IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. SA-98-CA-114
DUPONT MERCK PHARMACEUTICAL COMPANY,	)	
Defendant.	)	

ORDER CONCERNING
CONSENT TRIALS, DISCOVERY, PRETRIAL MATTERS, AND PRETRIAL ORDER

The Court has considered the status of the above styled and numbered cause. It is hereby ORDERED that:

1. The ultimate responsibility for submitting the joint proposed pretrial order rests with plaintiff. Unless plaintiff has made a motion to compel or a motion for extension of time based on defendant's alleged non-cooperation before expiration of the scheduling deadline, non-cooperation by defendant shall not excuse plaintiff of this scheduling responsibility.

The proposed order shall supply information as required by the enclosed modified from titled "Agreed Pretrial Order", which this Court has adopted as a substitute to the form set forth in Local Rule, Appendix B, Form PT-1. The Court may impose sanctions under Federal Rules of Civil Procedure 16(f) and/or 41(b), if counsel do not timely submit their agreed pretrial order consistent with the enclosed pretrial order form.

2. Pursuant to 28 U.S. C. § 636(c)(1), all full-time Magistrate Judges are authorized and empowered to try any civil case, jury or non-jury, with the consent of all parties to the lawsuit. Because of the crowded condition of the criminal docket in this District and the difficulty in reaching civil cases for trial, you may wish to consent to the trial of your case by a United States Magistrate Judge.

Your consent to trial by a Magistrate Judge must be voluntary, and you are free to withhold consent without suffering any adverse consequences. If all parties do consent to trial of this case by a Magistrate Judge, the Court will enter an order referring the case to a Magistrate Judge for trial and for entry of judgment.

3. Requests for extension of the Scheduling Order deadlines must be filed before expiration of that deadline. See Fed. R. Civ. P. 6(b). The Court will be strongly disinclined to grant any extensions of time. If the parties file any motion for extension of time, they should be aware that the mere filing of the motion does not stay the applicable deadline and that the Court may impose sanctions pursuant to Rule 16(f) despite the timely filing of a Rule 6 motion. If a motion for extension of time is joint or unopposed, a statement to this effect should be contained in the caption and in the body of the motion. A proposed order with the requested deadlines already added shall be attached to all motions for extensions of time. Failure to attach the proposed order in proper form may result in summary denial of the motion. The parties may agree to extend the deadline for responding to written discovery without Court intervention, unless the agreed extension will affect a Court-ordered scheduling deadline.

4. These deadlines shall not relieve the parties of full compliance with any deadlines or scheduled arbitration proceedings pursuant to Local Rule CV-87. Similarly, submission of the case to arbitration does not stay any of these deadlines.

5. Discovery shall comply with the Federal Rules of Civil Procedure, and Local Rules CV-5, CV-16, and CV-26 through CV-37.

6. All Rule 26(c) and 37 motions shall be submitted with copies of disputed portions of the challenged discovery.

7. No motions relating to discovery, including Rule 26(c), 29, or 37 motions, shall be filed after the expiration of the discovery period unless they are filed within five business days after the discovery deadline and they pertain to conduct occurring during the final seven calendar days of discovery. Any other discovery related motions filed after the discovery deadline will not be entertained. Written discovery must be served to allow the responding party at least thirty days (thirty-three days if served by mail) to respond before the close of discovery. The responding party does not have any obligation to respond to written discovery if the response to the requested discovery would be due after the close of discovery. The responding party does not waive objections if it does not respond. Depositions must be completed before the discovery deadline, and notices setting depositions after the discovery deadline will not be enforced.

8. Any pretrial motion except a dispositive motion shall contain within the body of the motion a certificate by the movant that counsel for the parties have first conferred in a good faith attempt to resolve the matter by agreement before filing the motion. Local Court Rule CV-(7)(I); CV-37(b). In addition, any motions requesting sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure must contain a similar certificate by the movant. See generally, Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988). Failure to provide a certificate of

conference within the body of such motions may result in summary denial of the motion and sanctions.

9. Unopposed discovery may continue after the deadline for discovery so long as it does not delay other pretrial preparations.

10. Upon filing any motion for summary judgment or motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56, there shall be annexed to the motion and brief a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried, including specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file and affidavits which support such contentions.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, including specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file and affidavits which support such contentions.

All material facts set forth in the statement required to be served by the moving party may be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

Failure to comply with this rule by the moving party may result in denial of the motion.

11. Absent prior permission of the Court, no party shall file any brief or legal memorandum in excess of twenty (20) pages in length. Responses to motions must be filed no later than fourteen (14) calendar days after the date the motion is filed. Reply briefs to responses to motions must be filed no later than fourteen (14) calendar days after the date the response if filed; however, the Court may rule on a motion without awaiting a reply brief. If a motion or response is served by mail, three additional days **will not** be added to these timeframes. The Court prefers that reply briefs and supplemental briefs not be submitted in letter form.

12. All filings must be signed by a party or his attorney, and the name, address and telephone number, and facsimile number of the signer must be typed or printed under the signature, and indicate which party the signatory represents (e.g., "John Doe, attorney for defendant, Acme, Inc."). The State Bar card number of each signing attorney shall also be included. A filing may be signed with permission by another attorney admitted to the Western District of Texas.

13. Failure of a pro se party or an attorney for a represented party to keep the Court advised at all times of its correct address may subject that party to appropriate sanctions.

14. Any requirement of this order or the attached pretrial order form may be waived by the Court when it is in the interest of justice.

15. All pleadings and papers in a case shall be filed with the District Clerk. The Court will not accept courtesy copies. Service on other parties must be by hand delivery, United States mail, or express delivery; service by facsimile is not permitted and does not constitute service.

ORDERED, SIGNED and ENTERED this 10 day of June, 1998.

FRED BIERY
UNITED STATES DISTRICT JUDGE

PRETRIAL ORDER GUIDELINES

INTRODUCTION

In preparing the proposed pretrial order, counsel are to use the following checklist. The paragraphs in the proposed order are to be numbered to coincide with the checklist item numbers. If a checklist item is inapposite, then indicate that in the appropriate place and continue to treat the remaining items in proper sequence. Counsel should be aware that, when the checklist indicates that material is "attached hereto," the Court expects the relevant material to be submitted with the proposed order. Additionally, counsel are to include verbatim the language set out in checklist items numbers 8, 14, and 17.

The substance of the proposed order is even more important than the form. Items 1 and 2 are intended to provide the Court with a checklist of all procedural issues. The lists should disclose what action has been taken on motions and what remains to be done. Thus, if no jurisdictional issues are in dispute, the proposed order should state: "There are no jurisdictional issues." These items are meant to be all-inclusive. Thus, all motions that counsel intend to make, with the exception of motions in limine, should be made prior to the submission of the proposed order.

Items 3 and 4 should be concise statements of contentions, not jury arguments. These contentions, which ideally should be digested in one or two paragraphs, and which are not to exceed one page unless exceptional circumstances exist, should be general rather than specific. The details will be fleshed out in items 5, 6, and 7. The factual and legal issues enumerated there should be listed individually, and each issue should be honed down to the simplest terms. Every effort should be made to weed out those issues that are not in serious dispute. Only material issues that are genuinely in controversy should be litigated. The remaining items on the checklist are self-explanatory.

Counsel should note that, with the exception of items 5 and 8 on the pretrial checklist, counsel can prepare the entire proposed pretrial order without agreeing to anything. For example, the contentions of the parties are not negotiable; plaintiff is to draft plaintiff's contentions, and defendant is to draft defendant's. Similarly, the disputed issues of fact should present no problem if counsel cooperate. Facts are either disputed, undisputed, or irrelevant. If one party feels that a fact is disputed, but the other feels that it either should be stipulated to, or is irrelevant, then the procedure to be followed is simple. The arguably irrelevant disputed fact should be listed as disputed, with a caveat that one party feels that the fact is irrelevant. Utilization of this procedure makes it unnecessary for counsel to submit separate proposed pretrial orders, as contemplated by paragraph 6 of the Scheduling Order in Appendix "B" to the Local Court Rules. All counsel are, therefore, responsible for preparing an agreed proposed pretrial order instead of separate proposed pretrial orders. See Local Rules CV-1 (e) and CV-16. Counsel are under a duty to cooperate to "secure the just, speedy, and inexpensive determination of [this] action." Fed. R. Civ. P. 1.

IN THE UNITED STATES DISTRICT COURT
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	§	
	§	
PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO. ___
	§	
DEFENDANT.	§	
	§	

AGREED PRE-TRIAL ORDER

Consistent with Federal Rule of Civil Procedure 16 and Local Rule CV-16, the following is presented as a complete summary of substantive and procedural matters, and shall control the subsequent course of this action.

1. The following jurisdictional questions are pending: [Set out.]

2. The following motions are pending:

[List each motion by title; date of filing; movant; date opposition, if any, was filed.]

3. In general, the plaintiff claims:

[In addition to a general statement of the claims, plaintiff should separately list (1) each theory of recovery; (2) the source or basis for each theory of recovery (common law, e.g., tort, contract, etc., or statutory, identifying the specific statutory authority); and (3) the relief sought pursuant to each claim (e.g., declaratory relief, past and future mental anguish, lost earning capacity, punitive damages, permanent injunction, etc.). If more than one defendant exists, the plaintiff should list the requested information separately for each defendant.]

4. In general, the defendant claims:

[In addition to a general statement of the claims, each defendant should separately list the defenses asserted as to each of plaintiff's claims.]

5. The following facts and issues are undisputed:

[Here, the parties should set out all material facts and issues as to which there is no dispute. Special consideration should be given to such things, where relevant, as life and work life expectancies, amounts of medical and hospital bills, or funeral expenses, cause(s) of death, lost wages, and value of property damage.]

6. The contested issues of fact are:

[Set out.]

7. The contested issues of law are:

[Here the parties should set forth contested legal questions. This should include such issues as: (1) any legal disputes as to the elements of plaintiff's cause(s) of action; (2) whether recovery is barred as a matter of law by a particular defense; (3) whether as a matter of law a particular defense would apply; (4) any legal dispute as to the measure, elements, or recovery, of damages claimed; (5) any unusual evidentiary questions which are likely to arise at trial; (6) whether the statute of frauds or the parol evidence rule will be raised; and (7) conflict of law questions. Any of the above issues which can be resolved prior to trial should be urged by way of motion for partial summary judgement, motion to strike, or motion in limine, as appropriate, and filed prior to filing of the joint proposed pretrial order.]

8. A list of the exhibits for each party is attached hereto:

[Each party should list their exhibits on a form similar to the attached form to correspond with the marking of the exhibits explained in the Note below. In addition, each exhibit should be listed in one of the following categories:

A. The parties agree that no objections to the admission of the following exhibits will be raised:

(1) Plaintiff's exhibit list (briefly describe)

(2) Defendant's exhibit list (briefly describe)

B. The parties desire to introduce in evidence the following exhibits to which the opposing party will object as indicated.

(1) Plaintiff's exhibit list (describe exhibit, state its purpose, and the objection)

(2) Defendant's exhibit list (describe exhibit, state its purpose, and the objection)

Note: The Court may deny admission of exhibits not listed and objections not indicated may be deemed waived unless this order is modified prior to trial by motion to prevent manifest injustice. All exhibits shall be made available to opposing counsel for inspection sufficiently prior to the due date of this order to permit objections to be noted therein. Failure to provide exhibits for inspection shall constitute a valid ground for objection at trial and should be noted in this order.

A list of exhibits intended to be offered at trial shall be supplied to the clerk, prior to jury selection. Each party shall obtain and prepare exhibit tags and mark its own exhibits with the exhibit number. (If not otherwise available, counsel may obtain exhibit tags from the clerk.) In addition, the exhibits shall be marked with the cause number of the suit. All exhibits shall be marked in accordance with Local Rule CV-26(b) as follows:

(1) All exhibits shall be marked with an identifying

sequence, followed by a dash, followed by a number; for example, Exhibit P-3 and Exhibit D-15. The identifying sequence (e.g., "P" for plaintiff, "D" for defendant, and "G" for government) will identify the party whose exhibit it is. Parties will assign numbers to their exhibits consecutively, beginning with the number 1.

(2) The identifying sequence will be assigned to each party or set of parties with a sufficient identity of interest that they are either all represented by the same attorneys, or at least one attorney represents all parties which comprise the set. In a case involving multiple parties who do not have common exhibits, the first set of parties having common exhibits named in the caption of the case will be identified as "P1" ("D1"), the second set of parties sharing common exhibits as "P2" ("D2"), etc.

(3) In cases involving more complex pleading relationships (e.g., consolidated cases, intervenors, and third-party actions), it will be the responsibility of counsel for the plaintiff(s) -- in consultation with the judge's courtroom deputy clerk -- to coordinate the assignment of the unique identification sequences. Counsel will consult with the courtroom deputy clerk on this matter one week prior to the trial date.

(4) If the identifying sequence system either has not been used during discovery, or if some exhibits that were identified during depositions need not be offered at trial, deposition exhibits that are to be offered may be renumbered to conform with this rule so long as adequate steps are taken to avoid confusion to the other parties, the court and the record. For example, the parties may agree to simply renumber deposition exhibits and references to such exhibits in depositions. Another example: exhibits referred to in deposition summaries may be renumbered so long as the summary contains a table correlating the deposition exhibit numbers with the trial exhibit numbers.]

9. A list of the names of all witnesses for each party, together with a brief statement as to what their testimony will be, is attached hereto.

A. Plaintiff's

B. Defendant's

Note: Each party shall list (1) the name, (2) the address, and (3) the purpose of the testimony of all witnesses which that party will call at trial. Counsel shall in good faith list every witness which he will call to establish his case-in-chief and indicate whether the witness will testify in person or by deposition. Witnesses which counsel plans to use in rebuttal shall also be listed. If both parties desire to examine a particular witness, both parties should list that person on their witness list and both are responsible for securing his presence at trial. Any witness not listed

will not be allowed to testify at trial unless this order is modified on good cause shown. Appropriate sanctions will likewise be imposed upon any party who otherwise fails to comply with the provisions of this order.

No later than seven days before trial, the parties should submit a supplement to the pretrial order listing all depositions to be offered in evidence.

Both written and video depositions offered into evidence shall be marked as an exhibit, but will not be submitted to the jury during deliberation. Counsel shall provide the Court with written copies of all deposition testimony on the first day of trial.

10. Proposed jury instructions are attached hereto.

Because the Court has already assembled basic instructions used in all cases, which define the juror's duties, burden of proof, etc., parties need only submit those instructions which are related to the specific matters at issue. The proposed jury instructions should include instructions on the following matters:

(1) each theory of recovery urged by a party, whether by original claim or counterclaim;

(2) each theory of recovery urged against a party, whether by original claim or counterclaim;

(3) each defense urged by a party, whether to an original claim or to a counterclaim; and

(4) each defense urged against a party, whether to an original claim or to a counterclaim.

For example, parties in a negligence action should include proposed charges defining negligence and the elements thereof, damages allowable, and contributory negligence if pleaded. Precise authority (i.e. case citations, statutes, law review articles, etc.) with signals and explanatory parenthetical phrases, shall be provided for each proposed instruction. If multiple authorities are relied upon, the submission shall clearly indicate the source for each legal proposition contained within a single instruction. Source material should be listed immediately after each proposition sought to be supported so that the relation between a proposition and its source is clear. The citation shall contain citation to the appropriate page(s) within the authority (pinpoint citation). Each instruction shall be presented on a single page.

The instructions shall be prepared in the style as presented in Devitt and Blackmar, Federal Jury Practice and Instructions. Instructions presented in question and answer format are not acceptable. All requests are to be headed with the number and style of the case and identified as to party; for example, Plaintiff's Request No. 1, 2, 3, etc., or Defendant's Request No. 1, 2, 3, etc. A space should be provided at the end of each request to reflect the Court's action thereon; for example:

Given ( ) Given as Modified ( ) Refused ( )

United States District Judge Date

Besides requested jury instructions, each party is also to submit a set of proposed special interrogatories in all jury cases in which a general verdict would be insufficient. The Court notes that in the Fifth Circuit, Fed. R. Civ. P. 49(a) questions are called "interrogatories" to distinguish the device from former the Texas special issue practice. See Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 93-94 n. 31 (5th Cir. 1966); see also Brown, Federal Special Verdicts: The Doubt Eliminator, 1967, 44 F.R.D. 245, 330-53.

11. If a non-jury case, the proposed findings of fact and conclusions of law of each party are attached hereto.

The parties shall attach detailed proposed findings of fact and conclusions of law as follows.

(1) Each party shall submit proposed findings of fact and conclusions of law which set forth each of the elements of each of its claims.

(2) Each party shall submit conclusions of law setting forth each type of relief sought.

(3) Each and every proposed conclusion of law shall contain citation to the authority which supports the proposed conclusion. The citation shall contain citation to the appropriate page(s) within the cited authority (pinpoint citation). Source material shall be listed immediately after each proposition sought to be supported so that the relation between a proposition and its source is clear. All propositions must be supported by some authority. Authority from the Fifth Circuit shall be provided when available.

(4) For clarity, each proposed finding of fact and conclusion of law shall be separately numbered.

(5) Each party shall file proposed conclusions of law which correspond to the proposed findings of fact.

At the discretion of the Court, the parties may be directed to submit additional findings of fact and conclusions of law after the trial.

12. The probable length of trial is ____ days.

13. All motions in limine which the parties desire to present, and objection thereto, will be filed with the Clerk by seven days prior to trial. The following motions in limine are pending:

[Specify.]

14. List all unusual matters which might merit a pretrial conference:

[For example: Does either party request bifurcation or have other suggestions for shortening or simplifying trial? If so, please explain.]

15. A list of questions each party desires the Court to ask prospective jurors on voir dire examination is attached hereto.

16. State whether the parties are willing to enter into an agreement with reference to the disqualification of jurors.

17. The following party requests an award of attorney's fees based on the reasons as stated below:

[Each party requesting an award of attorney's fees shall specify (1) against which party or parties the award is sought, (2) the statutory authorization or other authority for such an award and, (3) whether determination of (a) entitlement to and (b) amount of the requested award are questions for the jury or judge to decide. If these are jury questions, the parties shall state whether they can stipulate to reservation of these questions for submission to the Court after trial.]

18. This matter is related to the following matter(s) pending in this court or another state or federal court, including Bankruptcy Court, or a matter(s) previously resolved by this or another court:

[Specify.]

19. A Guardian Ad Litem, administrator, or executor is necessary because:

[The parties should advise the Court as to the necessity for or validity of appointment of guardian ad litem, administrator or executor.]

20. List conflict of laws questions, if any.

21. A copy of any statute or regulation not found in the United States Code, Code of Federal Regulations, or Vernon's Texas Statutes is attached hereto.

APPROVED:

_____ _____

(Signature) Date

Attorney for Plaintiff

_____

_____

_____

(Attorney's name, address, bar card number, and telephone number)

_____ _____

(Signature) Date

Attorney for Defendant

_____

_____

_____

(Attorney's name, address, bar card number, and telephone number)

[Proposed pretrial order must be signed by all parties.]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO. _____
	§	
DEFENDANT.	§	
	§	

STIPULATION FOR JURY LESS THAN SIX
BUT NOT LESS THAN FIVE

The parties herein stipulate that if, in the opinion of the Court, one of the jurors, after being selected to serve, becomes disqualified, incapacitated, or is otherwise unable or unqualified to serve at any stage of the trial, the trial may, nevertheless, continue with the remaining five jurors.

SIGNED this ____ day of _____, 19___.

_____
Attorney for Plaintiff(s)

_____
Attorney for Defendant(s)

APPROVED:

_____
FRED BIERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO. _____
	§	
DEFENDANT.	§	
	§	

_____ EXHIBITS

Exhibit	Description	Date Admitted
1	_____	_____
2	_____	_____
3	_____	_____
4	_____	_____
5	_____	_____
6	_____	_____
7	_____	_____
8	_____	_____
9	_____	_____
10	_____	_____
11	_____	_____
12	_____	_____