

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET SCHMERLING and : CIVIL ACTION  
MORTON SCHMERLING :  
 :  
v. :  
 :  
DANEK MEDICAL, INC., et al. : NO. 96-2749

MEMORANDUM ORDER

Plaintiffs have advised that the only defendants in the above case against which plaintiffs wish to proceed are Sofamor, S.N.C., Sofamor, Inc., Sofamor Danek Group, Inc. and Youngwood Medical Specialties, Inc. and have proposed that all other remaining defendants be dismissed "without prejudice." The court has attempted several times now to clarify the situation and to facilitate the structuring of this case in a manner consistent with plaintiffs' stated position and in a manner in which the case can effectively be resolved.

Although reflected on the face of the docket, it appears that plaintiffs are still unable to discern which of the many defendants they have named other than the four against whom they wish to proceed are in fact still parties to this action. It also appears that plaintiffs still fail to appreciate what is required to effect the dismissal without prejudice which they state they seek. In an effort to avoid further unnecessary time, effort and expenditure in the resolution of this case, the court will make a final attempt to clarify the situation as it now exists.

Shortly after five o'clock on this date, following court proceedings convened in part to facilitate the dismissal and proper structuring of this case which plaintiffs claim they wish to effect, plaintiffs submitted several stipulations of dismissal. They submitted a stipulation of dismissal of all claims against defendants Pickard and Treharne without prejudice. This stipulation is signed by counsel for the parties and would appear to effectuate the desired dismissal.

Plaintiffs also submitted a document captioned "Joint Stipulation of Voluntary Dismissal without Prejudice" calling for the dismissal without prejudice of all claims against Scientific Spinal. This stipulation is signed only by counsel for plaintiffs who advised she is in the process of obtaining the signature of defense counsel. There is no need, however, to effect the dismissal of defendant Scientific Spinal. All claims against Scientific Spinal were in fact dismissed with prejudice at plaintiffs' request on February 25, 1999 and this defendant was accordingly terminated as a party by the Clerk on that same date.

Plaintiffs have submitted a document captioned "Joint Stipulation of Voluntary Dismissal without Prejudice" calling for the dismissal without prejudice of claims against defendant Zimmer. This stipulation is signed by counsel for plaintiffs who advises she is in the process of obtaining the signature of defense counsel. There is no need, however, to effect the

dismissal of defendant Zimmer. All claims against defendant Zimmer were in fact dismissed with prejudice pursuant to a stipulation of the parties on February 18, 1999 and the Clerk accordingly terminated this defendant as a party on that date.

Plaintiffs finally submitted a document captioned "Joint Stipulation of Voluntary Dismissal without Prejudice" regarding "Synthes" calling for dismissal without prejudice "of this defendant." This document is also signed only by counsel for plaintiffs. There is in fact no defendant carried on the docket of this case named "Synthes." There are multiple defendants with Synthes as part of their names, the dismissal of none of which would be effected by this stipulation.

As the docket clearly shows and as this court endeavored to make clear by order of August 13, 1999 and at proceedings earlier on this date, Synthes (U.S.A.); Synthes, Inc.; Synthes North America, Inc.; and, Synthes, A.G. Chur remain as parties in this case. A stipulation making reference simply to "Synthes" and using the singular "this defendant" would not effect the dismissal of claims against each or any of these four defendants.

Plaintiffs have still not submitted a notice of dismissal without prejudice of claims against seven remaining named defendants which could readily be effected unilaterally by plaintiffs pursuant to Fed. R. Civ. P. 41(a)(1) since those defendants have never filed an answer or motion for summary

judgment. These defendants are Synthes, A.G. Chur; Acromed Corp. #614043; Acromed Corp. #816942; Acromed Corp. #811415; Acromed Corp. #816943; Acromed Corp. #811416; and, Groupe International Cotrel-Dubousset.

**ACCORDINGLY**, this                    day of August, 1999, **IT IS HEREBY ORDERED** that plaintiffs need not pursue the dismissal of claims against originally named defendants which in fact have already been dismissed and, consistent with counsel's repeated representations about the identity of those remaining defendants they are prepared to proceed against and those they wish to dismiss, plaintiffs shall forthwith file a notice of dismissal consistent with Fed. R. Civ. P. 41(a)(1)(i) as to Synthes, A.G. Chur; Acromed Corp. #614043; Acromed Corp. #816942; Acromed Corp. #811415; Acromed Corp. #816943; Acromed Corp. #811416; and, Groupe International Cotrel-Dubousset and a stipulation consistent with Fed. R. Civ. P. 41(a)(1)(ii) for dismissal without prejudice of the claims against Synthes (U.S.A.); Synthes, Inc.; and, Synthes North America, Inc. signed by plaintiffs' counsel and by defense counsel assuming that it remains their intent to effect such a dismissal.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**