

LAW OFFICES

COHEN, PLACITELLA & ROTH

A PENNSYLVANIA PROFESSIONAL CORPORATION

127 MAPLE AVENUE

RED BANK, NEW JERSEY 07701

(732) 747-9003

FAX (732) 747-9004

www.cprlaw.com

PHILADELPHIA, PA
LEMOYNE, PA
BALA CYNWYD, PA
PITTSBURGH, PA
CHERRY HILL, NJ



CHRISTOPHER M. PLACITELLA
MANAGING NJ ATTORNEY

June 13, 2017

Via ECF filing

The Honorable Joseph A. Dickson
United States Magistrate Judge
U.S. District Court, District of New Jersey
U.S. Courthouse Court Room: MLK 2D
50 Walnut Street
Newark, NJ 07101

RE: ***Williams v. BASF Catalysts, LLC, et al. – No. 2:11-cv-01754***

Plaintiffs' Objections to Order Establishing and Appointing Special Master, Dkt. 319.

Dear Judge Dickson:

On behalf of Class Action Plaintiffs we thank the Court for allowing us the opportunity to raise any objections or questions to the Court's June 7, 2017 Order appointing a Special Discovery Master ("SDM") under Fed. R. Civ. P. 53, Dkt. # 319 ("**Special Master Order**"). Having reviewed the Special Master Order, Plaintiffs ask that the Court modify and clarify the Special Master Order as set forth below.

Objection No. 1 – Going to scope of the reference: The cornerstone of discovery here is whether discovery of Plaintiffs' causes of action are limited as directed by the Third Circuit Court of Appeals¹ or should be substantially enlarged as BASF insists to permit detailed discovery into the merits of the thousands of cases that ended decades ago.² This critical question should be determined by an Article III judge as a matter of law and should not be referred for a preliminary determination to a Special Master. This gateway legal issue has been extensively briefed by both sides because it lies at the heart of virtually every discovery dispute before the Court and the Court's ruling will have a profound effect on the future course of this case.

¹ *Williams v. BASF Catalysts LLC*, 765 F.3d 306, 311, 315, 321–322, 327–328 (3d Cir. 2014). See also *Rosenblit v. Zimmerman*, 166 N.J. 391, 406–08, 766 A.2d 749, 757–758 (2001); *Tartaglia v. UBS PaineWebber Inc.*, 197 N.J. 81, 120–122, 961 A.2d 1167, 1189–90 (2008).

² As a further complicating matter, scope of discovery is also a central legal issue in the disputes before the Court concerning third party law firms who represented plaintiffs and/or class members in thousands of asbestos personal injury matters that have been subpoenaed regarding their past clients. This interrelated scope issue should likewise should be decided by this Court.

Honorable Joseph A. Dickson

June 13, 2017

Page 2

Although a Special Master can implement the Court's rulings in resolving specific issues of document production, discovery objections and the like, fundamental issues of law such as this scope issue must be decided by this Court.

Case law applying Rule 53, governing the appointment of Special Masters, recognizes that there is a firm dividing line between juridical tasks (for the Court to decide) and complex case management tasks, which a Special Master can administer and address by implementing the law as determined by the Court. In the context of a hotly contested matter such as this case, having a clear rule of law established by the Court for the SDM to follow is crucial to the successful completion of discovery. As Judge Chesler opined in *Agostino v. Quest Diagnostics, Inc.*, No. 04-4362 (SRC), 2012 U.S. Dist. LEXIS 85431, at *2-4 (D.N.J. June 20, 2012):

The governing rule as well as Third Circuit jurisprudence make clear that appointment of a special master must be limited in scope and is not justified simply because of docket congestion or the complexity of factual and/or legal issues. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957); *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 991 F.2d 1080, 1086-87 (3d Cir. 1993). In *La Buy*, the Supreme Court "noted that while masters could 'aid judges' in the performance of specific duties, they could not be permitted to 'displace the court.'" *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 441 (quoting *La Buy*, 352 U.S. at 256). The Third Circuit has cautioned that the mere voluminous nature of a task does not make it appropriate for reference to a special master, particularly in light of the availability of assistance from magistrate judges in handling all manner of pre-trial matters and motion practice. See *Prudential Ins. Co. of Am.*, 991 F.2d at 1087.... For the following reasons, the Court finds that the circumstances of this action and the work required to decide Plaintiffs' motion for attorneys' fees constitute both exceptional circumstances and present the need for a difficult and detailed accounting.

Accord Luppino v. Mercedes Benz USA, LLC, No. 09-05582 (DMC) (JAD), 2013 U.S. Dist. LEXIS 130228, at *12 (D.N.J. Sep. 11, 2013) (appointing special master to handle discrete tasks of (i) overseeing limited discovery on class certification; and (ii) making recommendations as to appropriateness of document confidentiality designations that receiving party disputed upon court's specific finding that, among other things, such limited assignments did not create a situation in which the court would be essentially displaced by the special master).

Referring the core dispute over the scope of discovery to the SDM to determine in the first instance improperly displaces the Court in a key matter. This legal issue is not a determination that involves examining numerous transactions or large volumes of discovery materials at issue like the *Agostino* and *Luppino* cases. Rather, it is a central and defining issue in this case. Its determination will shape not only the discovery permitted in this case, but the shape

Honorable Joseph A. Dickson

June 13, 2017

Page 3

of the entire litigation to come as well. The fundamental and core nature of this issue makes it one that an Article III judge should determine.³

There is also a time and cost factor on whether to refer the scope issue to the SDM or reserve it to the Court to decide. Its importance and the parties' sharp disagreement over the issue make it almost certain that whichever side finds itself disappointed by the SDM's ruling will appeal. Such will be a *de novo* appeal and all the time, energy and resources put into deciding it at the SDM level would be for naught. *See* F.R.C.P. 53(f)(4) (requiring court to decide *de novo* all objections to conclusions of law made or recommended by a master). In light of this, and in the interest of moving the case along in a timely and efficient manner, Plaintiffs respectfully request that the Order be amended to reserve for the Court the scope of discovery issue.

Objection No. 2 – Going to expense considerations. Rule 53(a)(3) requires that a court consider the fairness of imposing Special Master expenses on the parties in determining whether to appoint a Special Master. Plaintiffs have several interrelated issues relating to the SDM's compensation:

(A) *Special Master Compensation Rate.* We recognize and respect the fact that the SDM should be fairly compensated. As this Court is aware, \$900 an hour is at the highest end of New Jersey legal billing rates. And while this rate is not out of line for alternative dispute resolution ("ADR") services, especially for someone of Judge Brown's experience, ability and stature, the appropriate and reasonable rate calculus applicable and prevalent to the ADR area, where parties voluntarily agree to enter, is dramatically different from that which should be applied when and where a court *sua sponte* orders that a Special Master be employed in a complex and contentious litigation matter. Indeed, the expense burden of employing a Special Master is one reason why the Federal Rules provide the parties with the right to be heard prior to the appointment of a Special Master and to nominate candidates for appointment. F.R.C.P. 52(b)(1).

Although billing rates are a delicate subject, Plaintiffs are obliged to raise their concerns about the compensation rate given the history and contentious nature of this case. Counsel for BASF and Plaintiffs already have substantial experience with Special Masters in other pending fraudulent concealment litigation. In the related New Jersey Superior Court *Sampson* case both sets of counsel spent many days spread over two years appearing in person and by phone before retired Justice Gary S. Stein on just the crime-fraud exception issue alone. In this case it is entirely foreseeable, in light of the zealous advocacy positions taken by Defendants thus far in terms of very extensive briefs, reply briefs, sur-reply briefs and so on, and their intention to subpoena the closed files of thousands of absent class members located in numerous states, that the expense involved in compensating a Special Master in this matter will become prohibitive unless the Court decides the scope of discovery issues first and provides, as discussed below, clearer direction concerning how the SDM's costs will be shared among the parties.

³ It is foreseeable that additional core legal issues may arise during discovery which one or more of the parties and/or the SDM feel should be determined by the Court in the first instance. If and when this situation occurs, the parties and/or SDM at that time obviously can seek the Court's guidance on who should decide such legal issue in the first instance.

Honorable Joseph A. Dickson

June 13, 2017

Page 4

(B) *Application to third parties.* Section II of the Order is silent about if, and if so, how, the compensation provisions apply to third parties who have been subpoenaed in this case, such as the Rothenberg, Bevan and Early law firms and the Johnson and Johnson Company. Each of these non-parties has raised a substantial number of weighty objections concerning, among other things, document requests in the subpoenas *duces tecum* served upon them, which the Order refers to the SDM for disposition. As two of the third parties are the Representative Plaintiffs' asbestos lawyers who were subpoenaed by BASF because they handled the cases that were fraudulently dismissed, Plaintiffs believe they have standing to object to the extent it imposes fees upon the third parties. If Defendants would have their way, the SDM may be forced to review the closed files of thousands of absent class members and make privilege determinations concerning communications between absent class members and their lawyers. We refer the Court here to the objections filed by the Rothenberg law firm in relation to the subpoena served upon it, in which this issue is raised. *See* Dkt. Nos. 229.

(C) *Calculating pro rata shares.* Although the Court's Order does not address allocation directly, we suggest the following for the Court's consideration: That (1) BASF, (2) Cahill Gordon, (3) the Individual and Class of Plaintiffs, and (4) all other Defendants be responsible for separate equal shares. That is, that each group 1 through 4 be assigned a one-quarter ($\frac{1}{4}$) responsibility for the SDM's costs and expenses. Looking critically at the discovery needs and obligations of each party, allocating fees and expenses along these lines balances the discovery demands of the respective parties on the SDM.

Appeals Deadline. While not an objection *per se*, we note an ambiguity, and request that the Order be clarified, as to the time deadlines for appeals from the SDM's decision. It is not certain from the Special Discovery Order's text whether the deadline is the 14 days provided for appeals to the District Court from non-dispositive Magistrate Judge's orders under Local Rule 70.1(c)(1) or the 21 days provided in Rule 53(f)(2) for appeals from special master orders, findings or recommendations.

We thank the Court for its attention and consideration of these requests.

Respectfully Submitted,

/s/ Christopher M. Placitella
Christopher M. Placitella
Attorney for Plaintiffs

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cc: All Counsel of Record via ECF