

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**IN RE: EpiPen (Epinephrine
Injection, USP) Marketing,
Sales Practices and Antitrust
Litigation**

MDL No: 2785

Case No. 17-md-2785-DDC-TJJ

(This Document Applies to All Cases)

SCHEDULING ORDER NO. 2

After considering the parties' submissions and guided by the mandate of Fed. R. Civ. P. 1 for the just, speedy, and inexpensive determination of this MDL, the court enters this Scheduling Order No. 2.

17-md-2785-DDC-TJJ IN RE: EPIPEN SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
If necessary, motion to review plaintiff fact sheet proposals	November 10, 2017
Produce documents identified in R. 26 initial disclosures	December 5, 2017
Motion to dismiss consolidated amended complaint filed	December 15, 2017
Status report identifying issues for January 22 Status Conference submitted by email	January 15, 2018
Plaintiffs produce plaintiff fact sheets	January 16, 2018
Response to motion to dismiss filed	January 19, 2018
Telephone Status Conference Dial 888-363-4749 and enter Access Code 8354715	January 22, 2018 at 1:30pm
Reply in support of motion to dismiss filed	February 16, 2018
Completion of coordinated fact discovery	October 31, 2018
Class certification motion filed with all supporting evidence, including expert disclosures (report required)	November 16, 2018
<i>Sanofi</i> remand motion filed and parties must submit merits experts disclosure/report deadlines for <i>Sanofi</i> case	November 30, 2018
Documents previously produced by parties shall be deemed authenticated except for those objected to by this date; any documents produced thereafter are authenticated unless objected to within 10 days of production	November 30, 2018
Defendants' response to Plaintiffs' motion for class certification with all documentary and affidavits supporting evidence, including expert disclosures (report required)	February 4, 2019
Plaintiffs' reply brief in support of motion for class certification due, including rebuttal expert disclosures, if any	March 11, 2019
Merits experts disclosed by plaintiffs (report required)	March 29, 2019
Hearing on class certification	April 24, 2019 at 9:00 am
Merits experts disclosed by defendants (report required)	May 10, 2019
Merits rebuttal experts disclosed (report required)	June 10, 2019
Supplementation of disclosures	Per Rule and 40 days before deadline for completion of coordinated fact discovery for disclosure for claims and defenses in the <i>Sanofi</i> case and before

	completion of merits discovery for all other cases
Completion of class merits discovery	July 31, 2019
Final pretrial conference	August 2019
Dispositive motion and <i>Daubert</i> motion deadline in class case	August 23, 2019
Dispositive motion and <i>Daubert</i> motion response deadline	October 4, 2019
Dispositive motion and <i>Daubert</i> motion reply deadline	October 25, 2019
Trial	July 2020

1) Discovery.

a) The parties are reminded that, although Rule 26(a)(1) is keyed to disclosure of information that the disclosing party “may use to support its claims or defenses, unless solely for impeachment,” the advisory committee notes to the 2000 amendments to that rule make it clear that this also requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. In addition to other sanctions that may be applicable, a party who without substantial justification fails to disclose information required by Fed. R. Civ. P. 26(a) or Fed. R. Civ. P. 26(e)(1) is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. See Fed. R. Civ. P. 37(c)(1).

b) Copies of the various items described in the parties’ respective Rule 26(a)(1) disclosures shall be exchanged or made available for inspection and copying by **December 5, 2017**.

c) Supplementations of those disclosures under Fed. R. Civ. P. 26(e) must be served throughout the case at such times and under such circumstances as required by that rule. In addition, final supplemental disclosures must be served in any event: (a) for disclosure of

witnesses and exhibits for use on claims and defenses in the *Sanofi* case, 40 days before the deadline for completion of coordinated fact discovery; and (b) for disclosure of witnesses and exhibits for use on claims and defenses in all other cases, 40 days before the deadline for completion of merits discovery. The supplemental disclosures served 40 days before the deadline for completion of all discovery must identify all witnesses and exhibits that probably or even might be used at trial. The opposing party and counsel should be placed in a realistic position to make judgments about whether to take a particular deposition or pursue follow-up “written” discovery before the time allowed for discovery expires. Should anything be included in the final disclosures under [Fed. R. Civ. P. 26\(a\)\(3\)](#) that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto, the witness likely will be excluded from offering any testimony under [Fed. R. Civ. P. 37\(c\)\(1\)](#) or the exhibit likely will be excluded.

d) All coordinated fact discovery must be commenced or served in time to be completed by **October 31, 2018**.

e) All discovery on the merits in the class case must be commenced or served in time to be completed by **July 31, 2019**.

f) Under the December 1, 2015 amendments to the Federal Rules of Civil Procedure, the court reminds the parties and counsel that they are entitled to obtain pretrial discovery regarding any non-privileged matter *provided* it is (a) relevant to a party’s claim or defense, AND (b) proportional to the needs of this case. Under [Fed. R. Civ. P. 26\(b\)\(1\)](#), whether any particular discovery is proportional is to be determined by considering, to the extent they apply, the following six factors: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties’ relative access to relevant information, (4) the parties’ resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of

the proposed discovery outweighs its likely benefit.

g) Expert disclosures on class certification issues required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, will be served by the times set forth in Section 2b regarding class certification briefing and include:

i. All expert disclosures will include on CD or DVD all supporting documents and material relied on by the expert for his or her opinion except that bates-numbered discovery documents may be referenced by bates number in lieu of production.

ii. All expert designations will also provide three dates within the following 30 days when the expert can be deposed, with one date to be selected by opposing counsel.

h) Expert disclosures for the class case on the merits required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, will be served by plaintiffs no later than **March 29, 2019**; by Defendants no later than **May 10, 2019**; and rebuttal experts no later than **June 10, 2019**. All shall include:

i. Expert disclosures will include on CD or DVD all supporting documents and material relied on by the expert for his or her opinion except that bates-numbered discovery documents may be referenced by bates number in lieu of production.

ii. Expert designations will also provide three dates within the following 30 days when the expert can be deposed, with one date to be selected by opposing counsel.

i) The parties must serve any objections to such expert disclosures (other than

objections pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law), within 14 days after service of the disclosures. These objections should be confined to technical objections about the sufficiency of the written expert disclosures (e.g., whether all of the information required by Rule 26(a)(2)(B) has been provided) and should not extend to the admissibility of the expert's proposed testimony. If such technical objections are served, counsel must confer or make a reasonable effort to confer consistent with D. Kan. Rule 37.2 before filing any motion based on those objections.

j) Motions to compel compliance with D. Kan. Rules 37.1 and 37.2 must be filed and served within 30 days of the default or service of the response, answer, or objection which is the subject of the motion, unless the time for filing such a motion is extended for good cause shown. Otherwise, the objection to the default, response, answer, or objection will be deemed waived. *See* D. Kan. Rule 37.1(b).

k) Pursuant to Fed. R. Civ. P. 16(a), an interim discovery status conference is scheduled for **January 22, 2018 at 1:30 p.m.** before District Judge Crabtree and Magistrate Judge James. Counsel and any pro se parties should call 888-363-4749 and enter Access Code 8354715 to join the conference. A week prior to the interim status conference, **January 15, 2018**, the parties must each submit an interim status report (not exceeding 2 pages in length) setting forth any discovery issues, disputes, objections, or concerns. The reports should be sent via email to ksd_crabtree_chambers@ksd.uscourts.gov and ksd_james_chambers@ksd.uscourts.gov.

l) Documents previously produced by parties shall be deemed authenticated except as to those objected to by **November 30, 2018**. Any objection to authenticity in whole or part of a document or thing must have a good faith factual and legal basis. Objection as to a part of a

document or thing does not affect the authenticity of the remainder.

m) The court has stayed deposition discovery until further order.

n) The expense and delay often associated with civil litigation can be dramatically reduced if the parties and counsel conduct discovery in the “just, speedy, and inexpensive” manner mandated by Fed. R. Civ. P. 1. Accordingly, the parties are respectfully reminded that this court plans to strictly enforce the certification requirements of Fed. R. Civ. P. 26(g). Among other things, Rule 26(g)(1) provides that, by signing a discovery request, response, or objection, it’s certified as (i) consistent with the applicable rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. If a certification violates these restrictions without substantial justification, under Rule 26(g)(3), the court *must* impose an appropriate sanction on the responsible attorney or party, or both; the sanction *may* include an order to pay the reasonable expenses, including attorney fees, caused by the violation. Therefore, *before* the parties and counsel serve any discovery requests, responses, or objections in this case, lest they incur sanctions later, the court *strongly* suggests that they carefully review the excellent discussion of Rule 26(g) found in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

o) By **January 16, 2018**, class plaintiffs must serve plaintiff fact sheets, providing detailed information using a standard form about which the parties’ lead counsel must meet and confer. If the parties fail to reach agreement on the form of the plaintiff fact sheets, then by

November 10, 2017, they must jointly file a motion, limited to three pages of text, asking Judge James to review their competing proposals. The parties must concomitantly file their respective proposed plaintiff fact sheets, indicating areas of disagreement by redline, accompanied by separate supporting briefs limited to five pages of text, setting forth their respective positions. The parties shall also submit their proposed plaintiff fact sheets in Word format by email to ksd_james_chambers@ksd.uscourts.gov.

2) Motions.

a) The parties anticipate a motion to dismiss the consolidated amended class complaint will be filed in this case. Provided that such defenses have been timely preserved, any motions to dismiss asserting lack of personal jurisdiction, improper venue, insufficient process or service of process, failure to state a claim upon which relief can be granted, or the propriety of the parties, must be filed by **December 15, 2017**. Plaintiffs' response to the motion to dismiss must be filed by **January 19, 2018**. Defendants' reply in support of their motion to dismiss must be filed by **February 16, 2018**.

b) Any motion for class certification, filed with all affidavit and documentary supporting evidence, including expert disclosures (report required) must be filed by **November 16, 2018**. Defendants' response to Plaintiffs' motion for class certification with all documentary and affidavit supporting evidence, including expert disclosures (report required) must be filed by **February 4, 2019**. Plaintiffs' reply brief in support of motion for class certification due, including rebuttal expert disclosures, if any, must be filed by **March 11, 2019**. Judge Crabtree will hold a hearing on the class certification motion on **April 24, 2019, at 9:00 AM**. The hearing will be in the Kansas City courthouse in a courtroom to be determined.

c) Any motion suggesting remand of the *Sanofi* case to the transferor court must be filed by **November 30, 2018**. *Sanofi* plaintiffs and defendants shall also file, by **November 30, 2018**, their proposals for merits expert disclosure deadlines and management while any remand motion is pending.

d) All other potentially dispositive motions (e.g., motions for summary judgment) in the class case must be filed by **August 23, 2019**. Responses shall be filed by **October 4, 2019**. Replies shall be filed by **October 25, 2019**.

e) Compliance with [Fed. R. Civ. P. 56](#) and [D. Kan. Rule 56.1](#) is mandatory, i.e., summary-judgment briefs that fail to comply with these rules may be rejected, resulting in summary denial of a motion or consideration of a properly supported motion as uncontested. Further, the court strongly encourages the parties to explore submission of motions on stipulated facts and agreement resolving legal issues that are not subject to a good faith dispute. The parties should follow the summary-judgment guidelines available on the court's website:

<http://www.ksd.uscourts.gov/summary-judgment/>

f) All motions to exclude testimony of expert witnesses pursuant to [Fed. R. Evid. 702-705](#), *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, [509 U.S. 579](#) (1993), *Kumho Tire Co. v. Carmichael*, [526 U.S. 137](#) (1999), or similar case law, must be filed by **August 23, 2019**.

Responses shall be filed by **October 4, 2019**. Replies shall be filed by **October 25, 2019**.

g) If issues remain unresolved after the parties have complied with the “meet and confer” requirements applicable to discovery-related motions under [Fed. R. Civ. P. 37\(a\)\(1\)](#) and [D. Kan. Rule 37.2](#), the parties and counsel are strongly encouraged to consider emailing the chambers of the undersigned magistrate judge to request a discovery conference before filing such a motion. For purposes of complying with the “meet and confer” requirements, the court

construes the term “confer” to require more than mere e-mail communication. The parties, in person and/or through counsel, shall have verbal communications with each other; that is, they must actually talk with each other, preferably in person but otherwise by phone, about their discovery disputes.

h) To avoid the filing of unnecessary motions, the court encourages the parties to utilize stipulations about discovery procedures or deadlines. However, this authority does not apply to extensions of time that interfere with the deadlines to complete all discovery, for the briefing or hearing of a motion, or for trial. *See* [Fed. R. Civ. P. 29](#); [D. Kan. Rule 6.1\(a\)](#). Nor does this authority apply to modifying the requirements of [Fed. R. Civ. P. 26\(a\)\(2\)](#) concerning experts’ reports. *See* [D. Kan. Rule 26.4\(c\)](#).

i) The arguments and authorities section of briefs or memoranda submitted must not exceed 30 pages, absent an order of the court.

3) Pretrial Conference, Trial, and Other Matters.

a) At the appropriate time, the court will set a precise date in **August 2019** to hold the Final Pretrial Conference.

b) At the appropriate time, the court will set a precise date in **July 2020** to commence trial. Trial will be held in Kansas City, Kansas.

c) This scheduling order and all of the court’s subsequent orders, and likewise all discovery conducted in this MDL, will apply to all cases later consolidated in the MDL docket, unless a party shows good cause to the contrary. Any party challenging application of one or more orders to a later-consolidated case shall file a motion and supporting brief within 14 days after the docketing of that case in this court. The court does not intend to revisit issues that already have been decided just because a newly added party disagrees with the court’s reasoning or

result. But the court would entertain motions filed under this show-cause provision if a newly added party demonstrates why its case deserves different treatment. If such a motion is filed, any response must be filed within 14 days and any reply must be filed within 14 days of the filing of any response.

d) This court, like the Kansas Supreme Court, has formally adopted the Kansas Bar Association's *Pillars of Professionalism* (2012) as aspirational goals to guide lawyers in their pursuit of civility, professionalism, and service to the public. Counsel are expected to familiarize themselves with the *Pillars of Professionalism* and conduct themselves accordingly when litigating cases in this court. The *Pillars of Professionalism* are available on this court's website:

<http://www.ksd.uscourts.gov/pillars-of-professionalism/>

This scheduling order will not be modified except by leave of court upon a showing of good cause.

IT IS SO ORDERED.

Dated October 19, 2017, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
U.S. District Judge

s/ Teresa J. James
Teresa J. James
U.S. Magistrate Judge