IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	MDL No. 2545 Master Docket Case No. 1:14-cv-01748 Honorable Matthew F. Kennelly
THIS DOCUMENT RELATES TO ALL CASES	

PSC'S MEMORANDUM IN OPPOSITION TO THE
MAY 4, 2015 SUBMISSION OF ABBVIE INC. AND ABBOTT LABORATORIES

The Plaintiffs' Steering Committee (the "PSC") respectfully submits this memorandum in opposition to the submission of AbbVie Inc. and Abbott Laboratories (collectively, "AbbVie"), filed on May 4, 2015 (Dkt. No. 758) in advance of the May 6, 2015 case management conference (the "AbbVie Brief").

I. PRELIMINARY STATEMENT

For several months AbbVie has been insisting, without any basis in fact, that service of the plaintiffs' fact sheets ("PFSs") has been untimely, that many of the responses have been substantively defective, and that the documents served with the PFS have been deficient. The real purpose of AbbVie's attacks on the PFS process has been a transparent attempt to unwind the bellwether trial schedule and delay, as much as possible, the pace and progress of this litigation. The AbbVie Brief is the next milestone in this months-long effort to undermine the schedule for selecting bellwether trial cases.

AbbVie's unfounded complaints about the PFSs started the same day that AbbVie's new counsel entered its appearance. The schedule for service of PFSs set forth in the original CMO No. 9 (Dkt. No. 392) was stipulated by AbbVie through its prior counsel, Winston & Strawn

LLP. On February 18, 2015, AbbVie's new counsel, Dechert LLP, entered its appearance (*see, e.g.,* Notice of Appearance of David M. Bernick, Feb. 18, 2015, Dkt. No. 649) and filed AbbVie's motion to modify CMO No. 9 (Dkt. No. 656). To avoid the expense and delay of litigating AbbVie's motion to amend CMO No. 9, the PSC agreed to a modified schedule (and other provisions) proposed by AbbVie's new counsel, which was entered as Amended CMO No. 9 on March 3, 2015 (Dkt. No. 666).

Despite reaching this new agreement only two months ago, AbbVie has repeatedly tried to attack the PFS process at the last several CMCs, as a piece of tactical gamesmanship attempting to portray a scheduling crisis that simply does not exist. (*See* Hr'g Tr. at 7:11-8:8, Feb. 20, 2014; Hr'g Tr. at 7:19-8:21, Mar. 20, 2015; Hr'g Tr. at 24:9-27:7, Apr. 21, 2015.) AbbVie now seeks further extensions of time and requests extraordinary changes to the bellwether selection process without any showing of cause. At the time Amended CMO No. 9 was entered, AbbVie represented that it would not move to amend CMO No. 14 if at least 90% of the PFSs that were due by May 8, 2015, in accordance with Amended CMO No. 9, were served by that date. As it turns out, more than 92.5% of the PFSs that were due on May 8 were served in a timely manner, but, unfortunately, AbbVie has not yet withdrawn the requests in the AbbVie Brief.[1]

Among other factual inaccuracies in the AbbVie Brief, AbbVie contends that "PFS production delays to date have greatly prejudiced AbbVie's ability to collect and analyze the data and, in consequence, are compromising the first steps of the bellwether selection process."

[1] AbbVie contends in the AbbVie brief that there were 608 AbbVie-only cases pending as of March 3, 2015 (the date Amended CMO No. 9 was entered). (AbbVie Br. at 3.) The PSC disputes that number, and believes there were 604 AbbVie-only cases pending as of March 3. As of May 8, 2015, there were 559 PFSs served in AbbVie-only cases that were pending as of March 3 (559/604, equals 92.55%). Additionally, plaintiffs served 13 PFSs that were not yet due.

(AbbVie Br. at 5.) The PSC wholeheartedly disputes that AbbVie has suffered any prejudice. Despite AbbVie's repeated assertions to the contrary, the process of producing PFSs, and the documents requested in the PFSs, is progressing efficiently and in accordance with the agreed upon Amended CMO No. 9, as the parties anticipated and in a timely manner. More importantly, even if the PFSs were untimely or materially deficient (which they are not), the relief requested in Section III of the AbbVie Brief has no logical connection to solving AbbVie's purported problem.

AbbVie spends several pages of its brief discussing three general principles of MDL mass tort practice that are generally not controversial, specifically: (i) bellwether cases should be picked from a pool of cases that are representative of the claims in the MDL (or of more distinct categories of cases that comprise the whole) (AbbVie Br. at 5; "bellwethers must be representative of the claimant pool"); and (ii) bellwether candidate cases are most helpful to the parties and the Court when detailed information is available to the parties in advance of their selection (AbbVie Br. at 6: "the value of bellwethers depends on obtaining detailed information about them"). AbbVie then makes the incoherent leap in logic to propose in Section III of the AbbVie Brief that the best method to achieve these goals is to delay the litigation schedule, limit the information available to pick bellwether candidates, and limit the pool of plaintiffs from which bellwether trial candidates will be picked to an unreasonably narrow timeframe. (AbbVie Br. at 9-10.) AbbVie's proposal would undermine the very goals it purportedly wants to achieve.

The PSC remains committed to moving this litigation forward as quickly and efficiently as possible. AbbVie's concerns about the PFS process are unfounded and should not deflect the Court's attention from the issues presented by the PSC's inability to obtain meaningful discovery

from AbbVie, which at this point is the only demonstrable obstacle to maintaining the bellwether trial schedule.

II. ARGUMENT

AbbVie's meritless complaints about the timeliness and adequacy of the PFS process are not truly about the information included in the PFS or the documents served with the PFS, or the amount of time required to collect and review medical records. Instead, AbbVie has attacked the PFS process as a tactic to delay the bellwether selection process, and, in turn, the trial dates that turn on bellwether selection.

A. The PFSs are timely.

The original CMO No. 9 provided that a plaintiff's PFS was due on or before December 29, 2014 if a case was pending on or before October 6, 2014 (the date CMO No. 9 was entered). It also provided that, if a case was pending on or after October 7, 2014, a PFS was due within 45 days after service of the last named Defendant's answer. The terms of both the PFS and CMO No. 9 were negotiated by members of the PSC and counsel for all the defendants (not just AbbVie) at arm's length with many instances of accommodation and compromise by each side on various positions, including timing issues. The original schedule was not burdensome to plaintiffs or defendants.

Under the terms of the original CMO No. 9, the timing of service of the PFSs was under AbbVie's control, as it depended on when AbbVie answered plaintiffs' complaints. It was only after AbbVie retained new counsel, and desired a master complaint and master answer, that the timing set forth in the original CMO No. 9 became problematic for AbbVie.[2] The PSC agreed to

[2] While AbbVie attempts to argue in the AbbVie Brief and in its motion to amend CMO No. 9 that service delays and deficient authorizations caused the need to amend CMO No. 9, its papers

modify CMO No. 9, and an Amended CMO No. 9 was entered on March 3, 2015, providing that a plaintiff's PFS was due on or before May 8, 2015 if the case was pending on or before March 3, 2015 (the date Amended CMO No. 9 was entered). It also provided that, if a case was pending on or after March 4, 2015, a PFS was due within 80 days after filing of the complaint or transfer to this MDL.

AbbVie contends that "a very substantial portion" (AbbVie Br. at 1) of PFSs in AbbVie-only cases are untimely, based solely on language in Section V(C) of Amended CMO No. 9, stating that plaintiffs in AbbVie-only cases "will take reasonable actions to produce to AbbVie at the earliest practicable date a PFS completed in accordance with Sections A or B above, whichever is applicable" (Am. CMO No. 9 at 10). Section V(A) of Amended CMO No. 9 set forth the May 8, 2015 deadline for cases pending as of the date of entry of the order, and Section V(B) of Amended CMO No. 9 set forth the 80-day deadline for cases that are not pending as of the date of entry of the order. Accordingly, the plain language of Section V(C) provides that plaintiffs will take reasonable actions to produce to AbbVie a PFS in accordance with the deadlines in Amended CMO No. 9. AbbVie stated in the AbbVie Brief that "while AbbVie hopes and expects more … PFS will come in before May 8, they are already untimely and materially so." (AbbVie Br. at 3.) AbbVie apparently bases this timeliness argument entirely on

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in support of its motion to amend CMO No. 9 tell a different story. In its earlier motion, AbbVie was forced to concede that the PFSs were not untimely, stating the PFSs had "no due date at present, because the master pleadings CMO is still being negotiated, the master complaint has not yet been filed and so no answers are due. Under the PFS Order, those PFS are due in each case 45 days after the last Defendant in that case answers." (AbbVie's Mot. to Modify CMO No. 9, Feb. 18, 2015 (Dkt No. 656) at 7.) AbbVie has been aware of the importance of the schedule for the PFSs process, and its potential impact on the bellwether selection process all along. (*See, e.g.*, Hr'g Tr. 4:2-9, Jan. 13, 2015; where AbbVie's prior counsel acknowledged that "the way the current schedule is set up, the answers to the complaints are a prerequisite to further plaintiff fact sheets, which are a prerequisite to plaintiff medical records and to picking bellwethers".)

the fact that it expected PFSs to be served before the May 8, 2015 deadline. Even assuming *arguendo* that plaintiffs were required to serve PFSs before the May 8, 2015 deadline, AbbVie makes no showing that any Plaintiffs failed to serve PFSs "as early as practicable." As the Court noted during the May 6, 2015 interim CMC, this standard is not sufficiently specific to conclude that any PFSs are untimely under the circumstances presented here.

Additionally, AbbVie's reliance on the "side letter" described in the AbbVie Brief (the e-mail chain attached as Exhibit A to the AbbVie Brief (Dkt. No. 758-1) between AbbVie and members of the PSC is misplaced. The so-called "side letter" merely contains certain language that was deleted from Section V(C) of the proposed Amended CMO No. 9, because the PSC would not agree to its inclusion. The quoted language provided that "If such PFSs are not completed in accordance with Section A for at least 90% of the Member Actions covered by that Section or are not completed in accordance with Section B for at least 70% of Member Actions covered by that Section, the PSC understands that AbbVie ***may*** seek appropriate modification of the dates set forth in CMO 14." (Dkt. No. 758-1; emphasis added.) This permissive language does not create any additional obligations on the part of plaintiffs, and merely informs the PSC that AbbVie might seek to amend CMO No. 14 if at least 90% of the plaintiffs in AbbVie-only cases pending on or before March 3 do not serve PFSs before the May 8 deadline. The relief requested in the AbbVie Brief is effectively a motion to amend CMO No. 14, and AbbVie filed it even before the May 8 deadline had passed. Moreover, more than 92.5% of the PFSs due on May 8, 2015 were filed before the deadline, presumably rendering the requests in the AbbVie Brief moot.

AbbVie complains that some plaintiffs' lawyers have asked for an extension beyond May 8, 2015 to serve executed PFSs. (AbbVie Br. at 4.) This is to be expected with the hundreds of

AbbVie-only plaintiffs in this litigation, and the individual and unavoidable delays inherent in injury litigation like that before the Court (e.g., estate issues). Notably, Amended CMO No. 9 contemplated such issues, and expressly set forth a notice and cure period, providing plaintiffs 45 days to "cure" a PFS non-service deficiency before a motion to dismiss for failure to prosecute could be filed. (*See* Amended CMO No. 9 § II(D, E).)[3]

B. Any purported deficiencies in the PFSs are not material.

Over 92.5% of the PFSs that were due on May 8, 2015 were served by the deadline. Even if they are deficient, Section II(D, E) of Amended CMO No. 9 provides a deficiency dispute resolution process and includes a 45-day period that allows PFSs to be cured before motion practice. The standards for completing the PFS are set forth in Section II(B) of both CMO No. 9 and Amended CMO No. 9. It is important to note that "substantially complete" is defined in Section II(B) to require "the responding Plaintiff [to] answer the questions contained in the PFS to the best of his or her ability." Other than conclusory statements in the AbbVie Brief, AbbVie has made no showing that the deficiencies it claims are material. Furthermore, even if a plaintiff has provided answers in his or her PFS that AbbVie believes are lacking in some respect, this does not preclude AbbVie from ordering the necessary medical records, if authorizations were provided, while also working through the claimed deficiencies as contemplated by Section II(D, E) of Amended CMO 9. The key criteria for purposes of evaluating the need for the requests in the AbbVie Brief is whether AbbVie did not receive signed authorizations for medical records. AbbVie has not shown that plaintiffs' failure to

[3] Indeed, AbbVie has already taken advantage of these provisions by filing motions to dismiss, invoking CMO No. 9.

provide signed authorizations has prevented them from ordering medical records, as contemplated by both CMO No. 9 and Amended CMO No. 9.[4]

AbbVie's argument that "Plaintiffs have far more information at their disposal than does AbbVie" (AbbVie Br. at 8) cannot be taken seriously. AbbVie has the medical records in possession of plaintiffs' counsel, which are served with the PFSs. Beyond that, AbbVie will have access to the medical and other records available pursuant to the authorizations that each plaintiff executed—which, if it chooses, will be available for AbbVie's review well before bellwether candidates are due on October 31, 2015.

C. The requests in the AbbVie Brief should be denied.

In Section III of the AbbVie Brief, AbbVie makes five requests that would affect service of the PFS and the bellwether selection process.[5] The Court should not entertain AbbVie's requests for extensions of several deadlines in Amended CMO No. 9 and CMO No. 14. Additionally, the Court should not grant AbbVie's request that the initial bellwether pool be limited to Plaintiffs who have served a PFS by May 29, 2015.[6] Furthermore, although this fifth

[4] AbbVie would like this Court to believe that the issue of deficient authorizations is one that Plaintiffs have failed to address. (*See* J. Status Rep., Apr. 21, 2015 at 2; "The slow submission of Plaintiff Fact Sheets along with the overwhelming authorization deficiencies is an issue AbbVie has raised at the last two Case Management Conferences and has yet to see any noticeable attempts by plaintiffs to remedy.") However, after receiving notice of the allegedly deficient medical authorizations, Plaintiffs' leadership engaged in a rigorous process to contact the law firms named in AbbVie's list and remedy the concern. (*Id.* at 3.) Indeed, in this circumstance and more broadly, when AbbVie's concerns have been shared with MDL Plaintiffs' leadership, Plaintiffs' have acted swiftly to quickly address them.

[5] It is the PSC's understanding that AbbVie withdrew its fifth request at the CMC on May 6, 2015, but it is addressed herein in an abundance of caution.

[6] As described herein, the PSC would not object to limiting the initial bellwether pool to Plaintiffs who have filed a complaint in this Court, or had their case transferred to this Court, by July 17, 2015 and served a PFS by July 24, 2015, as it was going to propose these dates in the

request was withdrawn at the May 6 CMC, the Court should deny AbbVie's request that bellwether cases should be picked "solely on the information contained in the PFSs and related documents, and defer collecting [medical] records until after the parties have identified the first 32 cases that are selected for inclusion in the initial bellwether pool." (AbbVie Br. at 10.) Individually and cumulatively, these requests are merely pretext for delay. The Court should maintain the current schedule set forth in Amended CMO No. 9 and CMO No. 14.

(1) AbbVie's requested extensions are not necessary.

(a) There is no need to extend the deadlines for PFS service.

As an initial matter, it is important to note that the extensions discussed in the AbbVie Brief are characterized as concessions to Plaintiffs, but they were not requested by the PSC.

The proposed extensions of time to serve the PFS (from May 8 to May 29, and 80 days to 120 days) are not necessary. Over 92.5% of the AbbVie-only PFSs due on May 8 were served by that time, and the less than 7.5% remaining have a 45-day cure period and will likely be completed within that time or be subject to dismissal under Amended CMO No. 9 or through stipulations of dismissal by individual plaintiffs due to case-specific circumstances. With respect to the 80-day deadline, there is no showing that so-called PFSs from Section B Plaintiffs are late.

(b) There is no need to extend the deadline for submitting the proposed CMO regarding the bellwether section process.

The proposed extension of time to submit a proposed CMO regarding the process for selecting the initial bellwether pool (from July 11 to August 10) is also unnecessary. AbbVie misconstrues the information it needs to prepare the process-oriented submission due on July 11,

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submission due July 11, 2015, in accordance with Section I(A) of CMO No. 14. Indeed, these are the precise types of parameters that were to be included in that forthcoming proposed CMO.

2915, as contemplated by Section I(A) of CMO No. 14.[7] The submission due on July 11 only relates to the parameters and process for picking cases. The parties' submissions for their preferred bellwether candidate cases are not due until October 31, 2015. (*See* CMO No. 14 § I(B).) The issues to be addressed in the July 11 submission are relatively technical procedural matters rather than substantive issues relating to individual cases. Among other issues to be addressed in the July 11 proposed CMO, the PSC contemplates that it will include the following:

(a) establishing a process for the parties in potential bellwether cases to waive applicable venue and *forum non coveniens* challenges, including waiver of their rights under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), to allow trial to be conducted in this Court without remand to a transferor court; and

(b) defining the parameters of the pool of cases from which bellwether candidates can be considered, specifically by identifying the dates by which the complaint must have been filed, the PFS served and the defendants' fact sheet ("DFS") served (as discussed in Section III below, AbbVie jumps the gun on this issue and seeks to define this pool in the AbbVie Brief by requiring service of the PFS by May 29, and as discussed below the PSC proposes that this issue be decided in the July 11 submission, but would not object if the initial bellwether pool were composed of cases where a complaint is filed by July 17, 2015 and the PFS is served by July 24, 2015).

A detailed review of the PFSs and medical records is not necessary to prepare the proposed CMO due July 11, and AbbVie's insistence that the July 11 submission be delayed to

[7] Section I(A) of CMO No. 14 provides that "[o]n or before July 11, 2015, the parties shall submit to the Court a proposed Case Management Order ('CMO') identifying the process and parameters for selecting AbbVie-only bellwether plaintiffs for two tiers of cases: (1) Thromboembolism ('TE') clotting injury cases (e.g., deep vein thrombosis ('DVT'), Pulmonary Embolism ('PE'), or other clotting cases; and (2) cardiovascular cases (e.g., heart attack). The Court will endeavor to enter a CMO in this regard by July 31, 2015." (CMO No. 14 § I(A).) While reviewing the PFSs before July 11 will identify generally the number of TE clotting injury cases and the cardiovascular cases, a more detailed review of the PFSs is not required to prepare the proposed CMO due July 11.

August 10 is not necessary, even if the PFSs were untimely or deficient (which they are not). In fact, this proposed CMO could be prepared within the next few days.[8]

(2) AbbVie's two proposed restrictions on selecting the bellwether pool are unreasonable and unnecessary.

(a) Limiting the initial bellwether pool to cases where the PFS is served by May 29 is arbitrary and unreasonable.

AbbVie's proposal to limit the initial bellwether pool to "Plaintiffs who have provided a completed PFS, the documents requested by the PFS, and medical authorizations by May 29, 2015" (AbbVie Br. at 10) is arbitrary, and it is not necessary to close the pool at this stage in the proceedings. The bellwether candidate cases should be drawn from the largest possible pool. There is nothing inherently better or worse about the cases pending before or after a given deadline, but, to have a broader pool of cases for selection as bellwethers, it would be prudent to allow as many cases as possible to be filed (and PFSs served) before closing the pool.

While the PSC recognizes that a cut-off date is necessary at some point to allow the parties to focus on selecting cases, there is no inherent value in closing that window by May 29, particularly if AbbVie is really trying to limit the pool to those cases that were pending as of the even earlier date of March 3, 2015.[9] In any event, this request should be denied as this limitation is not necessary or reasonable.

[8] The futility of changing this deadline is shown by AbbVie's admission that "[t]his interim deadline extension would not disturb the date by which the parties will identify the initial bellwether Plaintiffs (October 31, 2015)." (AbbVie Br. at 9.)

[9] It is not clear whether AbbVie is attempting to limit the initial bellwether pool to the so-called Section A Plaintiffs (those with cases pending on or before March 3, 2015), or whether the pool can include a so-called Section B Plaintiff (those with cases pending after March 3, 2015) if the PFS is served by May 29 (even if under the terms of Section V(B) of Amended CMO No. 9, he or she could have served the PFS at a later date). Under the specific terms of AbbVie's proposal, it is conceivable a plaintiff could file a case and serve a PFS simultaneously on May 29 and still be included, but, in its request, AbbVie seems to try to condition its proposal on Section A

As noted above, this is the precise topic that should be negotiated by the parties and included in the proposed CMO that is due July 11, 2015 (in accordance with Section I(A) of CMO No. 14), in which the parties hope to define the bellwether parameters and pool eligibility. It is likely more efficient to deal with this issue at that time, but the PSC would not object if the cases in the initial bellwether pool were limited to those cases in which a complaint was filed on or before July 17, 2015 and a completed PFS was served on or before July 24, 2015. Plaintiffs' counsel—both leadership and broader plaintiffs' counsel—correctly understood that their ability to participate in the bellwether discovery and trial process that could shape this MDL was not limited by any present deadline under the previously entered CMOs. A retroactive deadline, or an unreasonably short near-term one, should not be imposed. Indeed, AbbVie has made no showing that its proposed May 29 deadline is necessary to complete its review of PFSs. A July 24 deadline for service of PFSs still provides AbbVie more than the purported 90 days it claims are necessary to obtain medical records (a number the PSC believes is drastically overstated), before bellwether candidates are due on October 31, 2015. For earlier-filed cases, the process should be well under way (the first PFS was served on December 10, 2014, over five months ago). For cases with more-recently served PFSs, AbbVie has approximately six months to collect and review records before the October 31, 2015 deadline to propose bellwether candidates.

Plaintiffs complying with the PFS production deadline. In any event, this request should be denied as it is unnecessary and unreasonable.

(b) The Court should not sanction selecting bellwethers based "solely" on the PFS and limited medical records served with the PFS.

While it is the PSC's understanding that AbbVie withdrew this proposal at the interim CMC on May 6, 2015, it is important to note that, if this proposal were adopted, it would undermine an important purpose of the bellwether process, which is to instruct the parties and the Court about all the cases in the litigation to facilitate efficient resolution of these cases by settlement or trial.[10]

Under the circumstances of this case, if medical records were only collected for the 32 bellwether candidate cases put forward by the parties, and that collection began after they were proposed (on October 31, 2015), the parties will remain less informed about the remaining cases in the litigation and will have less information about whether they are similar to the bellwether candidates.[11] Additionally, AbbVie admits that starting the collection of records after October 31 would "likely add 75-90 days to the current schedule for bellwether discovery." This was never contemplated by either CMO No. 9 or CMO No. 14, both of which presume records would be collected before bellwether selection on October 31, because core discovery (four depositions only per side) for bellwether cases is to be conducted during a limited time period that would run

[10] As the Honorable Eldon Fallon has emphasized, the primary purpose of bellwether trials is to inform the parties about the strengths and weaknesses in cases for trial and settlement. *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2338 (2008) ("bellwether trials can precipitate and inform settlement negotiations"); *see also* Duke Law Ctr for Judicial Studies, *Standards and Best Practices for Large and Mass-Tort MDLs* 14 (Dec. 19, 2014) ("settlement talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weaknesses of the global litigation and examine the potential value of individual claims").

[11] Additionally, if it is necessary to substitute a replacement bellwether case, which is not unusual, there will be further delay to wait while medical records for proposed replacement cases are ordered and reviewed.

from November 1, 2015 to January 15, 2016 (76 days). (*See* CMO No. 14 § II(A).) The Court should not sanction further delay to allow AbbVie additional time after the bellwether cases are selected to only order 32 sets of medical records.

Moreover, the parties should be free to consult the information they deem necessary to select bellwether candidates, and this Court should not unnecessarily circumscribe the information available to the parties for purposes of making bellwether recommendations to the Court. Of course, PFSs and medical records are not the only sources of information for selection of bellwether candidates. The case selection process also typically includes consideration of the information maintained by the defense that is provided to plaintiffs in a DFS, which includes case-specific details about which only AbbVie is aware (including, but not limited to, whether a plaintiff's prescribing or treating physicians have been employed by or paid by AbbVie, communications (such as sales call notes and summaries) between a plaintiff's prescribing or treating physician and AbbVie, communications between a plaintiff and AbbVie, MedWatch reporting information, and other matters within a defendant's control and which must be shared with plaintiffs) to ensure that non-representative cases are not selected.

It is important to note that AbbVie mischaracterizes the best practices recommended by the Duke Law Center for Judicial Studies in its *Standards and Best Practices for Large and Mass-Tort MDLs* (Dec. 19, 2014). (*See* AbbVie Br. at 10 (citing Duke Law Ctr. for Judicial Studies, *Standards and Best Practices for Large and Mass-Tort MDLs* 8 (Dec. 14, 2014)[12]

[12] (Available at http://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf.)

[hereinafter *Duke MDL Standards and Best Practices*].)[13] In Section III of the AbbVie Brief, arguing that medical records should not be collected until after October 31, 2015 (the date on which the parties are to propose to the Court the first 32 cases in the bellwether pool), AbbVie cites to quotes from the *Duke MDL Standards and Best Practices* stating that many of the judges surveyed "preferred to hold off on individual discovery until a pool of cases had been selected to act as bellwethers," because "individual discovery . . . could become a morass or black hole." (AbbVie Br. at 10; citing *Duke MDL Standards and Best Practices* at 8.) AbbVie's use of these quotes is misleading. These quotes are from an introductory part of the *Duke MDL Standards and Best Practices*, suggesting the need for a discovery plan that focuses first on "general or generic discovery" before "individual discovery." *See Duke MDL Standards and Best Practices* at 8. In the AbbVie Brief, AbbVie is conflating "individual discovery" with ordering medical records. As is made abundantly clear later in the *Duke MDL Standards and Best Practices*, it is suggested that medical records should be ordered "at a relatively early stage" of the litigation. *Id.* at 15 ("the collection of plaintiffs' medical records (in personal injury cases) or employment histories (in employment cases) is another straightforward way that MDL courts can encourage a robust exchange of key information at a relatively early stage"). The PSC agrees that "full case development (e.g., plaintiff depositions, case-specific expert discovery)" is not necessary to pick bellwethers, but it is important to note that medical records are frequently ordered and reviewed in conjunction with PFSs before bellwether selection. *See id.* at 14-15, 30.

While the PSC understands this request has now been withdrawn, it is surprising it was ever put forward in the first place, as it was a complete reversal from AbbVie's prior

[13] One of Plaintiffs' Co-Lead Counsel, Christopher A. Seeger, was a member of the Editorial Board for the *Duke MDL Standards and Best Practices*, along with five other members of the plaintiffs and defense bar. *See Duke MDL Standards and Best Practices* at vii.

representations to the PSC and the Court. It has always been represented that AbbVie would actually use the authorizations, which AbbVie has consistently demanded from Plaintiffs and claimed were deficient, to obtain medical records. It formed the basis of the PSC's agreement reached with all defendants to implement the PFS process reflected in CMO No. 9, in its original form and as amended.

II. CONCLUSION

Based on the foregoing, the PSC respectfully requests that the Court enter an order denying AbbVie's requests in its submission filed on May 4, 2015.

DATED: May 11, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015, the foregoing PSC'S Memorandum in Opposition to the May 4, 2015 Submission of AbbVie Inc. and Abbott Laboratories was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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