

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: MOTOR FUEL TEMPERATURE)	
SALES PRACTICES LITIGATION)	
)	MDL No. 1840
(This Document Relates to All Cases))	
)	Case No. 07-MD-1840-KHV/JPO
_____)	

SCHEDULING ORDER NO. 1

On August 28, 2007, the Court held its initial scheduling conference with counsel in this multidistrict litigation (“MDL”) proceeding. The conference convened in accordance with Fed. R. Civ. P. 16(b), the Court’s preliminary order dated July 24, 2007 on practice and procedure upon transfer pursuant to 28 U.S.C. § 1407(a) (“Practice and Procedure Order No. 1”) (doc. 2), and the suggested procedures outlined in Section 11.21 et seq. of the *Manual for Complex Litigation - Fourth* (Fed. Judicial Ctr. 2004) (“MCL 4th”). The Honorable Kathryn H. Vratil, U.S. District Judge, and the undersigned James P. O’Hara, U.S. Magistrate Judge, conducted the conference. Pursuant to Practice and Procedure Order No. 1, counsel met on August 14, 2007 and submitted competing written proposals for pretrial scheduling. The Court has duly considered those submissions, as well as the statements of counsel¹ during the scheduling conference.

¹ The Court’s sign-in sheet indicates that 86 attorneys attended the scheduling conference. The only attorneys who addressed the Court on plaintiffs’ behalf were Norman E. Siegel and Thomas V. Bender, both of whom practice in Kansas City and whom plaintiffs designated as their interim liaison counsel for the limited purpose of the initial scheduling
(continued...)

In consideration of the foregoing,

IT IS HEREBY ORDERED:

1. Plaintiffs have indicated their need for both Liaison Counsel² and Lead Counsel.³ Despite preliminary discussions, plaintiffs have not yet not reached any

¹(...continued)
conference. The only attorneys who addressed the Court on defendants' behalf on any substantive issues were Martin M. Loring (of Kansas City) and Donald B. Craven (of Washington, D.C.)

² The Court uses the term "Liaison Counsel," consistent with Judge Vratil's order dated August 29, 2007 (doc. 131) and the definition in MCL 4th (§ 10.221 at 24), as counsel responsible to:

- (a) maintain and distribute to co-counsel and to defendants' Liaison Counsel an up-to-date service list;
- (b) receive and, as appropriate, distribute to co-counsel orders from the Court and documents from opposing parties and counsel;
- (c) except such documents as may be available at a document depository, maintain and make available to co-counsel at reasonable hours a complete file of all documents served by or upon each party; and
- (d) establish and maintain a document depository if appropriate.

³ The Court uses the term "Lead Counsel," consistent with Judge Vratil's order dated August 29, 2007 (doc. 131) and the definition in MCL 4th (§ 10.221 at 25), as counsel generally responsible for coordinating the activities of plaintiffs during pretrial proceedings. Lead Counsel shall:

- (a) after such consultation with co-counsel as may be appropriate, determine and present to the Court and opposing parties (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) the position of the plaintiffs on all matters arising during pretrial proceedings;
- (b) coordinate the initiation and conduct of discovery on behalf of plaintiffs consistent with the requirements of Fed. R. Civ. P. 26(b)(1), 26(b)(2), and 26(g), including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in depositions;
- (c) conduct settlement negotiations on behalf of plaintiffs, but not enter binding agreements except to the extent expressly authorized;

(continued...)

agreements on these matters. As addressed in Judge Vratil's separate order on this issue dated August 29, 2007 (doc. 131), all motions for such appointments, whether agreed or contested, shall be filed by **September 4, 2007**. No responsive briefs shall be permitted. Judge Vratil expects to rule on these motions by **September 11, 2007**.

2. Without objection by any party, by separate order, Martin M. Loring of Blackwell Sanders, LLP, is appointed Liaison Counsel for all defendants. During the scheduling conference, Mr. Loring reported that despite certain divergent interests, defendants have established a steering committee which is efficiently coordinating the work of various subcommittees. Defendants therefore do not feel any need to appoint Lead Counsel. Accordingly, the Court declines to appoint Lead Counsel for defendants at this

³(...continued)

- (d) delegate specific tasks to other counsel or committees of counsel, as authorized by the Court, in a manner to ensure that pretrial preparation for the plaintiffs is conducted efficiently and effectively;
- (e) enter into stipulations with opposing counsel as necessary for the conduct of the litigation;
- (f) prepare and distribute periodic status reports to the parties;
- (g) maintain adequate time and disbursement records covering services as lead counsel;
- (h) monitor the activities of co-counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; and
- (i) perform such other duties as may be incidental to proper coordination of plaintiffs' pretrial activities or authorized by further order of the Court.

Counsel for plaintiffs who disagree with Lead Counsel or those acting on behalf of Lead Counsel, or who have individual or divergent positions, may present written and oral arguments, conduct examinations of deponents, and otherwise act separately on behalf of their clients as appropriate, provided that in doing so they do not repeat arguments, questions or actions of Lead Counsel.

time.

3. Solely as an MDL administrative and procedural tool designed to narrow the predominant legal issues common to the underlying cases, plaintiffs (acting by and through their appointed Lead Counsel) shall file a consolidated amended complaint by **October 5, 2007**. The consolidated amended complaint shall not supercede any pleading in the constituent cases in the MDL proceeding.

4. By **October 19, 2007**, defendants shall file a consolidated motion to dismiss the consolidated amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). This motion shall be confined to arguments that the consolidated amended complaint fails to state any claim upon which relief can be granted.⁴ The brief in opposition to this motion shall be filed by **November 19, 2007**, and any reply brief shall be filed by **December 5, 2007**. The arguments and authorities section of briefs or memoranda submitted in connection with this motion (and all further motions or other pretrial matters) shall not exceed 30 pages, absent Court order. No extensions of this briefing schedule will be granted absent a showing of truly exceptional circumstances.

5. On **January 11, 2008, at 9:30 a.m. (C.S.T.)**, in the Special Proceedings

⁴ In the written submissions in connection with the scheduling conference, defendants' Liaison Counsel assert that *some* defendants do not sell motor fuel at retail in the geographic region impacted by this case, and that the claims against these defendants should be dismissed for lack of standing and (in turn) lack of subject matter jurisdiction. Notwithstanding Fed. R. Civ. P. 12(g) (consolidation of defenses in motions to dismiss), these issues shall not be presented in the motion to dismiss due on October 19, 2007. No defendant shall be deemed to have waived any such defense in this regard, as these issues will be addressed by the Court (if necessary) after the Rule 12(b)(6) rulings.

Courtroom (Room 655) of the Robert J. Dole United States Courthouse, 500 State Avenue, Kansas City, Kansas, Judge Vratil will hear oral argument on the above-described Rule 12(b)(6) motion to dismiss. Judge Vratil expects to decide that motion within weeks (not months) of oral argument.

6. If Judge Vratil denies the motion to dismiss in whole or in part, within 11 calendar days of that ruling plaintiffs' Lead Counsel and defendants' Liaison Counsel shall meet and confer pursuant to Fed. R. Civ. P. 26(f), and submit their discovery and case management planning meeting report via email to Judge O'Hara. Judge O'Hara expects to arrange a scheduling conference with counsel within days (not weeks) after receipt of this report from counsel.

7. If Judge Vratil denies the motion to dismiss in whole or in part, plaintiffs may immediately serve interrogatories on any or all defendants under Fed. R. Civ. P. 33. These interrogatories shall be no more numerous (or broader in scope) than the draft set which plaintiffs' designated interim liaison counsel provided the Court during the scheduling conference on August 28, 2007. That is, this discovery shall be specifically limited to the previously mentioned assertion by some defendants that they do not sell motor fuel at retail in the geographic region impacted by this case, and that the claims against them should be dismissed for lack of standing and (in turn) lack of subject matter jurisdiction. The deadline for serving all responses (including any objections) to this limited discovery is shortened to 11 days.

8. All other formal discovery, including but not limited to the parties' obligation

to serve initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1), is stayed until after counsel have conducted the above-described Rule 26(f) meeting. Despite this stay of discovery, parties are *strongly* encouraged to voluntarily exchange information on one specific issue: defendants' assertion that some of them do not sell motor fuel at retail in the geographic region impacted by this case. The Court believes this exchange of information, whether it takes the form of sworn interrogatory answers⁵ or otherwise, probably would serve to narrow the scope of the consolidated amended complaint and allow some defendants to be dismissed without the needless expense of further litigation.

9. Despite the above-described stay of discovery, by **September 18, 2007**, plaintiffs' Lead Counsel and defendants' Liaison Counsel shall meet and confer and submit to Judge O'Hara via email a proposed order concerning the parties' suggested procedures for the retention and storage of documents, including but not limited to a protocol for handling electronically stored information. In the hopefully unlikely event the parties are unable to agree upon such a proposed order, the parties shall promptly confer with Judge O'Hara at that time and establish procedures for resolution of the areas of disagreement. The Court's intent here is to put in place procedures *now* that will serve to avoid disputes *later* about destruction of documents in the event the motion to dismiss the consolidated amended

⁵ During the scheduling conference, counsel provided draft interrogatories which plaintiffs have suggested all defendants answer. Judge O'Hara has reviewed this draft and believes that although it may cast an unnecessarily broad net, it at least provides a reasonable general framework for the sort of information which hopefully can be exchanged before the consolidated amended complaint is filed.

complaint ultimately is denied.

10. The 90-day deadline in D. Kan. Rule 23.1(b) for plaintiffs to file class certification motions is extended indefinitely until further order of the Court.

11. Absent a showing of compelling hardship, all counsel in this MDL proceeding shall register with the Court's CM/ECF system by **September 7, 2007**. Filing through the Court's CM/ECF system shall be deemed effective service on all parties.

12. This order, and any subsequent scheduling orders of the Court, shall apply to all cases consolidated in this MDL docket, including any tag-along cases or other cases transferred to this Court after the date of this order.

Dated this 30th day of August, 2007 at Kansas City, Kansas.

s/James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge