

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

**IN RE: PROTON-PUMP
INHIBITOR PRODUCTS
LIABILITY LITIGATION**

**2:17-MD-2789 (CCC)(MF)
(MDL 2789)
and all member and related cases**

Judge Claire C. Cecchi

**This Document Relates to:
ALL ACTIONS**

**CASE MANAGEMENT ORDER NO. 51
("Stage 2" Cases Evidence of Product Use)**

In furtherance of the effective and efficient case management of this litigation, the following Case Management Order is issued regarding "Stage 2" cases. On February 5, 2018, the Court entered Case Management Order ("CMO") No. 9, ECF 119, setting forth the criteria by which Plaintiffs' claims would be categorized as "Stage 1" or "Stage 2." Pursuant to CMO No. 9, in order for a Plaintiff's claim as to a specific Defendant to be categorized as a Stage 1 Claim, Plaintiff was required to produce a "record (in addition to the PFS, and consisting of more than just a declaration or affidavit by the Plaintiff) indicating that he or she used at least one of that Defendant's PPI products." *See* CMO 9 at III. To the extent such a record was not produced as to a specific Defendant(s), Plaintiff's claims as to that Defendant were deemed Stage 2 Claims. *Id.* Cases with multiple Defendants could be a Stage 1 Case with respect to one Defendant but a Stage 2 Case as to another Defendant(s) ("Mixed Stage 1 / Stage 2 Case"). *Id.* Only Stage 1 Cases were eligible to proceed

to any further case-specific discovery pursuant to subsequent CMOs. Stage 2 Cases or Mixed Stage 1 / Stage 2 Cases, however, were not eligible for further case-specific discovery. *Id.*

For some Plaintiffs who allegedly ingested one or more PPI products, there may be no record in existence sufficient to recategorize the case from a Stage 2 Case to a Stage 1 Case. Where no record, such as a physician prescription or pharmacy record, is available, some Plaintiffs have submitted affidavits or sworn declarations to support their alleged use of Defendant(s)' products. Pursuant to CMO No. 9, however, an affidavit or sworn declaration, by itself, is not sufficient for a case to become a Stage 1 Case. Such cases thus reside in a suspended state; pending indefinitely on the docket without a clear path forward.

From discussions with the Parties, Defendants appear to have taken the position that if a case is not able to produce a record as contemplated in CMO No. 9 as to a specific Defendant, that case is not only ineligible for further case-specific discovery, but should also be dismissed as to that Defendant. Plaintiffs disagree. Put another way, the core of the issue is whether an affidavit or sworn declaration by a Plaintiff attesting to product use (in the absence of other record evidence) is sufficient to defeat a Rule 56 motion for summary judgment.

To resolve this issue, which likely affects at least several hundred cases, the Parties are ordered to submit briefing regarding their relative positions to Special

Master Reisman within 30 days of entry of this Order. Each Defendant shall submit a separate submission rather than one joint defense submission. The Parties' briefs should be filed on the MDL docket and emailed to ppispecialmaster@rkgattorneys.com. In their briefs, the Parties should specifically address the following questions:

1. Fed. Rule Civ. Pro. 56(c)(1) specifically contemplates affidavits or declarations may be used to assert that a fact is or is not genuinely disputed.¹ According to Third Circuit law, when is an affidavit or declaration of product use (in the absence of other record evidence) sufficient to defeat a Rule 56 motion for summary judgment? In what circumstances is an affidavit or declaration of product use (in the absence of other record evidence) insufficient to defeat such a motion?

2. Are there or have there been other mass torts involving prescription or over-the-counter ("OTC") medications (whether in the Third Circuit or from other Circuit Courts) where the court specifically addressed the sufficiency / insufficiency of a plaintiff affidavit or declaration in establishing product use (in the absence of other record evidence)? If so, describe the court's analysis.

¹ "A Party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations..., admissions, interrogatory answers, or other materials..." Fed. Rule Civ. Pro. 56(c)(1)(A).

3. Do courts analyze the sufficiency of an affidavit or declaration to establish product use (in the absence of other record evidence) differently depending on whether the case involves a prescription vs. OTC drug? Or is the analysis the same regardless of whether the drug at issue is a prescription medication or OTC?

4. If the individual who allegedly ingested the drug is deceased such that a case is being brought by heirs of the deceased or on behalf of the deceased's estate, and there is no independent record evidence of drug ingestion, would an affidavit or declaration from a surviving family member attesting that the deceased ingested the drug be sufficient to defeat a Rule 56 motion? Under what circumstances would such affidavit or declaration be sufficient or insufficient to defeat a Rule 56 motion?

The format of the Parties' briefs shall comply with Local Civil Rule 7.2. Special Master Reisman will issue an order following her review of the Parties' submissions.

SO ORDERED

SIGNED 2nd day of September, 2021.



ELLEN K. REISMAN
Special Master