid needless delays, unnecessary expense, and resolution of these matters.

A. Applicability

Except where expressly stated otherwise in this Order, in subsequent Orders of this Court or by express written stipulation by Lead Counsel for the parties or their designees, the Federal Rules of Civil Procedure shall control the obligations, limits, sequence, and timing of discovery in these cases.

B. Case Groups

1. Accelerated Case Group A: Within 14 days of this Order Schulte/Crump shall designate 10 cases and Defendants shall simultaneously designate 10 cases from the pool as defined. The parties shall file these designations under seal. The Court shall remove the seal after both designations are filed.
2. Accelerated Case Group B: Within 21 days of this Order Schulte/Crump shall designate 10 cases and Defendants shall simultaneously designate 10 cases from the pool as defined. The parties shall file these designations under seal. The Court shall remove the seal after both designations are filed.
3. Accelerated Case Group C: Within 28 days of this Order Schulte/Crump shall designate 10 cases and Defendants shall simultaneously designate 10 cases from the pool as defined. The parties shall file these designations under seal. The Court shall remove the seal after both designations are filed.

C. Deadline for Filing Amended Pleadings

The deadline for filing of Amended Pleadings for those Plaintiffs in Accelerated Case Groups A, B, and C has expired.

D. Deadline for non-expert discovery

1. All fact discovery for Accelerated Case Group A shall be completed on or before March 2, 2015.
2. All fact discovery for Accelerated Case Group B shall be completed on or before May 1, 2015.
3. All fact discovery for Accelerated Case Group C shall be completed on or before July 1, 2015.

E. Deadline for expert discovery

1. Accelerated Case Group A.
 - a. Plaintiffs' expert disclosure and reports due: March 2, 2015
 - b. Deadline for Plaintiffs to make experts available for deposition: April 15, 2015
 - c. Defendants' expert disclosure and reports due: May 1, 2015
 - d. Deadline for Defendants to make experts available for deposition: June 15, 2015
2. Accelerated Case Group B.
 - a. Plaintiffs' expert disclosure and reports due: May 1, 2015
 - b. Deadline for Plaintiffs to make experts available for deposition: June 15, 2015
 - c. Defendants' expert disclosure and reports due: July 1, 2015
 - d. Deadline for Defendants to make experts available for deposition: August 17, 2015
3. Accelerated Case Group C.
 - a. Plaintiffs' expert disclosure and reports due: July 1, 2015
 - b. Deadline for Plaintiffs to make experts available for deposition: August 17, 2015
 - c. Defendants' expert disclosure and reports due: September 1, 2015
 - d. Deadline for Defendants to make experts available for deposition: October 15, 2015

F. Deadline for *Daubert* and dispositive motions.

The parties may file dispositive motions in any pending cases, including but not limited to cases designated for trial. If a dispositive motion is filed a case designated for trial, the moving party shall notify the Court when that motion is ripe. The following deadlines are set for motions filed in cases designated for trial:

1. Accelerated Case Group A:

- a. The deadline for filing *Daubert* motions and dispositive motions shall be July 10, 2015, but the parties are encouraged to file these motions earlier if possible.
- b. Response briefs shall be due within 14 days.
- c. Reply briefs shall be due within 7 days.
- d. A hearing will be set at the convenience of the parties, if the Court feels a hearing is necessary.

2. Accelerated Case Group B:

- a. The deadline for filing *Daubert* motions and dispositive motions shall be September 11, 2015, but the parties are encouraged to file these motions earlier if possible.
- b. Response briefs shall be due within 14 days.
- c. Reply briefs shall be due within 7 days.
- d. A hearing will be set at the convenience of the parties, if the Court feels a hearing is necessary.

3. Accelerated Case Group C:

- a. The deadline for filing *Daubert* motions and dispositive motions shall be November 6, 2015, but the parties are encouraged to file these motions earlier if possible.
- b. Response briefs shall be due within 14 days.
- c. Reply briefs shall be due within 7 days.
- d. A hearing will be set at the convenience of the parties, if the Court feels a hearing is necessary.

G. Status Conferences.

1. The Court shall conduct status conferences at the following times: (i) Tuesday, January 6, 2015 at noon; (ii) Monday, February 2, 2015, at noon; (iii) Monday, March 9, 2015 at noon; (iv) each successive first Monday of the month, at noon, until further Order of the Court. Counsel shall join the teleconference by dialing 1-877-336-1831 then give the Access Code 6879517 and #, then when prompted press # again to join the call.
2. The Court will attempt to rule on all *Daubert* and dispositive motions within 60 days after they become ripe. Counsel shall notify the Court when motions are ripe by e-mail to Kelly Harris, courtroom deputy (kelly_p_harris@kywd.uscourts.gov). Status conferences as to these motions are set as follows:
 - a. For Accelerated Case Group A, the court shall conduct a status conference on October 30, 2015 at noon.
 - b. For Accelerated Case Group B, the court shall conduct a status conference on January 8, 2016 at noon.
 - c. For Accelerated Case Group C, the court shall conduct a status conference on March 4, 2016 at noon.
3. Cases arising in the Western District of Kentucky or to which the parties have consented for the Court to hear, at the status conferences set forth in Subsection 2 a, b, and c above, the Court will set final pretrial conferences and trial dates.
4. Recommendation of cases for remand. To the extent that those matters arising in Accelerated Case Groups A, B, and C have not been dismissed, resolved by summary judgment, settled, and to the extent remand is necessary at the status conference in Section 2 a, b, and c above, the Court will set hearings appropriate to the respective scheduling tracks of Accelerated Case Groups A, B, and C at which the parties shall be prepared to discuss any remaining issues prior to the

Submission to the Judicial Panel on Multidistrict Litigation for the remand for trial of those cases remaining in Accelerated Case Groups A, B, and C to their respective transferor courts or counsel as previously outlined in this Order. The Court shall follow *Lexecon* unless otherwise agreed to by counsel on both sides. Pursuant to Practice and Procedure Order No. 2 (Service and Direct Filing), certain cases in the MDL were directly filed in the MDL Court. PPO 2 directed Plaintiffs to allege in their complaints the proper venue for direct-filed cases. Within 10 days of the Court's ruling on dispositive motions, Defendants shall provide the Court with a list of all the cases remaining in the pertinent Accelerated Case Groups A, B, and C. For each Plaintiff on the list, the list shall also state the venue alleged by each plaintiff in their complaint (or the transferor jurisdiction for cases not filed directly in the MDL) and include a statement by Defendant indicating either that the Defendant agree that the venue alleged by the Plaintiffs is the proper venue or that the Defendant objects to the venue selected by Plaintiff. Further, if Defendant objects to the venue selected by any Plaintiff, Defendant shall file a motion for determination of proper venue within 30 days of the Court's ruling on dispositive motions for the respective Accelerated Case Group. When the issue of proper venue has been resolved among the respective Accelerated Case Groups, the Court will then submit those matters to the Judicial Panel on Multidistrict Litigation suggesting remand for trial of those cases remaining in the Accelerated Case Groups A, B, and C to the respective transferor courts. The parties anticipate that the timing and procedures of the trials may need to be coordinated with the transferor courts following remand.

Once a trial is set, the parties shall advise the Court of the trial date and continue to keep the Court advised of any changes in schedule. Further, the parties will submit reports as to the result of trials, dismissals or settlements of those matters in Accelerated Case Groups A, B, and C, that are remanded to the transferor courts.

H. Deadline for Motions to Dismiss.

At any time after a complaint has been filed and answered, a party may file a motion to dismiss that complaint, which must be based on a good faith belief as to the merits of the motion to dismiss.

I. Additional Case Groups

If for any reason, including resolution by dismissal, summary judgment, or settlement, the number of active cases in Accelerated Case Groups A, B, and C falls below 50 cases, the parties will:

1. Notify the Court within seven (7) calendar days
2. Prior to filing the aforementioned notification with the Court, meet and confer to consider whether additional cases should be accelerated and report their recommendation to the Court.

IT IS SO ORDERED.