UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	**Case No. 1:14-CV-01748** **MDL 2545**
	JUDGE MATTHEW F. KENNELLY

ABBVIE INC. AND ABBOTT LABORATORIES' PROPOSAL FOR SELECTION OF BELLWETHER CASES FOR DISCOVERY, MOTION PRACTICE, AND TRIAL

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SUMMARY OF SUBMISSION

In accordance with Amended Case Management Order ("CMO") 14, Defendants AbbVie Inc. and Abbott Laboratories (collectively "AbbVie")[1] submit this proposal to select 32 representative cases for discovery, motion practice, and potential trial. AbbVie attaches its proposed CMO as Exhibit 1. AbbVie attaches as Exhibit 2 a chart comparing the current CMO deadlines with the proposed deadlines. AbbVie attaches as Exhibit 3 a graphic identifying the key groupings of the Plaintiffs in the AbbVie-only bellwether pool.

The parties agree on certain important principles, such as the desire to have this Court preside over any bellwether trials in this "AbbVie-only" phase, and the goal of preserving the currently scheduled trial dates, the first of which is October 31, 2016. In other key aspects, however, the parties have fundamentally different views about the role of this MDL Court in assuring that pretrial proceedings are "productive," and the nature of the Court's involvement in the bellwether section process, as provided by CMO 14.

AbbVie's proposal is rooted in two principles. First, pursuant to the multidistrict litigation statute, this Court must preside over "coordinated or consolidated ***pretrial proceedings***." 28 U.S.C. § 1407 (emphasis added). Although, of course, the Court may attempt to facilitate settlement within the confines of the MDL, nothing in § 1407 requires the Court to do so, and any efforts in that regard do not displace the statutory requirement that the Court coordinate pretrial proceedings for the just and efficient conduct of the actions. If the bellwether process is used solely to identify cases for trial and drive settlement, the parties and, inevitably,

[1] AbbVie was established in January 2013 as an independent, publicly traded company from the innovative pharmaceutical business of codefendant Abbott Laboratories, which no longer sells AndroGel in the United States.

the Court will be distracted from the central pretrial goals set by the statute. The essential pretrial function threatened here is the framing and resolution of cross-cutting issues relating to specific groups of Plaintiffs in the pool, including: (1) whether Plaintiffs' evidence of medical causation regarding different diseases among different groups of claimants meets the gatekeeping requirements of *Daubert*; (2) whether the risk information included in the various AndroGel labels approved by the federal Food and Drug Administration ("FDA") and used in different periods of time was adequate as a matter of law; and (3) whether, in different periods of time involving different groups of Plaintiffs, marketing activities can support allegations of "off label marketing," notwithstanding contrary law, the FDA's review of marketing materials, and the fact that those materials incorporated content taken directly from FDA-approved labeling.

Second, AbbVie believes this Court should take an active role in the selection of the 32 representative discovery cases and should not simply leave it up to the lawyers to choose their favorites from the pool. Amended CMO 14 specifically contemplates the Court's involvement in selection when it reserves to the Court the decision on what selection process to use. Amended CMO 14 at 2. Rather than being relegated to a purely administrative formality, this decision should be regarded as one of the most important in the case, as it will define the arena of facts that will be used in the AbbVie-only pretrial and trial proceedings.[2] Accorded that significance, the selection process should be guided by data, use available statistical methods, and apply

[2] *See* ANNOTATED MANUAL FOR COMPLEX LITIGATION § 22.36 (4th ed. 2014) (highlighting the importance of the bellwether process because it allows the transferee court to respond to dispositive motions and to test plaintiffs' claims, "which would allow the litigation to mature through trials"); Barbara Rothstein and Catherine Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUDICIARY CTR. 44-47 (2011) (urging MDL judges to consider importance of bellwether trials in framing a resolution to the litigation); *Standards and Best Practices for Large and Mass-Tort MDLs*, DUKE CTR. FOR JUDICIAL STUDIES 27 (2014) (explaining bellwether selection "will drive the outcomes in motion practice and trial ─ and in the shadow of those expectations, the settlement values reached if settlement is to occur.").

objective criteria. Selection by lawyers is the opposite of all of this and, as experience in this District teaches, it frustrates rather than facilitates sound pretrial case management. *See generally In re Zimmer NexGen Knee Implant Prods. Liab. Litig.*, MDL No. 2272. As the Court is aware, the *Zimmer* MDL has become gridlocked (through no fault of Judge Pallmeyer), because the parties have used case selection and dismissals strategically to "game" the system by picking unrepresentative cases that have irreconcilably skewed the pool of potential trial cases.

Although Plaintiffs may contend that AbbVie's proposal conflicts with the language of Amended CMO 14, which calls for the parties to "identify" 16 bellwether cases "per side" by October 31, 2015, the fact is that the proposal is fully in accord with a complete and harmonized reading of the CMO. Amended CMO 14 calls for the Court, not the parties, to determine the process for selection (Section I.A.) and provides that the goal of bellwether selection is a program that will be "***representative and productive***." Amended CMO 14 at 1 (emphasis added). The language regarding identification of cases later in the year must be read consistent with the Court's reserving to itself the decision on selection process, and must conform to the CMO's stated goals. The language regarding case identification merely contemplates that the parties will execute the Court's decision on process by a certain date and on a co-equal basis. To read that language as ***requiring*** attorney selection would minimize the Court's power to decide on a process and would nullify its stated goals. To the extent the language regarding actual selection is ambiguous or conflicts with the overall goal of the program, it should be interpreted as AbbVie's proposal contemplates, or be amended. As the Court recently recognized, case selection "is not supposed to be a process where the plaintiffs pick the really great cases and the defendants pick the dogs. It's a complete waste of time if that happens, and I am not going to permit that." Transcript of July 9, 2015 Hearing, at 14:4-8. Further, as described in detail

below, AbbVie's proposal that the parties select the six trial bellwethers ***expands*** the parties' role in deciding, after pretrial proceedings, which of the bellwethers ***to take to trial***, so the parties can evaluate strengths and weaknesses of individual cases.

To ensure the selection method leads to representative and productive bellwethers, AbbVie's proposed process begins with data gathered from the pool as a whole. These data come from the source provided for in Amended CMO 14: the Plaintiff Fact Sheets ("PFS"). Specifically, AbbVie has entered information from all of the PFSs in the pool and, with respect to two important medical matters, from those attached medical records that contain the relevant data. AbbVie has assembled a database of the extracted information, which it provides to the Court as Exhibit 4 to this Submission. The database reflects PFS information for each claimant, on the basis of which the Court can divide the pool into groups that share a common core issue for the Court to address. For example, one of the issues is whether Plaintiffs have reliable science to support a claim that Testosterone Replacement Therapy ("TRT") is associated with cardiovascular injury in patients under 65 who have no history of cardiovascular disease. The database identifies all claimants who were under 65 as of the date they were diagnosed with a cardiovascular event and whose PFSs and attached medical records reflect no prior known history of such cardiovascular disease. The database performs the same function for 14 other groups as well. The defined scope of the groups is driven by specific, significant issues in the litigation, including medical causation, the adequacy of AbbVie's warnings over time, and AbbVie's alleged marketing conduct. The groups encompass the entire pool, stratifying it so that the identified issues can be addressed clearly in pretrial litigation of bellwether cases selected from each group. In this way, AbbVie's proposal seeks to assure the bellwether program will be "productive" in core pretrial litigation.

Using these data, discovery bellwethers can be selected randomly from each of the groups, using a statistical program. This is the only objective, reliable way to select a sample that is most likely to be "representative" of the pool or any group within the pool. In service of presenting this approach and allowing the Court to implement it if the Court so chooses, the database has been reviewed by Dr. M. Laurentius Marais, an expert in statistics. As set forth in his proposal, attached as Exhibit 5, computer programs can make random selections from each group, such that the pool of 32 discovery cases will include at least one individual claimant "representing" each group (including other groups the Court decides to test). To accomplish this selection, the Court can approve a statistical "vendor" to run the random selections on the database and provide the results to the Court, with the costs to be borne by the parties. There will be no selection bias, meaning that each case has an equal chance of being randomly selected. The process will ensure that each group is represented among the group of 32. In other words, the pool and the groups both will be properly represented by the 32 cases. No process other than random selection will produce a statistically representative selection. Importantly, the selection can be completed without resorting to full medical record collection and review and, as a result, it may occur much earlier than the November 30 date in the current CMO schedule provided the parties work collaboratively.

This approach not only gives effect to the two important MDL principles cited above and in the CMO—facilitating "productive" pretrial management and relying upon the Court to decide upon a "representative" selection process—but it does so with very little change to the current CMO schedule and no change to the set trial dates. Thus, after the selection of 32 pretrial cases, discovery can and should begin immediately with the parties collecting medical records on an expedited basis for the selected cases. AbbVie's proposal then calls for full fact and expert

discovery of each selected case, to occur from October 1, 2015 through July 15, 2016, with dispositive and *Daubert* motions due August 1, 2016. This preserves Amended CMO 14's schedule for dispositive and *Daubert* motions, and keeps the parties on track to try the first case on October 31, 2016. The completed discovery will support and inform the dispositive and *Daubert* motion practice that is aimed at testing the most critical cross-cutting issues among ***all*** the representative groups, not just the handful selected for trial (which cannot possibly represent the full spectrum of Plaintiffs and claims).

And there is an appropriate time in the bellwether litigation for the lawyers to drive bellwether selection. Recognizing that a goal of having trials of bellwether cases in this Court to identify and evaluate the strengths and weaknesses of individual cases, AbbVie's proposal calls for ***the parties*** to choose the six ***trial*** bellwether cases on August 1, 2016. And deferring the decision until the close of discovery in all 32 cases will allow for more informed selections of potential trial cases, and will reduce the risk that those chosen are outliers. Although this method is aggressive, it should be feasible if the parties proceed diligently. By contrast, wielding the current schedule, Plaintiffs can insist that "core" discovery of the 32 discovery cases be done by January 15, 2016, even though Amended CMO 14 contemplates full medical record collection and up to 8 depositions per bellwether case. This means 256 depositions and extensive document discovery—all to be done at the end of the year and while discovery of AbbVie is in full swing.

Finally, AbbVie believes the Court's experience in this litigation, which will only grow over the next year, will be invaluable to those trials. To that end, and provided that Plaintiffs do the same, AbbVie consents to this Court presiding over the trial of any AbbVie-only case

selected for trial, regardless of where the case was originally filed. *See generally Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

The remainder of this submission explains in greater detail AbbVie's proposal and the rationale supporting it.

I. The Court Should Choose A Bellwether Selection Process That Is "Productive."

This MDL has been constituted to "promote the just and efficient conduct of such actions," 28 U.S.C. § 1407(a), and in furtherance of that goal, the Court is required to conduct "coordinated or consolidated pretrial proceedings" under the Rules. *Id.* § 1407(b). Nothing in the statute requires the Court to institute a bellwether trial program designed to "value cases" and thus drive a settlement.[3] The Judicial Panel on Multidistrict Litigation's ("JPML") Overview identifies a number of purposes accomplished by centralization—avoiding duplication of discovery, preventing inconsistent pretrial rulings, and conserving resources—but does not include driving settlement as a goal. *See* JPML Overview of Panel, *available at* http://www.jpml.uscourts.gov/panel-info/overview-panel. Thus, while evaluating the strengths and weaknesses of individual cases and facilitating settlement are potentially valuable functions that MDL courts can and do perform, any bellwether plan should be tailored to serve the core purpose of making the pretrial process in this case productive. As set forth above, the CMO requires as much of the bellwether process in this case.

[3] Indeed, Congress enacted § 1407 for the "***limited purpose*** of conducting coordinated pretrial proceedings." *See* HR 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1989, 1900 ("The proposed statute affects ***only the pretrial stages*** in multidistrict litigation.") (emphases added). The legislation was Congress' response to antitrust litigation in the 1960s that "flooded the Federal district courts." *See* S. 454, 90th Cong., 1st Sess., § 3 (1967) ("The pretrial discovery problems created by this wave of cases placed a heavy burden on the Federal courts, and it was apparent to the judiciary that unless some special action was taken ***these case would engulf the courts with continually conflicting pretrial discovery demands*** for the same witnesses and documents.") (emphasis added).

A. AbbVie's Proposal Calls For Efficient, Productive, And Comprehensive Pretrial Litigation Of All 32 Discovery Cases.

To make the bellwether process as "productive" as possible, AbbVie's proposal calls for the parties to conduct full fact and expert discovery in each of the 32 pretrial discovery cases prior to the selection of potential trial cases. With a full record, the parties will be able to litigate dispositive motions and *Daubert* challenges for each relevant Plaintiff group in the pool, and the bellwether trial selections will be more informed.

Under AbbVie's proposal, the parties will collect medical records for the selected cases immediately after selection, and fact discovery will begin on October 1, 2015, with expert discovery beginning February 1, 2016. This adds discovery of experts to the "core discovery" provided in the current CMO. But it lifts the 75-day limit on "core discovery," and accommodates the expert discovery by creating a single extended discovery period without disturbing the current trial date. It is critical that ***full*** fact and expert discovery thus occur in all 32 cases so the parties and the Court may use pretrial proceedings to test and shape the cross-cutting claims and issues, such as core medical causation and warning adequacy questions. These potentially dispositive questions should be rigorously examined pretrial, in order to rationalize a large and currently unexamined pool and permit only triable cases to continue. This briefing can be accomplished in a way that preserves the current schedule, with opening briefs due August 1, 2016 and a potential first trial scheduled for October 31, 2016.

B. For Decades, Courts In Mass Tort Cases Have Used Coordinated Pretrial Proceedings To Resolve Key Issues And Provide Guidance To Similarly Situated Plaintiffs.

Without coordinated pretrial proceedings like this MDL, it would be virtually impossible to resolve cases in an efficient manner in the "mass tort" arena. MDL judges have used pretrial litigation to test and potentially resolve key issues and claims and thereby narrow the litigation as

a whole. Most notably, pretrial litigation is particularly well-suited to testing the scientific basis, if any, for Plaintiffs' claims. For instance, Judge Barbara Rothstein, who presided over the Phenylpropanolamine ("PPA") litigation, recommends, "[a] transferee judge should go beyond mere pretrial discovery and should encourage the resolution of scientific disputes. Judges must grapple with scientific issues in their roles as gatekeepers." Barbara Rothstein & Catherine Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUDICIARY CTR., at 36 (2011). Indeed, many MDL judges have done just that, using the platform of coordinated pretrial proceedings to grapple with potentially cross-cutting *Daubert* challenges. *See, e.g.*, *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1257 (11th Cir. 2010) (affirming ruling excluding specific causation experts and dismissing first two cases set for trial in MDL bellwether program); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449 (E.D. Pa. 2014) (finding expert generic causation opinion inadmissible under Rule 702 and *Daubert*), *reconsideration denied* 2015 U.S. Dist. LEXIS 7664 (E.D. Pa. Jan. 23, 2015); *In re Propulsid Prods. Liab. Litig.*, 261 F. Supp. 2d 603, 617-18 (E.D. La. 2003) (finding expert testimony inadmissible under Rule 702 and *Daubert*); *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1070 (D. Minn. 2007) (granting and denying *Daubert* motions to exclude expert testimony from pretrial MDL proceeding); *see generally In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2010 WL 7699456, at *1 (N.D. Ohio June 4, 2010) (cataloging rulings in bellwether and other pretrial proceedings related to admissibility of expert testimony). .

Nor is this precedent confined to courts examining scientific matters and *Daubert* challenges. Courts have also used coordinated pretrial proceedings to resolve warning adequacy and other substantive and evidentiary legal issues. *See, e.g.*, *In re Meridia Prods. Liab. Litig.*,

328 F. Supp. 2d 791, 803-07, 826 (N.D. Ohio 2004) (granting summary judgment to pharmaceutical defendants as to claims of all plaintiffs), *aff'd sub nom. Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861 (6th Cir. 2006); *In re Bextra & Celebrex Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. MDL 05-01699 CRB, 2007 WL 2028408, at *9 (N.D. Cal. July 10, 2007) (granting in part and denying in part defendants' motion to dismiss claims in MDL proceeding); *see generally In re Silicone Gel Breast Implants Prods. Liab. Litig*, MDL No. 926, Pretrial Order No. 30 (N.D. Ala. Mar. 25, 1996) (highlighting key pretrial motions in the MDL).

The use of bellwethers to do this work is just as well accepted. *See* Eldon E. Fallon, *et al.*, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2336-39 (2008) (identifying two MDLs in the early 2000s that shaped "modern approach" of using bellwether trials "for nonbinding informational purposes and for testing various theories and defenses in a trial setting.") ("*Bellwether Trials*"). They are an accepted tool to test claims, issue pretrial dispositive and evidentiary rulings, and, if necessary, try cases. In the *Seroquel* MDL, for example, the parties conducted full fact and expert discovery in 12 bellwether cases. The defendant thereafter filed dispositive motions and *Daubert* challenges in each remaining case.[4] The court issued an opinion excluding plaintiffs' causation experts and granting summary judgment in the first two cases selected for trial, and held the remaining motions pending appeal. The orders were affirmed on appeal, and the MDL settled soon thereafter. *Guinn v. AstraZeneca Pharm. LP*, 598 F. Supp. 2d 1239 (M.D. Fla. 2009); *Haller v. AstraZeneca Pharm. LP*, 598 F. Supp. 2d 1271 (M.D. Fla. 2009), *aff'd* 602 F.3d 1245 (11th Cir. 2010); *see also In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2010 WL 7699456, at *1 (N.D. Ohio June 4,

[4] Plaintiffs in 5 cases dismissed their claims during discovery.

2010) (discussing history of bellwether rulings related to the admissibility of expert testimony, key technical documents, and motions *in limine*).

C. To Be Productive, This Bellwether Program Demands Rigorous Pretrial Scrutiny Of Key Issues And Claims.

While AbbVie will save its arguments on the merits for another day, there is no question but that this litigation cries out for deliberate and thorough pretrial litigation of the obvious issues that affect Plaintiffs' claims. To be sure, the litigation now comprises over 1000 cases. But of course, mere volume provides no evidence of merit. This medication is far from novel. TRTs have been an established treatment for hypogonadism for decades. Literally millions of patients have been treated. Nor are the medical issues and alleged injuries raised by Plaintiffs' claims new. The FDA has carefully reviewed thromboembolism and cardiovascular disease as adverse events potentially associated with TRT use since before the FDA approved AndroGel 1.0% as safe and effective in 2000. Since that time, the FDA has reviewed relevant clinical and post-marketing data, has commented on the potential risks in its reviews, and has approved TRTs with appropriate labeling. There is no stunning secret risk that previously was hidden and suddenly has been revealed.

Increased usage of TRTs and a handful of more recent studies—three, including one published in November 2013 and one published in January 2014—have prompted new consideration of potential cardiovascular risk by AbbVie, the FDA, and the medical community. After examining each of these studies in detail, the FDA rejected a request for TRTs to bear a stronger warning about potential cardiovascular risks, and concluded "there is insufficient evidence of a causal link between testosterone therapy and adverse cardiovascular outcomes." *See* July 16, 2014 FDA Resp. to Public Citizen Pet. at 5 (attached as Exhibit 6). When the FDA ultimately decided earlier this year that the TRT manufacturers should provide updated risk

information, the FDA maintained that the new studies were "inconclusive," and that the warnings should reference the risk as "possible" rather than actual or established.[5] Similarly, a Plaintiff claiming a thromboembolic injury will have to account for: (a) a very recent peer-reviewed study of more than 30,000 men, which concluded, "[h]aving filled a prescription for testosterone therapy was not associated with an increased risk of VTE [venous thromboembolism] in commercially insured middle-aged and older men,";[6] and (b) the lack of contrary reliable scientific evidence supporting an increased risk of thromboembolic events in patients receiving testosterone therapy.

And these "general causation" issues are among the broadest in the litigation. Other issues pertain to large groups within the pool, such as the adequacy of the risk information conveyed to AndroGel prescribers in light of the state of scientific knowledge at the relevant time, and Plaintiffs' accusations of alleged "off-label" marketing. Each of these is described in Section III below, along with the number of Plaintiffs in each group, and the objective criteria for determining the membership of the group.

II. Consistent With Its Responsibility To Actively Coordinate Pretrial Proceedings, The Court Should Randomly Select 32 Discovery Cases Using A Statistically Sound Methodology That Ensures Representation Of Each Key Plaintiff Group.

Informed by the notion that bellwethers serve the narrow purpose of identifying and trying cases to establish settlement values, and that the parties rather than the Court should be in charge of the selection process, an attorney-selection procedure would call for each side to hand-pick 16 cases for limited discovery, with a subset of those cases eligible for full discovery and

[5] *Testosterone Replacement Therapies*, U.S. Food and Drug Admin. (May 2015), http://www.fda.gov/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/ucm451075.htm (attached as Exhibit 7).

[6] J. Baillargeon et al., *Risk of Venous Thromboembolic Injury In Men Receiving Testosterone Therapy*, 90 MAYO CLIN. PROCS. 8, 1038-45 (Aug. 2015) (attached as Exhibit 8).

trial. But a proposal with that endpoint in mind, without active participation of the Court, and with zealous advocates on both sides, ensures only that the bellwether discovery and trial pool will be populated with a selected subset of cases picked for their appeal (or lack thereof) as "triable" cases.

AbbVie takes a broader view of this Court's role in managing the just and efficient conduct of these cases. Trying six cases certainly will tell the parties about the relative strengths and weaknesses of those six Plaintiffs' claims before the trier of fact, and perhaps the claims of other similarly situated Plaintiffs as well (although history suggests the losing party is often quick to identify many reasons why the trial case is not representative of the remainder of the litigation). But it will do nothing to tell the parties more broadly about the other 26 discovery cases that have been cast aside and will not provide reliable information about the pool as a whole. A plan that randomly selects cases across the whole pool is the only way to provide the parties and this Court with a reliable platform for pretrial resolution of key issues and claims.

Random selection is an accepted and well-tested method for choosing the "most representative" bellwether cases. *See* ANNOTATED MANUAL FOR COMPLEX LITIGATION § 22.315 (4th ed. 2014) ("To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases."). Indeed, the *Manual for Complex Litigation* tolerates attorney selection only if the parties ***agree*** on the group of cases to be tested—which is not the case here. *Id.*

Consistent with this guidance, for years MDL courts have used random selection in mass tort cases. *See* Order re Bellwether Trial Selection at 2, *In re: Prempro Prods. Liab. Litig.*, MDL No. 1507 (E.D. Ark. June 20, 2005) (attached as Exhibit 9); *see also In re Norplant*

Contraceptive Products Litig., No. MDL 1038, 1996 WL 571536, at *1 (E.D. Tex. Aug. 13, 1996) (selecting entirely random cases for the bellwether process); Pretrial Order No. 89, *In re Baycol Prods. Litig.*, No. 01-md-01431 (D. Minn. July 18, 2003) (same) (attached as Exhibit 10). Agreement of the parties has led to bellwether selection by attorneys in some cases, to be sure. There are a variety of strategic reasons that make such agreements attractive to both sides, depending upon the circumstances of the case. But "agreement" should not be mandatory where the goal is testing strengths and weaknesses, where the conduct of bellwether trials in the MDL is both based upon voluntary *Lexecon* waivers, and where such trials lie outside the core pretrial function of MDL litigation. Nor, as demonstrated by the *Zimmer* MDL discussed below, does agreed attorney selection provide any assurance of success.

AbbVie proposes to use random selection to populate the discovery pool with 32 cases that are representative of up to 15 key groups (and thus representative of the litigation as a whole as it relates to AbbVie). Exhibit 3 illustrates the 15 key groups. As detailed in Section III below, AbbVie identified these 15 groups by analyzing the information provided in PFSs to understand the demographics and characteristics of the AbbVie-only cases as a whole, as contemplated by Amended CMO 14. Then, AbbVie stratified the Plaintiffs into groups that reflect the key issues and claims in the case as pled by Plaintiffs in their Amended Master Long-Form Complaint And Jury Demand ("Complaint"). These groups test "both sides" of a particular issue. For example, AbbVie includes groups relating to discrete time periods across the whole lifespan of AndroGel, to test the adequacy of the risk information contained in AndroGel's labeling over time. AbbVie also includes groups that test Plaintiffs' medical causation theory by grouping cases in

accordance with the studies identified in Plaintiffs' own Complaint.[7] Importantly, AbbVie believes it will be beneficial for the Court to take an active role choosing the particular issues and groups it wants to test; the proposed groups are simply intended to provide the Court with objective criteria to do so. To that end, AbbVie has provided the Plaintiffs' Steering Committee ("PSC") and the Court with an analysis of the entire pool, in the form of a database extract identifying each Plaintiff's group membership. *See* Exhibit 4.[8]

After the Court selects the groups it wants to test, the Court can use statistics to assure the sample of 32 pretrial cases includes representatives of each relevant group. To do so in a statistically sound and reliable way, AbbVie suggests the Court should use rejective simple random sampling. As explained in the attached Declaration of Dr. M. Laurentius Marais, an expert statistician, this is an accepted and reliable method to derive a random sample that meets certain criteria, such as ensuring the sample includes at least one representative from each group. *See* Declaration of M. Laurentius Marais, ¶ 5 (Exhibit 5) (hereafter "Marais Decl."). Whereas simple random sampling would use a randomized process to select on a one-time basis 32 cases, rejective simple random sampling repeats that process as many times as needed until the selected sample fulfills all the Court's criteria. The process would thus randomly sample a batch of 32 cases at a time, and then verify that the batch includes at least one unique case for each of the 15

[7] This is not to say that these studies are reliable or in fact explain Plaintiffs' claimed medical conditions. But they are the foundations of Plaintiffs' claims in this litigation, and AbbVie should have the opportunity to test the adequacy of Plaintiffs' evidence on cross-cutting issues before trials commence.

[8] The database is being submitted with patient-identifying information hidden. AbbVie has provided the PSC with an "unblinded" version that includes patient-identifying information and links to the materials that support each Plaintiff's categorization. Should the Court wish, AbbVie can provide it a similar "unblinded" version either under seal or *in camera*. Further, the courtesy copy of the database provided to the Court is an excel program, so that the Court may sort the data as it sees fit.

Plaintiff groups. If the batch is not fully representative of the pool, it is discarded and the process repeats until a fully representative batch is pulled. The result is random for the pool as a whole and covers the cross-cutting issues that define the 15 groups. Dr. Marais has conducted preliminary tests to assure the viability of this method, using rejective random sampling against the Plaintiff dataset provided to this Court, and has determined that the method successfully pulls a sample populated with members of all 15 groups. Marais Decl. ¶¶ 6-7. Each sampling takes a matter of minutes and can be done via an automated program.

The proposed approach is "random" in that there is no systematic bias, i.e., every member of the pool has an equal chance of selection. At the same time, rejective sampling ensures that each Plaintiff group has representation in the sample.[9] This approach is statistically sound and consistent with the approaches taken in other litigation. *See, e.g.*, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-20 (5th Cir. 1997) (explaining the judicial benefits of selecting bellwether cases through the use of statistical models that randomly select cases representative of an array of common issues); *Abrams v. Ciba Specialty Chemicals Corp.*, No. CIV.A. 08-00068-WS-B, 2008 WL 4710724, at *3-5 (S.D. Ala. Oct. 23, 2008) (dividing the plaintiffs' claims into four distinct subgroups before drawing a random sample that appropriately represented each subgroup). Further, AbbVie's "hybrid" approach will advance a core goal of this MDL, allowing the Court and the parties to identify, develop, and test claims, arguments, and cross-cutting issues across every significant group in the pool. *See Standards and Best Practices for*

[9] Although random selection is a well-accepted method for picking bellwether cases, some critics worry about the "random" nature of simple random sampling. *See Bellwether Trials*, at 2348 ("If cases are selected at random, there is no guarantee that the cases selected to fill the trial-selection pool will adequately represent the major variables."). The problem is alleviated here by imposing a structure to increase the likelihood that the sample is representative of the larger pool. Further, any problem of "randomness" is more likely to arise where the number of selected cases is much smaller than the total number of cases. Here, by contrast, the Court's CMO calls for selection of approximately 5% of the total AbbVie-only cases in the initial bellwether pool.

Large and Mass-Tort MDLs, DUKE CTR. FOR JUDICIAL STUDIES 27 (2014) ("[B]ellwether trials are most beneficial if they . . . produce decisions on key issues that can be applied to other cases in the proceeding (e.g., *Daubert* issues, cross-cutting summary-judgment arguments, the admissibility of key evidence . . . .)") ("*Standards and Best Practices*"). In sum, AbbVie's proposal will provide the Court and the parties an opportunity to examine virtually every major issue in the AbbVie-only cases.

By contrast, a process that simply has attorneys make selections is devoid of any structure, criteria, or analysis of the true characteristics of the AbbVie-only cases. This is not a meaningful bellwether plan. It is ripe for abuse, will steer the Court and the parties away from the core, statutory pretrial functions, and reads the CMO to hamstring the Court and to nullify the stated goals of the bellwether program. Perhaps most importantly, the plan ignores what the Court already has said it contemplates. *See* Transcript of July 9, 2015 Hearing, at 14:2-12 (stating that Court is "not going to permit" bellwether selection plan where "the plaintiffs pick the really great cases and the defendants pick the dogs"); *see also Standards and Best Practices* at 29 (2014) ("[S]ome judges have been critical of allowing the parties too much freedom to select cases because advocates may have a strong inclination to pick cases they are most likely to win, without regard to the representativeness of those cases."); *In re Chevron*, 109 F.3d at 1019 (rejecting process that gave parties unfettered discretion to choose cases, because outcome was "simply a trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in this litigation.").

Indeed, attorney selection seems calculated to ***avoid*** testing a truly representative sample of cases, whether by motion practice or at trial. Moreover, Plaintiffs will likely engage in tactical dismissals of cases picked by AbbVie, either during the discovery process or in the lead-

up to trial, leaving the Court with a skewed pool of unrepresentative trial cases. All of this tactical maneuvering is sure to create massive delays and destroy the Court's schedule.[10]

The *Zimmer NexGen Knee Implant* MDL before Judge Pallmeyer is a perfect example of the perils of attorney selection. *See* Memorandum In Support of Mot. For Revision of Trial Plan, *In re: Zimmer NexGen Knee Implant Prods. Liab. Litig.*, (Doc. No. 1549) (filed July 23, 2015) (detailing history of *Zimmer* bellwether program) (*Zimmer* docket entries attached as Exhibit 11)[11] In October 2012, the Court accepted the parties' plan to select a "representative case pool." *See* Parties' Revised Joint Submission Regarding Representative Trial Plan at ¶ 1 (filed Oct. 19, 2012) (Exhibit 11). The parties agreed to pick six cases per side in three different case categories

[10] Should Plaintiffs voluntarily dismiss any case after it is selected for inclusion in the bellwether program, the dismissal should be with prejudice, and the Court should impose sanctions. To replenish the pool, the Court should use the random selection method set forth in the Declaration of Dr. Marais, which calls for an "apples to apples" replenishment such that any dismissed case is randomly replaced by a case with the same key characteristics (there are 46 different "subpopulations" of cases sharing the same characteristics). *See* Marais Decl. Attachment D. These steps may curb, to some degree, the practice of tactical dismissals, but if the dismissal occurs months into the process, even sanctions and replenishment will not cure the harm to the program and the schedule.

[11] The *Yaz* litigation before Judge Herndon in the Southern District of Illinois is another example where unfettered attorney selection of bellwether cases went awry. There, the Court initially decided it would not "take a chance with random selection despite its endorsement by the Complex Litigation Manual." *In re Yasmin/Yaz Marketing, Sales Pracs, and Prods. Liab. Litig.*, Case Management Order 24 ¶4 (Doc. No. 1329) (entered Oct. 13, 2010) (*Yaz* docket entries attached as composite Exhibit 12). After entering an Order that called for the attorneys to select cases for discovery and pretrial practice, with trials scheduled to begin in late 2011, the Court revisited that decision in January 2012, commenting that the bellwether process "had completely broken down" and "would not produce the hoped for results." *Yaz*, Case Management Order 54, at 2 (Doc. No. 2228) (entered Jan. 10, 2012). The Court halted the bellwether program and ordered the parties to a mediation, which did not resolve the litigation. In August 2014, the Court instituted a new plan. Although that plan still calls for attorney selection, it is now limited to cases within 4 key groups, aimed at testing various significant risk factors. *Yaz*, Case Management Order 65 (Doc. No. 3480) (entered Aug. 28, 2014). As in the *Zimmer* MDL, the *Yaz* MDL tried no cases. According to recent reports, the remainder of the Yaz litigation recently settled for $57 million. Matt Fair, *Bayer Agrees to $57M Deal to End Yaz Blood Clot Suits*, LAW360.COM (Aug. 4, 2015), http://www.law360.com/articles/686987/bayer-agrees-to-57m-deal-to-end-yaz-blood-clot-suits (attached as Exhibit 13).

relating to the particular medical device at issue. *Id.* After limited case-specific discovery of those 12 attorney-picked cases, the Court was to pick 4 of the 12 cases for dispositive motions and trial. *Id.* at ¶ 4. All of this was to be completed in time to try the first cases in June 2014. *Id.* at ¶ 10.

To date, there still has not been a single trial in the *Zimmer* MDL. Memorandum In Support of Mot. For Revision of Trial Plan, at 1 (Exhibit 11). Instead, due to the gamesmanship attendant to attorney selection, the parties have been unable to get the requisite number of cases ready for trial despite the Court's intervention and assistance. *Id.* at 2-4. The problem stems from plaintiffs' tactic of dismissing ***every*** defense pick, with those dismissals sometimes occurring only after the parties have expended time and resources conducting discovery, and sometimes occurring even after plaintiffs' counsel certified that they would not voluntarily dismiss the case if selected as a bellwether. *Id.* To date, there have been more than a dozen defense picks dismissed, including, most recently, two cases earmarked for bellwether discovery and trial, which were only dismissed after a three month delay and a refusal by plaintiffs' counsel to engage in discovery. *Id.* As a result of the prejudice and delay caused by attorney selection, Zimmer filed a motion within the last month requesting Judge Pallmeyer to adopt a new trial plan that uses random selection to choose more balanced and representative cases. *Id.* at 1.

Finally, it bears mention that an attorney selection plan is particularly susceptible to gaming because at this stage, Plaintiffs necessarily have a major information advantage over AbbVie: counsel can talk to their clients and their clients' doctors, identify the cases and clients that may have stronger appeal to a jury, and stack the deck by picking those cases for inclusion in the bellwether program. *See Standards and Best Practices* at 30 ("The transferee judge should

adopt rules that will minimize the risk that parties will attempt to 'game' the bellwether trial-selection process, resulting in test trials of cases that are not representative of the pool as a whole."). AbbVie, by contrast, would be forced to make selections based on the limited, untested, and often self-serving information reported in the PFSs and the medical records Plaintiffs chose to provide in support of their claims. Randomized selection levels the playing field to the greatest degree possible and allows bellwether discovery cases to be selected solely by reference to the same well-defined universe of information. And using groups that are defined by objective criteria derived from Plaintiffs' PFS responses and the Complaint will assure that the sample truly represents the entire litigation as to AbbVie.

III. A Representative And Productive Bellwether Program Must Take Into Account The Characteristics Of The Plaintiffs In The Pool, And How They Relate To The Key Issues And Claims In The Litigation.

A full appreciation of the heterogeneity of the claimant pool requires the Court to go beyond a mechanical grouping of Plaintiffs by claimed injury; rather, the Court should look to the factors that will be most important to the resolution of these cases, whether individually or in groups. *See Bellwether Trials*, at 2344 ("[T]o ensure that the cases ultimately tried are emblematic of all the cases comprising the MDL, the transferee court and the attorneys must determine the composition of the MDL prior to engaging in any further trial-selection steps. To discharge this task effectively, the transferee court and the attorneys should each conduct a census of the entire litigation and identify all the major variables.").

When the bellwether pool closed on June 15, AbbVie analyzed the information provided in the PFSs, and for two key pieces of information, AbbVie also analyzed the medical records

Plaintiffs attached to their responses.[12] In summary, the demographics of the pool of 666 total Plaintiffs[13] currently are:

Alleged Injury

- 214 Plaintiffs allege a thromboembolic ("TE") injury [32%]
- 394 Plaintiffs allege a cardiovascular ("CV") injury [59%][14]
- 46 Plaintiffs allege both a TE and CV injury [7%]
- 9 Plaintiffs allege other or unknown injuries [1%][15]

[12] Those two pieces of information were: known history of prior cardiovascular disease, and "hematocrit" levels. The PFSs did not capture this information, and AbbVie describes below why it is nonetheless critical to certain Plaintiffs' claims.

[13] There are 46 cases where Plaintiffs allege both cardiovascular and thromboembolic injury AbbVie submits that these hybrid cases should be ineligible for selection as bellwethers in this initial phase, because of those cases' greater complexity, which makes them unrepresentative of the typical case. There are another 9 cases where the Plaintiffs allege other non-CV, non-TE injuries, and 3 cases where the Plaintiffs allege no AndroGel use. AbbVie believes all of these Plaintiffs should be ineligible for selection as bellwether cases, and has excluded those Plaintiffs when discussing the proposed group memberships.

In addition, 175 of these Plaintiffs used AndroGel as well as a TRT made by another manufacturer, and thus are not truly representative "AbbVie-only" cases. Still other Plaintiffs continue to have serious deficiencies in their discovery responses. For the reasons set forth in AbbVie's Motion Pursuant To The Court's Amended CMO 14 To Insure The Finality And Integrity Of The Bellwether Pool, the Court should exclude from the bellwether pool the 175 Plaintiffs who used other TRTs, and dismiss the claims of any Plaintiffs who fail to comply with their discovery obligations by August 14, 2015. The database submitted to the Court, however, includes information for all 666 cases. Should the Court choose to exclude some or all of the aforementioned categories of cases, AbbVie will promptly provide a revised database reflecting those Court-ordered changes.

[14] AbbVie includes cerebrovascular accident ("CVA"), *i.e.*, "stroke" cases in the CV injury groupings. Ischemic stroke is the most common form of CVA, and happen when there is a lack of oxygen flow to the brain. This process is mechanistically similar to the process that causes a blockage of blood in an artery of the heart, causing a myocardial infarction ("MI") or "heart attack." It is a different process from that which occurs when a blood clot or embolism forms in a vein, causing deep vein thrombosis ("DVT") or pulmonary embolism ("PE").

[15] These "other" injuries include: ischemic bowel, anemia, pulmonary hypertension, breast cancer, enlarged prostate, prostate cancer, and blindness. This group also includes one Plaintiff whose response to almost every question on the PFS was N/A, including whether or not he was claiming an injury.

Age

- 100 Plaintiffs were 65 or older at the time of their first prescription (15%)[16]
- 494 Plaintiffs were under 65 at the time of their first prescription (74%)

Timing Of AndroGel Use In Relation To Labeling Claims[17]

- 181 CV Plaintiffs were first prescribed AndroGel before July 2010 label change (46% of CV cases)
- 204 CV Plaintiffs were first prescribed AndroGel on or after July 2010 label change (52% of CV cases)
- 57 TE Plaintiffs were first prescribed before December 2007 label change (27% of TE cases)
- 65 TE Plaintiffs were first prescribed between December 2007 and April 2011 label change (30% of TE cases)
- 87 TE Plaintiffs were first prescribed after April 2011 label change (41% of TE cases)

Timing Of AndroGel Use In Relation To Marketing

- 219 Plaintiffs were first prescribed AndroGel before the first "unbranded" TV ad describing hypogonadism aired in May 2009 (33%)
- 209 Plaintiffs were first prescribed AndroGel between May 2009 and February 2012, after the first "unbranded" TV ad aired but before the first AndroGel TV ad aired (31%)
- 166 Plaintiffs were first prescribed AndroGel after the first AndroGel TV ad aired in February 2012 (25%)

Taking into consideration these pool demographics and the allegations in the Complaint, AbbVie has identified 15 key characteristics that will drive the resolution of issues and/or claims in these cases. Broadly speaking, these characteristics relate to medical causation and to timing of AndroGel usage, which is relevant to Plaintiffs' core warning claims, as well as their marketing allegations. Each Plaintiff has identifying characteristics that relate to both medical

[16] Since 2007, the labeling for AndroGel has included specific risk information related to patients over the age of 65, which the labeling characterizes as a "Special Population."

[17] Fourteen Plaintiffs (2%) did not disclose the date of their first AndroGel use. Where a Plaintiff identified only the year of his first use (213 Plaintiffs, or 35%), AbbVie assumed a start date of January of that given year. Of these 213 Plaintiffs, only 34 (6%) were first prescribed AndroGel in a year implicated by AbbVie's labeling groups.

causation and timing of usage, and each Plaintiff therefore is a "member" of more than one group.

What follows is a brief explanation of the 15 key characteristic groupings, the support for those groupings, and the specific issue or claim targeted.

CV Medical Causation Groups

Group 1: **Plaintiff under 65 with history of prior CV disease (85 Plaintiffs)**

Group 2: **Plaintiff under 65 with no known history of prior CV disease (209 Plaintiffs)**

The Complaint alleges that a January 2014 study "demonstrated an increased risk of heart attack in men over age 65 years, ***and in men younger than 65 years with a prior history of heart disease***." Complaint ¶ 416 (citing William D. Finkle *et al.*, *Increased Risk of Non-Fatal Myocardial Infarction Following Testosterone Therapy Prescription in Men*, PLOS ONE (January 29, 2014) ("the Finkle study") (emphasis added)). Plaintiffs have identified no other study showing an increased risk of CV events specifically attributable to TRT users under 65. AbbVie will use the pretrial litigation of the bellwether cases to present to the Court the full picture of the relevant, reliable science on the issue of whether TRT use causes cardiovascular disease. That science will show that ***no causal association*** has been established. Indeed, after reviewing all of the relevant science, including the Finkle study, the FDA approved a warning this year stating that epidemiologic studies and randomized controlled trials to date "have been inconclusive for determining the risk of major cardiovascular events . . . with the use of testosterone compared to non-use," and that because some studies, but not all, have reported an increased risk, patients should be informed of this "possible risk." *Testosterone Replacement Therapies*, U.S. FOOD AND DRUG ADMIN. (May 2015),

http://www.fda.gov/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/ucm451075.htm (Exhibit 7).

Initially, "possible risk" is not even proof of general causation, which means that without more reliable scientific evidence, further inquiry into specific causation is unnecessary. For example, the under-65 Plaintiff with no known history of heart disease presents a simple case where no studies have shown increased risk of cardiovascular disease—even the studies upon which Plaintiffs rely. But AbbVie's proposal does not simply target this subset of the strongest defense cases. To the contrary, AbbVie's proposal calls for the Court to test the claims of Plaintiffs with such a history as well, to cover the full scope of the litigation as to CV Plaintiffs.

These groups will test the reliability of the medical causation evidence underpinning the vast majority of CV Plaintiffs' claims.[18] Where Plaintiff can identify ***no*** studies demonstrating an increased risk of CV specifically attributable to under-65 men with no history of heart disease, Plaintiff's experts cannot offer scientifically reliable, admissible testimony to establish that TRT use can or did cause the alleged injury. And even a Plaintiff with a prior history of heart disease will have to establish that his proffered evidence—*i.e.*, the Finkle study and his experts' specific causation opinions—are sufficiently reliable to be admissible and create a triable issue of fact for a jury.

For both groups, a pretrial ruling that Plaintiff's proffered evidence is unreliable and inadmissible will be very instructive to the viability of the other CV Plaintiffs' claims. Conversely, a ruling allowing the expert opinions would provide other Plaintiffs, AbbVie, and

[18] There are only 100 Plaintiffs who claim they sustained a CV injury when they were 65 or older. Including a special grouping targeting those CV Plaintiffs would over-emphasize their significance to the litigation as a whole. Instead, as discussed below, AbbVie proposes specific groupings focused on all Plaintiffs who allege they sustained an injury at age 65 or older (both CV and TE), because of the targeted risk information directed at that special population that AbbVie has included in AndroGel's labeling since December 2007.

the transferor courts guidance about the relevant criteria to consider when examining medical causation evidence in CV cases. As this Court noted when denying AbbVie's motion to bifurcate the case and address general causation first, its pretrial causation rulings will be instructive, if not binding, for similarly situated Plaintiffs and should advance the goals of this MDL (*e.g.*, preventing inconsistent pretrial rulings and conserving resources). *See* Transcript of Oct. 24, 2014 Hearing, at 43:3-8 ("[I]f two years from now in a bellwether case, I rule on a motion for summary judgment that there's no evidence of general causation of cardiovascular incidence, it's a pretty good indication that I'm going to rule the same way in the other, you know, 900 cases in which that comes up.").

CV Warning Groups

Group 3: **Plaintiff first prescribed AndroGel before July 2010 (181 Plaintiffs) (46% of CV cases)**

Group 4: **Plaintiff first prescribed AndroGel July 2010 or after (204 Plaintiffs) (52% of CV cases)**[19]

To sustain a claim for failure to warn of a risk associated with AndroGel, a Plaintiff will have to show, among other things, that the state of scientific knowledge at the time of Plaintiff's prescription gave rise to a duty to provide risk information beyond what was in AndroGel's labeling. Here, the FDA reviewed and approved AndroGel's labeling repeatedly over the years, after specific consideration of the then-existing science relating to the issues raised by this case. That labeling is adequate as a matter of law, and the Plaintiff's claim should be dismissed, if the scientifically reliable evidence at that time of Plaintiff's prescription did not support strengthening the risk information. To test the adequacy of Androgel's warnings, then, the Court will have to take into account what was known about AndroGel's potential risks over time.

[19] 9 CV Plaintiffs did not disclose the date of their first AndroGel use.

The proposed CV warning groups center on the ***first*** study even suggesting a possible association between TRT use and cardiovascular events, which was published in July 2010. Researchers discontinued the study when participants in the testosterone group had a greater number of "cardiovascular events" than participants in the placebo arm. *See* Shehzad Basaria *et al.*, *Adverse Events Associated with Testosterone Administration*, 363 NEW ENG. J. MED. 109 (July 8, 2010) ("the Basaria study"). The participants were all frail men ages 65 and over, with an average age of 74. *Id.* at 110-11.

The Basaria study was the first publication reporting any potential increased risk of CV events in TRT users, and therefore distinguishes the claims arising from prescriptions before and after the release of that study. *See* CV Timeline Chart (attached as Exhibit 14). Those who were prescribed AndroGel before the Basaria study must establish that a warning of cardiovascular risk should have been made even in the absence of such a study, and notwithstanding the many other studies that did not show a treatment-related cardiovascular risk. Those who were prescribed AndroGel after the Basaria study must establish that it warranted additional risk information. They will have to contend with the fact that the FDA subsequently examined the Basaria study and found that it did not warrant a change in the labeling. In fact, AndroGel 1.62%, newly introduced in 2011, carried a label approved by the FDA with full consideration of the Basaria study. At that time, the FDA did not require a change to the labeling to reflect potential risk data from the Basaria study.[20]

Again, AbbVie has proposed two groups to capture the different facts that existed before and after July 2010. And between them, the groups include every Plaintiff claiming CV injury in

[20] While the subsequent publication of Finkle and another study (cited in the Complaint) in late 2013 and early 2014 ultimately led to the 2015 "possible risk" warning changes described above, only approximately 10% of the CV Plaintiffs in the AbbVie-only pool allege injury arising after those studies were issued.

the pool. A pretrial ruling that the AndroGel labeling was adequate a matter of law because it appropriately disclosed all known alleged CV risks could eliminate or limit the core claims of many if not all CV Plaintiffs.[21]

TE Medical Causation Groups

Group 5: **Plaintiff had hematocrit level below 50% (136 Plaintiffs) (64% of TE cases)**

Group 6: **Plaintiff had hematocrit level 50% or higher (15 Plaintiffs) (7% of TE cases)**

Group 7: **Plaintiff's hematocrit level unknown (63 Plaintiffs) (29% of TE cases)**

Plaintiffs have not identified any studies showing an increased risk of TE events specifically attributable to TRT use. In fact, as noted above, the most recent peer-reviewed science shows just the opposite: the July 2015 Ballargeon study, published in the Mayo Clinic Proceedings, found no increased risk of VTE in patients who were prescribed TRTs. J. Baillargeon et al., *Risk of Venous Thromboembolic Injury In Men Receiving Testosterone Therapy*, 90 MAYO CLIN. PROCS. 8, 1038-45 (Aug. 2015) (Exhibit 8).

Nonetheless, the Complaint alleges that Plaintiffs are at an increased risk of TE events because TRT can increase "hematocrit" levels. *See, e.g.*, Complaint ¶ 392 (alleging testosterone "causes an increase in hematocrit" and results in "thickened blood," which "can lead to life threatening cardiac events, strokes, and thromboembolic events"); *id.* ¶ 398 (discussing labeling's alleged failure to "warn of the serious and life threatening risks that are associated with red blood cell count that exceeds 50%, including the fact that individuals with a hematocrit greater than or equal to 51% have a doubling of the risk of stroke, new-onset heart failure, and

[21] Even if the Court's adequacy ruling does not lead to summary dismissals in all similar cases, it will be important for the parties to test different claims relating to the adequacy of AndroGel's labeling across all relevant time periods in the litigation.

coronary heart disease."). Hematocrit ("HCT") measures the volume of red blood cells in blood. In a normal male, red blood cells comprise about 45% of the total blood volume, with the remainder comprised of white blood cells, platelets, and plasma. "Polycythemia" is when the percentage of red blood cells (i.e., HCT) increases above 55% of total blood volume.[22]

Given the lack of other plausible mechanisms or scientific evidence supporting Plaintiffs' TE claims, the Court should test the viability of cases where a Plaintiff's HCT is normal, unknown, or elevated immediately prior to or at the time of injury. If a Plaintiff's HCT was normal, Plaintiffs' causal hypothesis is inapplicable, and the Court should dismiss that case unless Plaintiff's experts provide other reliable and admissible scientific evidence to establish the Plaintiff's TRT can and did cause the TE event. Similarly, where the medical records disclose no HCT data immediately prior to or at the time of injury, Plaintiff and his experts will have to explain how they can reliably attribute the Plaintiff's TE event to TRT use. Even where the Plaintiff had elevated HCT, Plaintiff's experts will have to offer reliable, admissible opinions that the TE event was in fact caused by TRT use as opposed to some other factor. The rulings in each of these groups will be instructive as to the remaining similarly situated Plaintiffs.

[22] AbbVie does not agree that Plaintiffs have accurately described the alleged risks associated with hematocrit levels at 50% or higher, but accepts Plaintiffs' Complaint at face value for purposes of defining the TE groups to be tested.

TE Warning Groups

Group 8: **Plaintiff first prescribed AndroGel before December 2007 (57 Plaintiffs) (27% of TE cases)**

Group 9: **Plaintiff first prescribed AndroGel between December 2007 and April 2011 (65 Plaintiffs) (30% of TE cases)**

Group 10: **Plaintiff first prescribed AndroGel after April 2011 (87 Plaintiffs) (41% of TE cases)**[23]

The TE warning groups center on the dates of labeling revisions relating to HCT and polycythemia. As reflected in the TE Timeline Chart attached as Exhibit 15, the history relevant to HCT and polycythemia labeling is different from that relating to cardiovascular disease. In the former case, the labeling explicitly addressed the subject from the very first AndroGel label and AbbVie timely revised the labeling as post-marketing adverse events were reported.[24]

Thus, at the 2000 launch of AndroGel, the "Precautions" section of the labeling warned: "Hemoglobin and hematocrit levels should be checked periodically (to detect polycythemia) in patients on long-term androgen therapy."

[23] 5 TE Plaintiffs did not disclose the date of their first AndroGel use.

[24] An adverse event ("AE") is an observation (or report) that the patient experienced a change in physical or mental state while taking a drug. The FDA explicitly cautions that AEs should not be taken by treating physicians as proof that the drug "caused" the particular event. *See* 21 C.F.R. § 312.32(e) ("A safety report or other information submitted by a sponsor under this part . . . does not necessarily reflect a conclusion by the sponsor or FDA that the report or information constitutes an admission that the drug caused or contributed to an adverse event."). Courts routinely conclude that mere reliance on AE data is insufficient to satisfy Plaintiff's burden of establishing medical causation through reliable scientific evidence. *See, e.g.*, *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1250 (11th Cir. 2005) ("Uncontrolled anecdotal information [here AERs] offers one of the least reliable sources to justify opinions about both general and individual causation.").

Prior to a drug's approval by the FDA, the manufacturer reports any known AEs, which typically come from the clinical trials studying the drug. After approval, manufacturers have a continuing duty to submit AEs as they become known. These post-approval events are sometimes called "Post-marketing adverse events."

In December 2007, AbbVie and the FDA strengthened the "Warnings and Precautions" section to warn:

> Increases in hematocrit, reflective of increases in red blood cell mass, may require lowering or discontinuation of testosterone. Increase in red blood cell mass may increase the risk for a thromboembolic event.

And in April 2011, AbbVie and the FDA strengthened the "Warnings and Precautions" section of AndroGel 1.62%'s labeling to warn:

> Increases in hematocrit, reflective of increases in red blood cell mass, may require lowering or discontinuation of testosterone. Check hematocrit prior to initiating treatment. It would also be appropriate to re-evaluate the hematocrit 3 to 6 months after starting treatment, and then annually. If hematocrit becomes elevated, stop therapy until hematocrit decreases to an acceptable concentration. An increase in red blood cell mass may increase the risk of thromboembolic events.

Again, AbbVie's proposal of three TE warning groups will enable the Court to test the adequacy of the risk information that AbbVie provided when the TE Plaintiffs were prescribed AndroGel.[25] And again, AbbVie's proposal will allow representation of the entire pool. A pretrial ruling that AbbVie's labeling was adequate as a matter of law during one or more of these time periods will greatly streamline the litigation and inform similarly situated Plaintiffs of the viability of their warning claims.

[25] In June 2014, AbbVie and the FDA further strengthened the TE risk information in AndroGel's labeling, but no TE Plaintiff specifically alleges he was first prescribed AndroGel after this change.

Marketing Groups

Group 11: **Plaintiff first prescribed AndroGel before May 2009 (219 Plaintiffs) (35%)**

Group 12: **Plaintiff first prescribed AndroGel between May 2009 and February 2012 (209 Plaintiffs) (35%)**

Group 13: **Plaintiff first prescribed AndroGel after February 2012 (166 Plaintiffs) (28%)**

Plaintiffs' Complaint primarily focuses on the alleged marketing conduct of the TRT manufacturers, including AbbVie. For example, Plaintiffs allege at length that AbbVie engaged in marketing campaigns to convince Plaintiffs and their doctors that hypogonadism is a disease, for which AndroGel is a safe and effective treatment. *See* Complaint ¶¶ 119-141. Putting aside the inaccuracy of Plaintiffs' allegations, even if true, marketing conduct is simply irrelevant absent a nexus to the claims in the case. For example, a Plaintiff cannot claim that AbbVie engaged in fraud that caused him harm when neither Plaintiff nor his prescribing physician saw, much less relied on, the allegedly fraudulent statement. Nonetheless, while AbbVie believes the most critical bellwether groups are those that go to the core issues of medical causation and warning causation, it is apparent that Plaintiffs intend to focus their cases largely on irrelevant marketing allegations, rather than the issues that matter.

To identify cases that are likely to raise Plaintiffs' marketing issues, AbbVie has segmented the AndroGel era to account for the history of AbbVie's nationwide TV advertising campaigns. From launch in 2000 to May 2009, AbbVie did not run any nationwide campaigns. Beginning in May 2009, AbbVie ran "unbranded" advertisements, meaning no mention of AndroGel, which related to hypogonadism—so-called "disease state awareness" ads. Beginning in February 2012, AbbVie ran its first "branded" AndroGel TV advertisement nationwide. Thus, AbbVie proposes three groups to test: (1) Plaintiffs who were first prescribed AndroGel in the

period from launch in 2000 to May 2009 (before the unbranded TV ad); (2) Plaintiffs who were first prescribed AndroGel in the period from May 2009 to February 2012 (after the unbranded TV ads but before branded AndroGel TV ad); and (3) Plaintiffs who were first prescribed AndroGel after February 2012 (during and after the branded AndroGel TV ad, which was reviewed by the FDA prior to airing). To test Plaintiffs' marketing contentions, the Court should sample cases from these different periods of time.[26]

The Special Population Of Plaintiffs 65 Or Older At Time Of First Prescription

Group 14: Plaintiff first prescribed AndroGel before December 2007 (6 Plaintiffs)

Group 15: Plaintiff first prescribed AndroGel in December 2007 or thereafter (94 Plaintiffs)

Plaintiffs who were first prescribed AndroGel when they were 65 or older present a special category that warrants testing. In December 2007 Abbvie and the FDA changed AndroGel's labeling to include information about the unknown risks of using AndroGel in the geriatric population. The section warned:

> There have not been sufficient numbers of geriatric patients involved in controlled clinical studies utilizing AndroGel to determine whether efficacy in those over 65 years of age differs from younger subjects. Additionally, there is insufficient long-term safety data in geriatric patients to assess the potential risks of cardiovascular disease and prostate cancer.

The overwhelming majority of Plaintiffs 65 or older were prescribed AndroGel ***after*** this risk information appeared in the labeling. In those cases, it will be critical to test the adequacy of the December 2007 risk language in light of the then-existing state of scientific knowledge, particularly because his doctor made an independent medical decision to prescribe AndroGel for Plaintiff in the face of these unknown risks. Moreover, given the lack of reliable scientific

[26] Plaintiffs are free to propose alternative groups to test their marketing allegations if they disagree with AbbVie's proposed time periods.

evidence to support an increased risk of cardiovascular or thromboembolic events attributable to the special population of Plaintiffs 65 or older, these cases will also need scrutiny to ensure they can survive the *Daubert* gatekeeping function.

IV. The Parties Should Select Six Cases For Potential Trials, But Only After Completion Of Fact And Expert Discovery.

AbbVie's proposal leaves intact the schedule as it relates to the "trial phase" of six bellwethers, with one modest exception: AbbVie proposes to select those cases only after completing fact and expert discovery, and simultaneous with the filing of dispositive and *Daubert* motions as to all 32 cases. Waiting until discovery is completed will not only make for better potential trial selections that can truly test the most difficult issues in the litigation, but also will reduce the likelihood that a trial case gets dismissed or settled for tactical reasons. And to allay any criticism that random selection has removed the attorneys from the bellwether selection process entirely, AbbVie proposes the parties should each choose three trial cases. It is imperative, however, that all Plaintiffs chosen for inclusion in the bellwether discovery and pretrial pool stipulate they will consent to trial in this Court if chosen. *See Lexecon Inc. v. Milberg Weiss Bershand Hynes & Lerach*, 523 U.S. 26 (1998). Plaintiffs have suggested only that the PSC will use "reasonable efforts" to secure *Lexecon* waivers. This is unacceptable. Without a more concrete requirement, Plaintiffs' position as to *Lexecon* waivers is ripe for abuse. *See Bellwether Trials*, at 2359 ("From a practical standpoint, the attorneys and litigants must provide their consent to trial prior to nominating a case to fill a spot in the trial-selection pool. If consent is not obtained at this stage, a situation can develop where the attorneys or the litigants can back out of their commitment to try a given case.").

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There can be no serious objection to a plan that calls for Plaintiffs to actually litigate their claims fully if selected for participation in the bellwether program. Significantly, AbbVie's plan preserves the Court's first trial date of October 31, 2016.[27] And although Plaintiffs may argue that the plan requires them to expend resources doing full fact and expert discovery for cases that are not ultimately selected for trial, this is nothing more than a request for a free ride. If particular Plaintiffs are not willing to litigate their claims ***fully***, they should not be in this litigation.

In reality, Plaintiffs will resist any plan that has the potential to expose weaknesses in particular Plaintiffs' claims—and it appears there are many vulnerable groups within this MDL who face a heavy burden to survive summary judgment and *Daubert* challenges. Plaintiffs' bellwether plan attempts to whitewash or avoid these significant problems or, at a minimum, delay addressing them for years. AbbVie's plan, by contrast, provides the Court the opportunity to rigorously test the strengths and weaknesses of each bellwether discovery Plaintiff's claims, which will make each bellwether case productive regardless of whether or not it is selected for trial.

CONCLUSION

For the foregoing reasons, AbbVie respectfully requests that the Court adopt a bellwether program that uses restrictive random sampling to identify 32 cases for discovery and coordinated pretrial proceedings. The sample should include at least one case from each of the following 15 groups:

CV

1) CV Plaintiff under 65 with history of prior CV disease

[27] It bears noting, however, that AbbVie's proposed schedule, which is aggressive, is only achievable if the Court randomly selects the 32 cases by October 1, if not sooner.

2) CV Plaintiff under 65 with no known history of prior CV disease

3) CV Plaintiff first prescribed AndroGel before July 2010

4) CV Plaintiff first prescribed AndroGel July 2010 or after

TE

5) TE Plaintiff had hematocrit level below 50%

6) TE Plaintiff had hematocrit level 50% or above

7) TE Plaintiff with unknown hematocrit level

8) TE Plaintiff first prescribed AndroGel before December 2007

9) TE Plaintiff first prescribed AndroGel between December 2007 and April 2011

10) TE Plaintiff first prescribed AndroGel after April 2011

Marketing

11) Plaintiff first prescribed AndroGel before May 2009

12) Plaintiff first prescribed AndroGel between May 2009 and February 2012

13) Plaintiff first prescribed AndroGel after February 2012

Special Population

14) Plaintiff 65 or older first prescribed AndroGel before December 2007

15) Plaintiff 65 or older first prescribed AndroGel in or after December 2007

Fact discovery in all 32 selected cases should begin on October 1, 2015 and end on April 15, 2016. Expert discovery in all 32 cases should begin on February 1, 2016 and end on July 15, 2016. Dispositive and *Daubert* motions should be filed in all 32 cases on August 1, 2016, and follow the schedule set forth in the Court's Amended CMO 14. Finally, the Court should permit the parties to select 6 cases (three per side) to serve as potential trial cases, in accordance

with the trial plan set forth in Amended CMO 14, with the first trial scheduled to begin October 31, 2016.

Dated: August 10, 2015

Respectfully submitted,

By: */s / David M. Bernick*

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CERTIFICATE OF SERVICE

I, Christopher S. Burrichter, hereby certify that on August 10, 2015, the foregoing document was filed via the Court's CM/ECF system, which will automatically serve and send email notification of such filing to all registered attorneys of record.

/s/ Christopher S. Burrichter

Christopher S. Burrichter