

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**In Re: TAXOTERE (DOCETAXEL)
PRODUCTS LIABILITY LITIGATION**

MDL NO. 2740

SECTION “H” (5)

**THIS DOCUMENT RELATES TO
ALL CASES**

PRETRIAL ORDER NO. 97

(Enforcement of Subpoenas Issued to Nonparties Located Outside of this District)

The Judicial Panel on Multidistrict Litigation (“JPML”) issued an order on October 4, 2016, pursuant to 28 U.S.C. §1407, coordinating and consolidating pretrial proceedings in the Eastern District of Louisiana as *In Re: Taxotere (Docetaxel) Products Liability Litigation*, MDL 2740. Plaintiffs generally allege that the Defendant manufacturers of Taxotere (docetaxel) failed to warn of permanent hair loss in women who used certain chemotherapy drugs during their breast cancer treatment. As of June 2019, more than 11,000 cases have been centralized in the Eastern District of Louisiana either by direct filing into this Court or via JPML transfer from districts throughout the country.

As part of its coordinated or consolidated handling of pretrial proceedings in the matter, the MDL court has required that each Plaintiff in the MDL complete a Plaintiff Fact Sheet that requires, among other things, the identification of the particular Taxotere/docetaxel/docefrez (“docetaxel”) product infused and the production of records to identify the manufacturer of the docetaxel product infused.

To promote uniformity and consistency in procedures related to the identification of the product infused and the production of records identifying the manufacturer, and recognizing the importance of determining manufacturer identification, the MDL Court entered Case Management Order No. 12A, which sets forth a step-by-step process to be taken by each Plaintiff to discover

the manufacturer of the product. Paragraph 5 of CMO No. 12A provides that in the event all other methods fail for securing product identification information, “Plaintiff shall issue a subpoena requiring the infusion facility to release Product ID Information.” The Order further provides that “[i]f the infusion facility fails to comply with the subpoena, the Court shall take appropriate action including a Show Cause Order and/or setting a hearing on a motion to compel.”

A uniform process is needed to promote efficiency and consistency in the enforcement of subpoenas issued pursuant to paragraph 5 of CMO No. 12A. Since these subpoenas are issued out of the Eastern District of Louisiana, Rule 37 (a)(2) requires that a motion for an order to compel discovery against a nonparty must be brought “in the court where the discovery is or will be made.” Rule 45(c) provides more specific geographic limitations on where compliance can be compelled on the entity subject to the subpoena. However, Rule 45(f) provides that the court where compliance is required may transfer proceedings related to the enforcement of the subpoena if the person subpoenaed consents or if the court finds “exceptional circumstances.” The Court also interprets Rule 45(f) to provide efficiency to the nonparty insofar as the nonparty’s attorney may file papers and appear in response to the enforcement pleadings as an officer of the issuing court (i.e., the Eastern District of Louisiana) without the need for local counsel or a *pro hac vice* application, as long as that attorney is authorized to practice in the court where compliance is required.

CONSIDERING THE FOREGOING:

IT IS ORDERED that any MDL Plaintiff seeking transfer to this Court of motions to enforce, quash or modify subpoenas properly issued out of this Court and served pursuant to Rule 45, but where compliance is required elsewhere, shall follow the procedures set forth herein:

- 1) Before filing a motion to compel compliance, Plaintiff shall make diligent efforts to engage in a meet-and-confer with counsel for the nonparty to which they have issued a subpoena pursuant to CMO No. 12A, ¶5;
- 2) Before filing a motion to compel compliance, Plaintiff shall also request that the nonparty agree in writing to submit to the jurisdiction of the Eastern District of Louisiana to resolve disputed issues regarding the subpoena through the letter briefing process set forth in CMO No. 9, ¶IV, whereby such matters are briefed and resolved by Magistrate Judge North, subject to the ordinary manner of appellate review under Fed. R. Civ. P. 72;
- 3) If the conferral under paragraph (1) of this Order is unsuccessful and/or the nonparty does not agree to the voluntary adjudication by this Court of the subpoena under paragraph (2) of this Order within twenty-one (21) days of the request by Plaintiff for the nonparty to submit to the jurisdiction of the Eastern District of Louisiana, the Plaintiff shall file a miscellaneous proceeding in the District Court where compliance of the nonparty is required per Fed. R. Civ. P. 45(c);
- 4) Within thirty (30) days of a case number being opened in the District Court where compliance is required, Plaintiff shall file the appropriate pleadings to seek enforcement of the subpoena;
- 5) Any Plaintiff seeking this Court's adjudication of the dispute is encouraged to use the exemplar pleadings prepared by the PSC and attached hereto as Exhibit A ("Exemplar Motion and Memorandum in Support of Motion to Enforce Subpoena and to Compel the Deposition of and/or Production of Documents from []") and Exhibit B ("Exemplar Motion to Transfer Motion to Enforce Subpoena and to Compel the Deposition of

and/or Production of Documents from []”) to seek transfer of the enforcement of the subpoena to this Court pursuant to Fed. R. Civ. Proc. 45(f);

- 6) Any Plaintiff seeking transfer of the enforcement proceedings to this Court is encouraged to attach my letter addressed to the District Court where compliance is required, which is appended as Exhibit C to this Order.

New Orleans, Louisiana, this 11th day of July, 2019.

A handwritten signature in black ink, appearing to read "Jane Triche Milazzo", is written over a horizontal line.

HON. JANE TRICHE MILAZZO
UNITED STATES DISTRICT JUDGE

EXHIBIT A

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

IN RE:

SUBPOENA UPON _____

CIVIL ACTION NO.

Related cases pending in the Eastern District of Louisiana: In Re: Taxotere (Docetaxel) Products Liability Litigation, MDL Case No.____ and individual Case No. _____

MOTION TO ENFORCE DEPOSITION SUBPOENA AND TO COMPEL THE DEPOSITION AND PRODUCTION OF DOCUMENTS OF _____

NOW INTO COURT, through undersigned counsel, comes _____ (“_____”), who, for the reasons set forth in the accompanying Memorandum, respectfully moves this Honorable Court to enforce a deposition subpoena and document request properly issued to, and served upon, _____, issued from *In Re: Taxotere (Docetaxel) Products Liability Litigation*, MDL 2740 currently pending in the Eastern District of Louisiana, and to compel its appearance and production of documents at a deposition on _____.

Dated: _____, 2019

Respectfully submitted,

RULE 37 CERTIFICATE

Counsel for Plaintiff has confirmed that he has, in good faith, attempted to confer with counsel for _____ in an effort to secure the deposition and document production of _____, without court action. Counsel for _____ has informed counsel for Plaintiff that the requested third party will not voluntarily appear for its deposition or produce documents which were subpoenaed in the related proceedings. Accordingly, counsel has been left with no choice but to file this Motion to Enforce and to Compel the Deposition and Production of Documents of _____ with this Court in connection with the deposition subpoena and document request issued out of this matter styled *In Re: Taxotere (Docetaxel) Products Liability Litigation*, MDL 2740 currently pending in New Orleans, Louisiana.

Dated: _____, 2019

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that on _____ 2019, a copy of the above and foregoing has been filed electronically with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record. A copy of the above and foregoing will be sent to the parties in the related litigation pending before the Eastern District of Louisiana either by CM/ECF or by email.

UNITED STATES DISTRICT COURT

_____DISTRICT OF _____

IN RE:

SUBPOENA UPON _____

CIVIL ACTION NO.

Related cases pending in the Eastern District of Louisiana: In Re: Taxotere (Docetaxel) Products Liability Litigation, MDL Case No. ____ and individual Case No. _____

**MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE DEPOSITION
SUBPOENA AND TO COMPEL THE DEPOSITION AND PRODUCTION OF
DOCUMENTS OF _____**

MAY IT PLEASE THE COURT:

Plaintiff, _____, respectfully requests this Court to enforce a deposition subpoena and document request properly issued to, and served upon _____, issued from MDL 2740, *In re: Taxotere (Docetaxel) Products Liability Litigation* currently pending in the Eastern District of Louisiana and to compel its appearance at a deposition at a place and time ordered by this Court.

I. FACTUAL BACKGROUND

The Judicial Panel on Multidistrict Litigation issued an order on October 4, 2016, pursuant to 28 U.S.C. §1407, coordinating and consolidating pretrial proceedings in *In Re: Taxotere (Docetaxel) Products Liability Litigation*, MDL 2740, in the Eastern District of Louisiana which litigation concerns alleged permanent hair loss in women who used certain chemotherapy drugs during their breast cancer treatment. As of June 2019, the Honorable Jane Triche Milazzo presides over more than 11,000 cases centralized before the Eastern District of

Louisiana for which suits have either been filed directly into that Court or have been transferred to that Court from districts throughout the country.

From the very inception of the Taxotere/docetaxel litigation, issues have persisted regarding product and manufacturer identification, which issues have made it difficult for plaintiffs, like the Plaintiff herein, to identify the manufacturers of the chemotherapy products with which they were infused during their breast cancer chemotherapy treatment. As part of its coordinated or consolidated handling of pretrial proceedings in the matter, the MDL court has required that each Plaintiff in the MDL complete a Plaintiff Fact Sheet, which requires, among other things, the identification of the particular Taxotere/docetaxel/docefrez (“docetaxel”) product administered to the Plaintiff and the production of records to identify the manufacturer of the docetaxel product infused.

To promote uniformity and consistency in procedures related to the identification of the product infused and the production of records identifying the manufacturer, and recognizing the importance of determining manufacturer identification, the MDL Court entered Case Management Order No. 12A,¹ which provides a uniform procedure for each Plaintiff to discover the manufacturer of the product. Paragraph 5 of CMO No. 12A provides that in the event all other methods fail for securing product identification information, “Plaintiff shall issue a subpoena requiring the infusion facility to release Product ID Information.” The Order further provides that “[i]f the infusion facility fails to comply with the subpoena, the Court shall take appropriate action including a Show Cause Order and/or setting a hearing on a motion to compel.”

Plaintiff now finds herself in the position contemplated by paragraph 5 of CMO No. 12A, and has served a subpoena upon _____, which _____ has refused to honor. Since the

¹ Available at <http://www.laed.uscourts.gov/sites/default/files/taxotere/Case%20Management%20Order%2012A.pdf>

subpoena has been issued out of the Eastern District of Louisiana, Rule 37 (a)(2) requires that a motion for an order to compel discovery against a nonparty must be brought “in the court where the discovery is or will be made.” However, Rule 45(f) provides that the court where discovery is or will be made may transfer a subpoena-relation motion to the court which issued the subpoena if the person subpoenaed consents or if the court finds “exceptional circumstances.” Contemporaneous with the filing of this Motion, Plaintiff will be filing a Motion to Transfer this matter for hearing before the Eastern District of Louisiana based upon the existence of “exceptional circumstances.”

Attached as Exhibit A is a letter from the Honorable Jane Triche Milazzo agreeing to hear the enforcement motion in MDL 2740 should the court agree to the transfer. Should this court agree to the transfer, the MDL will hear the motion telephonically in order to accommodate the third party within this jurisdiction.

II. LAW AND ARGUMENT

Pursuant to Rule 26(b)(1), “[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense.” Additionally, “a party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2).” Rule 30(a)(1). Further, Rule 45 provides the framework for securing from non-parties, through the use of subpoenas, testimony, documents, electronically stored information, and tangible things relevant to a pending litigation. The deposition subpoena must be issued from the court where the action is pending. Rule 45(a)(2). However, a motion to compel discovery from “a nonparty must be made in the court where the discovery is or will take place.” Rule 37(a)(2). “Where a non-party has been properly served with a subpoena for a deposition, the non-party is required to either object to the subpoena or attend. If the non-party does neither,

the non-party may be held in contempt.” *Tranchant v. Envtl. Monitoring Serv., Inc.*, 2001 WL 1160864, at *1 (E.D. La. Oct. 2, 2001).

On _____, a deposition subpoena to appear and produce documents was issued out of the Eastern District of Louisiana in this matter to be served on non-party witness _____ for its deposition in _____ on _____. Despite being properly served, _____ has failed to appear for its deposition or to produce the requested documents and the instant motion to enforce the deposition is properly before this Court.

As the identification of the particular Taxotere/docetaxel/docefrez (“docetaxel”) product infused and the production of records to identify the manufacturer of the docetaxel product infused is absolutely critical to Plaintiff’s ability to maintain its claim in this litigation, this Court, or the MDL court if the Motion is transferred, should grant this Motion to Enforce and order that the deposition of _____ take place on the _____ day of ____ in _____ and that _____ produce all of the documents sought pursuant to the properly issued and served subpoena.

Dated: _____, 2019

Respectfully submitted,

EXHIBIT B

UNITED STATES DISTRICT COURT

_____DISTRICT OF _____

IN RE:

SUBPOENA UPON _____

CIVIL ACTION NO.

Related cases pending in the Eastern District of Louisiana: In Re: Taxotere (Docetaxel) Products Liability Litigation, MDL 2740 Case No. ____ and individual Case No. _____

MOTION AND INCORPORATED MEMORANDUM TO TRANSFER MOTION TO ENFORCE SUBPOENA AND TO COMPEL DEPOSITION AND PRODUCTION OF DOCUMENTS TO THE EASTERN DISTRICT OF LOUISIANA IN MDL 2740

Plaintiff, _____, appearing herein through undersigned counsel, respectfully submits this Motion to Transfer to the United States District Court for the Eastern District of Louisiana its Motion to Enforce the deposition subpoena and document request issued out of the United States District Court for the Eastern District of Louisiana in MDL 2740 captioned *In re: Taxotere (Docetaxel) Products Liability Litigation*, Case No. 16-2740, and related Case No. _____.

On _____, Plaintiff issued a deposition subpoena out of the Eastern District of Louisiana commanding _____ to appear on _____ at _____ and to produce documents relating to Plaintiff's infusion of chemotherapy drugs. Despite proper service of the subpoena, _____ failed to appear at the designated time and place and as _____ is domiciled in this District, Plaintiff was required to file its Motion to Enforce with this Court, and it did so. *See* Fed. R. Civ. P. 37(a)(2) (requiring that a "motion for an order to a nonparty must be made in the court where the discovery is or will be taken."). However, under

certain circumstances, a motion to enforce may be transferred to the issuing court as Rule 45(f) provides:

When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds *exceptional circumstances*. (emphasis added).

Although _____ has refused to consent to a transfer to the Eastern District of Louisiana, the existence of “exceptional circumstances” of the existence of the pending MDL 2740 warrants the transfer of this motion to the Eastern District of Louisiana.

As explained in its Order to facilitate transfer to the Eastern District of Louisiana, issued on _____ in *In re: Taxotere (Docetaxel) Products Liability Litigation*, MDL No. 2740, pursuant to 28 U.S.C. §1407, the Judicial Panel on Multidistrict Litigation tasked the MDL court with handling of coordinated or consolidated pretrial proceedings in the more than 11,000 cases centralized before the court., 28 U.S.C. §1407(b) authorizes an MDL Court to “exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions” in the MDL proceedings. The Honorable Jane Triche Milazzo, the Judge overseeing the MDL, and Magistrate Judge Michael B. North are willing to adjudicate subpoena-related enforcement motions to insure uniformity of discovery rulings on subpoena-related issues, and will seek to minimize any burdens on respondent and its counsel by holding hearings by telephone and is in the best position to adjudicate any subpoena-related issues. *See* Exhibit A attached hereto, Judge Jane Triche Milazzo’s letter confirming same.

WHEREFORE, Plaintiff respectfully requests that after due consideration this Honorable Court grant this Motion to Transfer pursuant to Rule 45(f) of the Federal Rules of Civil Procedure and that Plaintiff’s Motion to Enforce the subpoena served upon _____ be transferred to MDL 2740 in the United States District Court for the Eastern District of Louisiana

for hearing and adjudication. A proposed order granting the instant Motion is attached hereto as Exhibit B for the Court's convenience.

Dated: _____, 2019

Respectfully submitted,

UNITED STATES DISTRICT COURT

_____ **DISTRICT OF** _____

IN RE:

SUBPOENA UPON _____

CIVIL ACTION NO.

Related cases pending in the Eastern District of Louisiana: In Re: Taxotere (Docetaxel) Products Liability Litigation, MDL 2740 Case No. ____ and individual Case No. _____

[PROPOSED] ORDER

Considering the foregoing Motion to Transfer Motion to Enforce Subpoena and to Compel Deposition and Production of Document to the Eastern District of Louisiana, and upon this Court's determination that exceptional circumstances exist to warrant the transfer of this action to the Eastern District of Louisiana in MDL 2740,

IT IS ORDERED that the above captioned matter is hereby transferred to the Eastern District of Louisiana, Section "H(5)" for adjudication of the plaintiff's motion for enforcement of the subpoena pursuant to Federal Rule of Civil Procedure 45(f).

_____, _____ this ___ day of _____, ____.

UNITED STATES MAGISTRATE JUDGE

EXHIBIT C

United States District Court

Eastern District of Louisiana
500 Poydras Street
New Orleans, Louisiana 70130



Chambers of
Jane Triche Milazzo

Your Honor,

The Judicial Panel on Multidistrict Litigation ("JPML") centralized all cases involving product liability claims concerning the drug Taxotere (Docetaxel) as Multidistrict Litigation No. 2740, *In Re: Taxotere (Docetaxel) Products Liability Litigation* in the Eastern District of Louisiana. The JPML assigned this MDL to me as transferee Judge. Currently, the MDL 2740 docket has over 11,000 cases. Magistrate Judge Michael North presides over discovery matters.

Case Management Order No. 12A establishes a procedure for the parties to obtain documentation from Plaintiffs' medical facilities to identify the particular Defendant or Defendants whose products were administered to the Plaintiff during the chemotherapy treatment. CMO 12A authorizes each individual Plaintiff to issue a subpoena pursuant to FRCP 45 to the facility or other entity which may possess the information. CMO 12A also provides that the Court may take appropriate action including issuing a Show Cause Order and/or setting a hearing on a Motion to Compel should the facility fail to provide the information requested.

Rule 45 provides that the place of compliance for a subpoena for a deposition is within 100 miles of where the person or entity resides. The party seeking to enforce the subpoena must file a Miscellaneous Action in the appropriate District Court i.e., in Your Honor's District. Since one of the primary goals of an MDL is the efficient coordination of pretrial proceedings to reduce the possibility of inconsistent rulings, I write this letter to advise that the MDL is willing to handle the enforcement of any such subpoena associated with a Notice of Deposition, should any District Judge or Magistrate Judge be inclined to transfer the matter to the MDL. Magistrate Judge North recently handled enforcement issues related to a non-party subpoena issued in Washington, including allowing the person subpoenaed to conduct the hearing via telephonic conference.

Magistrate Judge North and I welcome the opportunity to accept transfer of any enforcement action related to any subpoena originating from the MDL. If you have any questions or concerns, please contact my chambers (efile-milazzo@laed.uscourts.gov) and/or Magistrate Judge North's chambers (efile-north@laed.uscourts.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Milazzo", is written over the typed name.

Jane Triche Milazzo