UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS LIABILITY LITIGATION	:	MDL NO. 2342 12-MD-2342
THIS DOCUMENT RELATES TO ALL ACTIONS	:	HON. CYNTHIA M. RUFE

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
TO DELAY THE TRIAL UNTIL 2015

Plaintiffs respectfully submit this memorandum in opposition to Defendants' Motion to delay the case by pushing the trial date back to January 2015.

The short and plain response to Defendants' emergency motion is this: There is no emergency, as demonstrated below. An emergency is an unanticipated urgent matter, requiring urgent attention. At best, the facts underlying Pfizer's motion have been known and/or anticipated by Pfizer for months. At worst, they are the result of some intentional foot dragging. Either way, there is no emergency here, and certainly no cause to move the Court's long established and well-considered trial schedule in this MDL.

As this Court has repeatedly recognized throughout these proceedings, this Court's actions will impact Zoloft cases pending in state court. The first state court trial is currently scheduled for February 2, 2015 in the Philadelphia Court of Common Pleas. If Defendants' motion is granted, it is possible that the federal trial will be ongoing when the Philadelphia trial commences. The second state court trial begins days later on February 9, 2015 in St. Louis. If the trial in this Court is

delayed until January 2015, neither state court will have time to use or digest, to whatever degree the state courts choose, this Court's rulings and decisions. If the state courts are to benefit from this Court's experience in the first trial, that trial must be completed in time for the state courts to have the federal trial information for the state final pretrial proceedings, such as motions in limine, final pretrial conferences, and drafting jury questionnaires. Moreover, the parties should also have an opportunity to digest the results of the first bellwether before immediately diving into a series of state court trials.

State courts in both St. Louis and Pennsylvania have adjusted their schedules to allow the federal trial to be completed first, in November. Judge Rau in the Philadelphia Court of Common Pleas initially set the trial date for April 14, 2014. As a courtesy, that date was pushed back. This cannot be lightly considered, as it impacts proceedings in state jurisdictions after those jurisdictions assumed the scheduling orders in federal court would remain in place, absent urgent reasons to make a change. No such urgency has been demonstrated here. The parties are still six full months away from trial and there remains ample time for any needed discovery to be completed.

Defendants' complaint about disparity in the volume of medical records misses an important detail. As defendants generally do in mass tort cases, Defendants here selected the lesser-injured plaintiffs as their discovery pool picks. As a result, the plaintiffs selected by Defendants had less significant injuries,

requiring less treatment and fewer doctor visits. So, there are simply fewer medical records, and that should be no surprise to anyone.

Defendants also argue that some plaintiffs have identified additional providers at or just before their deposition. The Court's schedule, however, did not contemplate that Defendants could collect and dissect every piece of paper that could be relevant when making trial picks. If that was the case, the discovery process would never see an end and no trial could ever be held. [1]

Defendants have Initial and Comprehensive Fact Sheets, at least some discovery and medical records for each plaintiff and all plaintiff mothers have now been deposed. This is more than enough information to choose three cases for the trial pool and continue on the current schedule.

Defendants further justify their request by arguing that depositions of all Plaintiffs' prescribing physicians and other healthcare providers have not been completed. Plaintiffs note that prescriber depositions have not been taken in all of

[1] Discovery will never be perfect. For example, this week Pfizer noticed two treating physician depositions in the *Fox* case, Dr. Lewis and Dr. Rubino. Dr. Lewis initially did not show up for her deposition, saying she never received notice (Pfizer says this is incorrect), and agreed to be deposed the next day. When Dr. Lewis did return for her deposition, she asked if she could be sued, Pfizer's counsel replied that was an outside possibility. The doctor then declined to testify until she retained counsel.

Dr. Rubino also canceled at the last minute, saying he wanted to retain his own counsel to represent him.

The bottom line is that discovery is, of necessity, imperfect, no matter what side notices the discovery.

Plaintiffs' picks either, yet Plaintiffs are still willing and able to proceed. *See, e.g.*, the *Berg, Byington, Crabtree* and *DuBois* cases.

While Defendants are now moving to schedule depositions, this has not always been the case. When Plaintiffs first began providing dates to Defendants for depositions, it was an unsuccessful effort:

- Plaintiffs first offered Defendants deposition dates on October 7, 2013 and numerous dates thereafter. Nonetheless, Defendants proceeded at their own pace and did not accept any deposition dates until mid-December, and even then requested specific dates when it knew most plaintiffs were unavailable. *See* Letter to A.Chirls dated 12/3/2013, attached as Exhibit 1. Only two depositions were taken in December 2013. Depositions did not begin in earnest until January 2014, despite Plaintiffs' efforts to begin three months earlier.

- Defendants, in fact, asked Special Master Chirls to stop Plaintiffs from noticing doctor depositions. *See* Letter to A.Chirls dated 12/23/2013, attached as Exhibit 2.[2]

- Defendants have not accepted dates offered for prescribers and healthcare providers and instead sought dates at a more leisurely pace. *See, e.g.,* Email Exchange, attached as Exhibit 3 (Defendants requesting dates for a specific week in March 2014, then rejecting those dates multiple times and requesting later dates in April 2014). No doctor was deposed by Defendants, despite Plaintiffs' offers, until February 24, 2014.

Plaintiffs agree that prescriber deposition testimony is important, and are not suggesting that Defendants forego it. But, as discussed above, there is ample time for prescriber depositions to be taken in the three trial pool cases that each party is to select on April 30.

As to the RecordTrak "issue," it will be recalled that the removal of MRC was necessitated by MRC's conduct – Plaintiffs did not make that request lightly. Once

[2] This letter also demonstrates that Pfizer's complaints about discovery are not new.

the Court granted Plaintiffs' motion, RecordTrak stood ready to begin its work immediately, but Pfizer interfered with the orderly transition from MRC to RecordTrak from the very beginning. *See* Letter from S. Corr to K. Armstrong, attached as Exhibit 4. That interference continued for months as shown on the attached Timeline. *See* RecordTrak Timeline, attached as Exhibit 5. Every event on that Timeline, except for the initial agreement, was a Pfizer demand, and those demands slowed the transition for almost three months.

According to the Timeline produced by RecordTrak at the request of Plaintiffs' Liaison Counsel, MRC ceased record collection on January 17, 2014 in accordance with this Court's Order. On January 21, 2014, RecordTrak representatives participated in a conference call with Pfizer's counsel and Plaintiffs' Liaison Counsel to discuss the transition. A second conference call took place on January 30, 2014. As of that date, Pfizer had not yet identified a single IT person at MRC who could speak with RecordTrak about the transfer. As described above, on February 1, 2014, Plaintiffs' Liaison Counsel wrote to Pfizer's counsel to express concern about the lack of progress that had been made since the Court's Order, and voiced additional concerns about instructions that had been given to MRC with respect to the Court's Order.

Despite Plaintiffs' Liaison Counsel's suggestion that the transfer be managed solely by the IT people at MRC and RecordTrak, Pfizer delayed the transfer of responsibilities from MRC to RecordTrak by negotiating a new "Service Agreement" (January 30 – February 5, 2014), its own "Pricing Schedule" (January 30 – March 3,

2014), a "Statement of Work" (February 12 – March 14, 2014), and a "Privacy Addendum" (March 26 – April 17, 2014). The technical aspects of the transfer had been completed by February 6, 2014, after a call between the RecordTrak IT department and the MRC IT department, when the initial twenty-five discovery pool cases were transferred to RecrodTrak. Rather than spending three months negotiating a new Service Agreement, a new Pricing Schedule, a new Statement of Work and a new Privacy Addendum, Pfizer could have simply insisted upon using the same documents it had in place with MRC.

As the Timeline demonstrates, the supposed "lack of records," to the extent it even exists given the fact that Pfizer's picks are far less injured (and thus have fewer medical records) than Plaintiffs' picks, is a problem of Pfizer's own making. By first opposing the transfer to RecordTrak, and then stalling the transfer process over basic contractual terms, Pfizer's conduct can reasonably be described as deliberate foot-dragging in an effort to convince this Court to move the trial. But as the Court has made clear, its schedule cannot and should not be affected by record collection issues.

Defendants could have earlier sought to alter the schedule. Defendants could have presented their motion to this Court at any time, but instead raised it as an "emergency" on the eve of the parties' trial picks. For example, Defendants had ample opportunity to raise the schedule less than a month ago when the Court considered Plaintiffs' motion to move up the strike date, but they did not. *See In re Zoloft*, 12-md-2342, Pretrial Order No. 56 (Amending Pretrial Order Nos. 39 and 44)

(E.D. Pa. Mar. 31, 2014) (Docket No. 768). Pfizer could have anticipated and dealt with the medical record issue many months ago and moved expeditiously with RecordTrak to obtain the necessary records.

The bottom line is that Defendants have eleven cases from which to select their three trial picks. While Defendants may not have everything they might want, Defendants have what they need to make decisions. Additional discovery can follow as needed.

For the above discussed reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to modify the schedule and delay the trial until 2015.

Dated: April 29, 2014

Respectfully,

/s/ Dianne M. Nast

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