

JAMES F. HYLAND, J.S.C.
SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION; VICINAGE 8 – MIDDLESEX
56 PATERSON STREET, P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-0964

IN RE TAXOTERE LITIGATION

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MIDDLESEX
COUNTY**

CASE TYPE: MCL NO. 628

MASTER DOCKET NO.:

MID-L-4998-18-CM

**CIVIL ACTION
IN RE TAXOTERE LITIGATION**

ORDER

This matter having come before the Court upon application from counsel for Defendants, for an Order to bar the Plaintiffs from filing a Third Amended Master Long Form Complaint containing new language defining Plaintiffs' alleged injury, and the Court having reviewed the letter briefs submitted by the parties and arguments during Case Management Conferences, and for good cause having been shown;

IT IS on this 22 day of January, 2021;

ORDERED that Plaintiffs' Third Amended Master Complaint may be filed; and it is further

ORDERED that Defendants shall file their Answer within thirty (30) days from the date of this Order; and it is further

ORDERED that Defendants may serve Plaintiffs with an additional set of interrogatories, to be limited to no more than fifteen (15) questions, pertaining to the changes in definition of Plaintiffs' injury contained in the Third Amended Master Complaint; and it is further

ORDERED that a copy of this Order shall be posted online by the Court and shall constitute service upon all parties.

/s/ James F. Hyland

Hon. James F. Hyland, J.S.C.

(X) OPPOSED

FILED

JANUARY 22 ,2021

HON. JAMES F. HYLAND, J.S.C.

SEE STATEMENT OF REASONS ATTACHED

**PURSUANT TO R. 1:6-2(f) THE COURT PROVIDES THE FOLLOWING
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Before the Court is a dispute between the Plaintiffs and Sanofi Defendants regarding the language used in Plaintiff's Third Amended Long Form Complaint to define Plaintiffs' injuries in this multi-county litigation ("MCL").

A. The Parties' Arguments

Defendants argue that the new language in Plaintiffs' amendment should be stricken as it has no basis or support in the medical or scientific literature, and that Plaintiffs' new definition is ambiguous, indefinite, and unworkable. Further, the Defendants argue that the amendment will result in prejudice to them along with the need to conduct additional discovery. Also, Defendants argue that the multi-district litigation ("MDL") Judge in Louisiana disallowed a similar amendment, and that this Court should follow suit. However, in the event the Court allows the amendment, Defendants assert that they should be permitted to serve written discovery on the group of Plaintiffs alleging their injuries occurred more than six months after the completion of chemotherapy.

In reply, Plaintiffs first assert that Defendants' objection is procedurally improper, as no motion was ever filed requesting the relief sought, and further, that this amendment was filed prior to any responsive pleading ever being served, and therefore this Court is without authority to circumvent Plaintiffs' amendment. Additionally, Plaintiffs argue that this MCL litigation is in its infancy, and the MDL Judge disallowed the similar amendment proposed in the MDL due to the advanced stage of litigation. Lastly, Plaintiffs argue that Defendants should not be permitted to serve additional case specific discovery as any discovery Defendants would require has already been provided by way of Plaintiffs' Fact Sheets and Plaintiffs' Short Form Complaints.

B. The Disputed Language in Plaintiffs' Third Amended Long Form Complaint

By way of background, in October 2018, Plaintiffs' counsel filed an initial Long-Form Complaint in this case. That Complaint mentioned select medical literature which described permanent hair loss following chemotherapy treatment as "incomplete hair regrowth six months beyond the date of completion of chemotherapy." Now, Plaintiff's position is that the state of science of Permanent Chemotherapy Induced Alopecia ("PCIA") has progressed; the scientific community's consensus is that there is no bright-line, six-month deadline by which hair loss is considered to be permanent. Accordingly, Plaintiffs' Third Amended Master Long Form Complaint seeks to change the definition of Plaintiffs' injuries to extend the period of time in which hair loss may be considered permanent from six (6) months to sometime between twelve (12) and twenty-four (24) months. While Defendants argue that Plaintiff's amendment has no basis in the scientific

community, Plaintiff asserts that there is in fact extensive factual support for the allegations.¹

C. Amending Pleadings

New Jersey Court Rules permit parties to amend their pleadings either as a matter of course or with leave of Court, depending on the circumstances. Under R. 4:9-1, a party may “amend a pleading as *a matter of course* at any time before a responsive pleading is served....” Here, Plaintiffs’ vehemently argue that their Third Amended Complaint was filed before any responsive pleading had ever been served by Defendants. Defendants do not provide the Court with any case law or legal support for how the Court could contravene this Rule. In fact, the Defendants do not address this argument at all in their letters.²

Plaintiffs filed this amendment prior to a responsive pleading being served, as such, Plaintiffs had the right to do so without any Court intervention.

Even if Defendants had filed a responsive pleading prior to Plaintiffs’ amendment, which they did not, R. 4:9-1 requires that motions for leave to amend be granted liberally, “in the interest of justice”. In fact, Courts generally only disallow amendments under two circumstances: (1) when the non-moving party will be prejudiced; and (2) when granting the amendment would be futile. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006).

D. The Court’s Analysis

First, Defendants do not argue specifically that the amendment would be *futile*, but rather, Defendant argues that the statute of limitations has lapsed. Specifically, Defendants state that under the discovery rule, “the accrual of a cause of action is delayed, in appropriate circumstances, until the injured party *actually* discovers, or by *the reasonable exercise of reasonable diligence and intelligence* have discovered, that he may have a basis for an actionable claim.” Yarchak v. Trek Bicycle Corp., 208 F. Supp. 2d 470, 479 (D.N.K. 2002).

¹ Plaintiffs’ Letter Brief filed on February 6, 2020, contains Defendants’ paid expert report which indicates that there is no “universal or authoritative clinical definition of this condition.” She mentioned that she used the term “irreversible alopecia” specifically to refer to hair loss that persists for *at least* six months after the cessation of chemotherapy without subsequent resolution. Also, Plaintiffs’ Letter Brief includes studies from 2018 onward which Plaintiff asserts makes the amendment to the definition of injuries appropriate. The studies indicate language such as “long term hair loss” is not specifically defined but a median follow up was 5 years. (Pls. Letter Brief, at pg. 4). Further, there is a study indicating that “persistent” alopecia is defined as occurring at or after 18 months of chemotherapy. *Id.* Plaintiff provides additional studies which define persistent alopecia as occurring within 6 months or more; 10 months or more; 3 years or more after chemotherapy, etc. *Id.*

² Defendants never filed a Motion seeking for the Court to strike the new language defining Plaintiffs’ injuries in the Third Amended Master Long Form Complaint; rather, the Defendants filed letters with the Court and added this issue to the January 23, 2020 CMC Proposed Agenda.

In reply, Plaintiffs argue that when each individual Plaintiff's injury occurred and/or manifested does not trigger the statute of limitations in these cases. Plaintiffs already timely filed their lawsuit after suspecting that Taxotere caused their PCIA. Plaintiffs assert that they were prevented from discovering this information at an earlier date because: (1) Defendants misrepresented to the public, the FDA, and the medical profession that Taxotere is free from permanent side effects; (2) Defendants failed to disclose to the public, the FDA, and the medical profession their knowledge of the risk of permanent side effects; and (3) Defendants fraudulently concealed facts and information that could have led Plaintiffs to discover the cause of their hair's failure to regrow.

This Court agrees with Plaintiff and respectfully finds that Plaintiffs could not have "actually known" that there was an actionable claim against Sanofi Defendants, nor could they have known with "reasonable exercise of reasonable diligence or intelligence" that there was a basis for an actionable claim, because Plaintiffs relied on Defendants' representations as well as the representations of the FDA, which at the time, indicated that no permanent side effects occurred from the use of Taxotere. No amount of diligence would have revealed an actionable claim when the scientific community itself was unaware or unwilling to accept the fact that there were permanent side effects associated with Taxotere.

Accordingly, permitting the amendment is not futile as the statute of limitations are not triggered by amending the language defining Plaintiffs' injuries

Lastly, Defendants argue that they will be prejudiced if the Court allows Plaintiffs' amendment. Specifically, Defendants argue that additional discovery will be necessary to determine when each individual Plaintiff's injury occurred or manifested. Likewise, Defendants argue that the MDL Judge disallowed MDL Plaintiffs' amendment based on the need for additional discovery.

In reply, Plaintiff asserts that Defendants are incorrect and that any information Defendants would need to discover the above has already been provided in the Short Form Complaint and Plaintiff Fact Sheet.³ Additionally, Plaintiff asserts that Defendants will have more opportunities to discover this information, including at individual Plaintiff's depositions.

This Court agrees that additional discovery, at least extensive additional discovery, will likely not be required as a result of permitting this amendment. Defendants have information available to them from Plaintiffs' Short Form Complaint and the Plaintiff Fact Sheet detailing when each Plaintiff's injury manifested or occurred. This is the exact information Defendants argue will be additionally necessary. However, the Court will permit Defendant to serve written discovery on the group of Plaintiffs who allege their

³ For example, Short Form Complaint Paragraph 11 requires each Plaintiff to provide the nature and extent of their alleged injury, including duration, approximate date of onset, and description of injury. Also, Section VI of Plaintiff Fact Sheet asks numerous questions pertaining to the Plaintiff's injuries. Question 5 specifically asks Plaintiff's to state the dates between which they experienced the alleged injury.

respective injuries occurred more than six months after the completion of chemotherapy based on Defendants' assertion that this is necessary due to the fact that the Plaintiff Fact Sheet presumes that all Plaintiffs' injuries occurred six months after the completion of chemotherapy due to the initial definition of the alleged injury.

Lastly, Defendants argue that the MDL Judge in Louisiana disallowed Plaintiffs' amendment in the Taxotere MDL, and that this Court should do so as well. Plaintiff's note that the MDL Judge's Opinion for why she did not allow the amendment is based on the fact that the MDL litigation is well underway. There has already been a first bellwether trial, and discovery on a second bellwether trial is complete. Because discovery in the MDL is advanced, the Court was concerned that Defendants would want to revise certain expert reports and conduct supplemental depositions, and that certain rulings from the Court would be rendered moot. Here, in contrast, the litigation is in its infancy. The bellwether process has just been established, and no depositions have been taken yet.

In light of the foregoing, the Plaintiff's amendment to the Third Master Long Form Complaint is permitted. Defendants may serve additional interrogatories upon the group of Plaintiffs who will be affected by the change in the Third Amended Long Form Complaint in accordance with this Court's Order.