**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **IN RE: NORTHERN OHIO MARITIME ASBESTOS LITIGATION** | ) | **Case No. 1:10-CV-00001** |
| | ) | **MARDOC ORDER 2016-21** |
| **Certain Plaintiffs** | ) | **Judge Dan Aaron Polster** |
| **v.** | ) | **OPINION AND ORDER (resolving Doc. #: 473)** |
| **United Fruit Company** | ) | |

Before the Court is Defendant United Fruit Company's ("United Fruit") Objection to, and Motion to Amend, MARDOC Order 2016-20. **(Doc. #: 473).** MARDOC Order 2016-20 sets ten maritime asbestos cases for one-week trials in November 2016, to be heard by judges to be named, on dates to be determined. The trial cases are to be chosen, five apiece by the parties, out of a pool of 341 cases. United Fruit maintains that the Order "exceeds and eviscerates" the original mandate to the undersigned judge to oversee settlement negotiations of the maritime asbestos cases, punishes United Fruit for refusing to settle, and violates United Fruit's constitutional right to counsel. United Fruit moves the Court to amend its Order to require:

(1) Selection by random draw of 10 cases wherein United Fruit is a defendant to be set for trial; and

(2) consistent with the Local Rules, assignment of each selected case to a district judge for further proceedings including a rule 16 pretrial conference, entry of a scheduling order including reasonable updated discovery, expert disclosures, pretrial conference and trial.

For the reasons that follow, United Fruit's motion is **DENIED.**

**I.**

The cases at issue here are part of this Court's maritime asbestos or MARDOC docket, which, beginning in the late 1980's, saw a large influx of asbestos exposure cases filed by merchant marines who sailed aboard commercial vessels. Such asbestos exposure claims continued to be filed against shipowners and product manufacturers throughout the 1990s and into the 2000s, and the alleged exposures in many of these cases date back to the 1950s. In the 1990s, the Judicial Panel on Multidistrict Litigation began consolidating cases pending on the MARDOC docket with cases from 87 other judicial districts and transferring them to the Eastern District of Pennsylvania as part of MDL-875.

The cases now before this Court, in which United Fruit is named as a defendant, were part of MDL-875 until late 2014, when approximately 2000 cases were remanded to this district. During that time, MDL-875 was overseen by three different judges, and the Defendants, including United Fruit, had many years to engage in fact and expert discovery and motion practice. When the cases were finally remanded to this Court, the MDL judge certified them as trial ready, meaning that discovery and motion practice was complete. Many, if not most, of the plaintiffs are now deceased.

In February 2015, Chief Judge Solomon Oliver authorized the undersigned and the recently-deceased Judge David A. Katz to oversee management of the MARDOC docket. The Court worked closely with counsel for Plaintiffs and numerous shipowners to mediate a global settlement. When the process proved unsuccessful, the Court proposed, and the parties agreed to, the selection of 26 cases for one-week bellwether trials, of which ten would ultimately be tried in March, 2016. Plaintiffs selected thirteen cases, and shipowner defendants, including United Fruit, selected thirteen. United Fruit was named as a defendant in five of the cases selected. Although the cases had been certified as trial ready, the Court permitted additional discovery. The parties engaged in extensive pretrial motion practice, presenting numerous in limine and *Daubert* challenges to named experts. United Fruit fully participated in the discovery and *Daubert* process.

Throughout this time, both Judge Katz and the undersigned continued efforts in mediating resolutions. In some cases, we resolved the entire inventory of a given shipowner, and, in other cases, just the trial cases. Ultimately, the Court mediated the resolution of all five cases against United Fruit shortly before trial. Juries were seated and trials commenced in two cases involving another shipowner, but the undersigned mediated a settlement of that shipowner's entire inventory of cases before the trials concluded.

In the weeks and months that followed, the Court engaged Plaintiffs and United Fruit in settlement discussions relating to United Fruit's remaining inventory of cases. It was made clear at the outset, and repeatedly during numerous phone conferences with Counsel, that if mediation proved unsuccessful, the Court would set cases for trial. On April 11, 2016, the Court established a protocol for resolution of the United Fruit inventory, setting deadlines for

identifying viable cases and for making demands and offers. An in-person settlement conference was set for August 11, 2016. The parties appeared before the Court on that date, but their efforts at negotiating a settlement proved unsuccessful.

On August 12, 2016, the Court issued MARDOC Order 2016-20, which established that "ten United Fruit MARDOC trials will be heard in November 2016, on dates, at times, in locations, and before district judges all to be determined." (Doc. 472 at 1). The Court ordered that by noon on August 18, 2016, Counsel were to submit to the Court a list of ten lung cancer cases to be heard in November 2016, with Plaintiffs selecting five cases, and United Fruit selecting five cases. Plaintiffs submitted their list of five cases in a timely fashion, but United Fruit has not done so. The Court further ordered that by August 31, 2016, Plaintiffs' Counsel are to submit a list of co-worker witnesses they plan to call at trial. The Court had previously ruled that to survive dismissal if plaintiff is deceased, there must be at least one co-worker testifying who worked in a similar job, on the same ship, at approximately the same time as the decedent, and who could testify about his own (the co-worker's) exposure to asbestos. It was also ordered that trial materials, including trial briefs, exhibit and witness lists, signed stipulations of fact, and joint neutral statements were to be filed by October 13, 2016. A final pretrial conference was set for Monday October 24, 2016 at 1:00 p.m.

**II.**

United Fruit now objects to MARDOC ORDER 2016-20 and moves for an amendment providing for (1) random selection of cases to be assigned to trial judges by random draw; and (2) issuance of a revised scheduling order that includes a Rule 16 conference.

United Fruit argues that by setting ten jury trials in one month, the Court is punishing United Fruit for failing to settle its inventory of cases; that United Fruit is being deprived of critical fact discovery, including the identity of witnesses; that United Fruit is being deprived of the opportunity to conduct expert discovery; and that United Fruit's constitutional right to counsel is being violated.

Setting cases for trial is not a punishment, and the Court is not punishing United Fruit or Plaintiffs. The requirement that a litigant participate at trial comes as an ordinary consequence of being named in a lawsuit. The MARDOC cases were returned to this Court with the certification that discovery and motion practice were complete, and it is the ordinary practice of this Court, after discovery and motion practice is completed, to promptly schedule trial. Both Plaintiffs and United Fruit had advance notice that the Court would promptly schedule trials if the cases were not settled on August 11.

Further, the Court's schedule will not deprive United Fruit of any discovery it needs in addition to what was discovered in MDL-875. United Fruit maintains that since the Court's order did not include provisions for discovery in advance of trial, it will not have the discovery needed to defend itself at trial. As already noted, these cases were remanded to this Court with the certification that they were trial ready. Many of the cases on the MARDOC docket are decades old, and there is no dispute that United Fruit has had every opportunity to conduct both fact and expert discovery while its cases were part of MDL-875. And there is no dispute that United Fruit has already retained general experts who have produced expert reports to be used in the previous round of trials, which the Court has every reason to believe will be used in the November trials. Plaintiffs' generic experts were all deposed earlier this year. The Court has

already decided that all *Daubert* rulings made in connection with the March, 2016 trials will be binding as to the November, 2016 trials. To the degree that additional fact or expert discovery is needed, the Court assumed, it seems erroneously, that experienced counsel would be able to reach agreement on a discovery timetable. Because it appears Counsel are not willing to even try to set a schedule for themselves, the Court will provide a discovery time table in the conclusion to this order.

United Fruit asserts that this Court should strictly abide by the Local Rules and distribute its cases randomly pursuant to L.R. 3.1(a). This Court has discretion in how it manages its docket, and allowing both Plaintiff and Defendant to choose five cases apiece from a large pool does not exceed that discretion. *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993) ("District courts unquestionably have substantial inherent power to manage their dockets."). In complex litigation such as this, this Court may use its discretion to "determine for itself how assignment of complex litigation should be made: according to the court's regular case -assignment plan, under a special rotation for complex cases, or to judges particularly qualified by reason of prior experience." Manual for Complex Litigation (Fourth Edition 2004). Given the number and age of the MARDOC cases and the burden that their ultimate disposition will place on this Court, it is within the discretion of the undersigned to assign these cases in a manner that promotes their fair and efficient resolution. The method chosen by the Court will accomplish that goal.

The Court is at a loss to see how it is unfair to United Fruit to allow the parties themselves to select the cases for trial. The Court chose the method it did to ensure that cases would be evenly divided between those likely to favor Plaintiffs and those likely to favor United Fruit. After all ten cases have been resolved, whether by jury verdict or otherwise, the parties

should have sufficient data upon which to reach a settlement of the entire inventory of United Fruit cases.

MARDOC Order 2016-20 does not infringe upon United Fruit's right to counsel. United Fruit seems to suggest that it has a constitutional right to have each and every one of its cases tried by Attorney Michael Cioffi. First, as a practical matter this is untenable. If the Court held one trial a week with Mr. Cioffi as counsel, it would take seven years before all 341 cases were tried. Again, as a matter of this Court's inherent discretion to manage its docket, the undersigned cannot reasonably allow such a course of action, particularly since these cases are already more than twenty years old. United Fruit cites numerous cases which it claims stand for the proposition that a civil litigant is constitutionally endowed with its choice of counsel. *See, e.g., Bottaro v. Hatton Associates*, 680 F.2d 895, 897 (2d Cir. 1982) ("[A]ll litigants [have] a right to select their own counsel. While the right may not be absolute, it can be overridden only where compelling reasons exist."). This Court is not preventing United Fruit from choosing counsel. United Fruit may hire any lawyer it wishes should Mr. Cioffi be unavailable to try a particular case. To the extent that United Fruit believes that it has a right to have Mr. Cioffi and Mr. Cioffi alone try each and every MARDOC case, this right is plainly overridden by the burden that exercising that right would have on Plaintiffs and this Court.

A Rule 16 case management conference is not needed in this instance. This Court has facilitated and participated in countless meetings with Counsel for Plaintiff and Counsel for United Fruit. The purpose of the Rule 16 conference has already been fulfilled, particularly given the extensive discovery and motion practice that was conducted in connection with the March, 2016 trials.

Plaintiffs have timely filed their list of cases to be tried in November. United Fruit has not. Instead, United Fruit filed the instant motion. By doing so, United Fruit is losing valuable time during which it could be preparing for trial and conducting discovery.

**III.**

For the foregoing reasons, United Fruit's motion to amend MARDOC Order 2016-20 is **DENIED**.

The Court establishes the following discovery timetable:

1. As previously ordered, Plaintiffs must identify co-worker witnesses no later than August 31, 2016.

2. The parties must designate their experts by August 31, 2016.

3. Fact and expert discovery is to be completed by September 30, 2016.

**IT IS SO ORDERED.**

***/s/ Dan Aaron Polster*** **8/19/2016**
**Dan Aaron Polster**
**United States District Judge**