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 SUPPORT OF ITS PROPOSAL FOR SELECTION OF ABBVIE-ONLY BELLWETHER DISCOVERY CASES

I. PRELIMINARY STATEMENT

Pursuant to Section I.A of Amended CMO No. 14 (Dkt. No. 793), the Plaintiffs' Steering Committee (the "PSC") respectfully submits this memorandum in support of its proposal for selection of AbbVie-only bellwether discovery cases. The PSC's proposal, in the form of a proposed case management order ("CMO"), is attached hereto as Exhibit A. Additionally, the PSC opposes what it understands to be the proposal of Defendants AbbVie Inc. and Abbott Laboratories (collectively, "AbbVie"). Though a summary of AbbVie's proposal was provided to the PSC during the meet-and-confer process a few days before this submission was due, AbbVie has yet to share the full details of its proposal.

Nonetheless, it is apparent that AbbVie's proposal departs from the provisions of the original and amended version of CMO No. 14 in material ways, and that the PSC and AbbVie cannot reach agreement. AbbVie's proposal is contrary to the bellwether framework set forth in CMO No. 14, established over nine months ago in November 2014 after significant briefing by

the parties (*see* original CMO No. 14 Nov. 6, 2014, Dkt. No. 467).[1] AbbVie's attempt to re-litigate the case management plan, on which the PSC has relied, should not be permitted.

II. RELEVANT PROCEDURAL BACKGROUND

Consistent with the terms of Amended CMO No 14 § I.B, the PSC and AbbVie will each pick eight (8) thromboembolism clotting injury cases (*e.g.*, deep vein thrombosis, pulmonary embolism, or other clotting cases) ("TE") and eight (8) cardiovascular cases (*e.g.*, heart attack) ("CV"), for 16 TE bellwether discovery cases and 16 CV bellwether discovery cases. Amended CMO No. 14 § I.A provides that on or before August 10, 2015, the parties will submit to the Court a proposed CMO regarding procedural details for the selection of the 32 bellwether discovery cases, which is what the PSC's attached proposal provides. The PSC anticipated that this would not be controversial and that a single proposed CMO would be submitted jointly on consent.[2]

The parties' picks for their bellwether discovery cases are not due until October 31, 2015, pursuant to Amended CMO No. 14 § I.B, and the 32 discovery cases are going to be reduced to six (6) trial cases by the Court pursuant to Amended CMO No. 14 §§ II.B and II.C. The first three TE bellwether trials are scheduled for October 31, 2016, December 5, 2016, and January 9, 2017, and the first three CV bellwether trials are scheduled for February 13, 2017, March 20,

[1] AbbVie had the opportunity to raise the changes it now seeks when it sought to amend CMO No. 14 in May and July 2015, but it failed to do so.

[2] The PSC provided AbbVie with a version of its proposal that contemplated a joint submission on July 24, 2015. In a meet and confer to address the PSC's bellwether proposal (and other issues) on August 5, 2015, AbbVie discussed its proposal with the PSC for the first time. The PSC was surprised by AbbVie's departure from Amended CMO No. 14 (*see* Ex. B, E-mail from C. Seeger to D. Bernick et al. Aug. 5, 2015), and AbbVie outlined its proposal by email on the same day (*see* Ex. C, E-mail from M. Yeary to D. Buchanan et al. Aug. 5, 2015). On August 9, 2015, M. Yeary e-mailed additional objections to the PSC (*see* Ex. D, E-mail from M. Yeary to M. London Aug. 9, 2015).

2017, and April 24, 2017. (*See* Am. CMO No. 14 § V.) In accordance with Amended CMO No. 14 § II.B, the parties will prepare a proposed CMO that will provide the process by which each side proposes the six trial cases from the 32 bellwether discovery cases on or before February 15, 2016.

The cases eligible to be considered as bellwether discovery cases are those in which a complaint was filed and a Plaintiff Fact Sheet ("PFS") was completed in accordance with Amended CMO No. 9 on or before June 15, 2015. Although AbbVie is in the best position to know the number of AbbVie-only cases in which a PFS was completed by June 15, 2015, it is the PSC's understanding that 666 cases have met this criterion. In accordance with Amended CMO No. 14, the six bellwether trial cases will be ready to be selected by the Court on February 15, 2016 from the 32 discovery cases that are selected by the parties on October 31, 2015, which, in turn are selected from the 666 eligible AbbVie-only cases with a PFS that was completed by June 15, 2015.

As noted in the original CMO No. 14 entered on November 6, 2014 (Dkt. No. 467), the Court refused to adopt the defendants' proposal to bifurcate causation and liability discovery. At no time during the briefing that led to CMO No. 14 (or in the later attempts to amend CMO No. 14) did any of the defendants (including AbbVie) seek to have the bellwether discovery cases be determined by random selection, which it now proposes. Indeed, the opposite is true.[3] The

[3] The original version of CMO No. 14 was the subject of much dispute between the parties and subject to several rounds of briefing. At the time the original version of CMO No. 14 was entered, AbbVie agreed with an approach where the parties would select bellwether discovery cases. (*See* PSC's Mem. in Support of Pls.' Proposed Unified Case Management Plan at 4 Oct. 30, 2014, Dkt. No. 450; "Similarly, during the meet and confer process, the AbbVie Defendants did not object to the PSC's proposal with respect to the number of bellwether candidates to be selected by each side….".)

framework set forth in the CMO No. 14 should continue to guide this litigation and should not be changed.

III. ARGUMENT

A. The Court should adopt the PSC's proposed CMO regarding bellwether discovery plaintiffs, as it comports with the express provisions of both the original and amended CMO No. 14 and is best for this MDL

Consistent with CMO No. 14, the PSC's proposal provides, among other things, additional enabling details regarding the procedures for:

> (a) 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;
>
> (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 and the PFS served; and
>
> (c) providing a process by which replacement cases are selected if the PSC and AbbVie select duplicate cases; and
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> (d) providing a process by which replacement cases are selected if a case is settled by AbbVie or withdrawn by a plaintiff.

(*See* Ex. A.)

CMO No. 14 established a case management plan for AbbVie-only bellwether cases, and contemplates additional CMOs to complete the bellwether selection process. These supplemental CMOs were intended to provide additional details, which the PSC thought were not controversial, simply to fill in gaps that were intentionally left open as they were more effectively and efficiently dealt with after the litigation had developed. The supplemental CMO contemplated by CMO No. 14, submitted herewith, should not be used by AbbVie to reopen settled issues, such as how and by whom bellwether cases are selected.

There is no need to change the method set forth in CMO No. 14 by which bellwether discovery and trial cases are selected. *See* Am. CMO No. 14 § I.B ("the Plaintiffs and Defendants shall identify the following AbbVie-only cases….") and § II.C ("the Court will select which bellwether cases are to serve as the first three TE trials and which are to serve as the first three cardiovascular trials….). As discussed below, AbbVie's proposal unnecessarily unwinds this procedure and adds a purportedly random process for selecting discovery cases and has the parties (not the Court) pick the trial cases. If AbbVie's proposal were adopted, it would undermine an important purpose of the bellwether process, which is to instruct the parties and the Court about common issues in this litigation and to facilitate efficient resolution of these cases by settlement or trial.

B. The Court should reject AbbVie's proposal

While AbbVie still agrees that the pool of bellwether discovery plaintiffs should be composed of 16 TE cases and 16 CV cases, for a total of 32 cases, AbbVie seeks to unwind most of the remaining provisions of Amended CMO No. 14. The central component of AbbVie's proposal—in contrast to the framework created by CMO No. 14, which allows the parties to identify the discovery cases—is randomization. AbbVie wants the 32 discovery bellwethers to be randomly selected and wants the parties (not the Court) to pick the trial cases.

Although the PSC has not seen AbbVie's full proposal, AbbVie is apparently in the process of creating what it calls a "randomization program" to select 16 TE cases and 16 CV cases. Once again, Amended CMO No. 14 is clear: the parties are to select 16 TE cases and 16 CV cases for the discovery pool and the Court selects the trial cases. Rather than using just the two categories of injuries (TE or CV), AbbVie also wants to interject several other variables into the selection process that reflect its pre-discovery value judgments about what issues will be

relevant at the time of trial, but this added complexity will not result in representative results. From a statistical point of view, given the numerous variables that AbbVie claims should be included to address what it considers important, the sample size of 32 discovery cases will in no sense reflect the many subgroups it claims should be represented.

But even more fundamentally, random does not equal representative or instructive. In the PSC's experience, random selection of discovery or trial cases does not account for what is truly representative of the important issues in a case, as those issues are rarely well identified at the front end of a case. The appropriate time for the Court to determine representativeness is at the time cases are selected for trial, after generic discovery has developed, the issues have sharpened on liability and injury causation, and the cases have had sufficient discovery to assess their ability to inform the parties and the Court. At that time, the Court and the parties will have a more nuanced understanding of which issues are likely to be instructive in a broad swath of cases, and which issues will be of greater value to the parties if they are aired at trial. Informed by such discovery and the broader composition of cases on the Court's docket, there will ultimately have to be consideration by the Court, with input from the parties, on what factors the bellwether trial cases should highlight. Just that process is laid out in Amended CMO No. 14 § II.

Outside the context of this MDL (and CMO No. 14), random selection of bellwether discovery or trial cases in not favored. *See* Federal Judicial Center and National Center for State Courts, *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges* 12 (2013) ("Selecting cases randomly . . . is unlikely to produce a representative set of verdicts that will assist the parties in reaching a global settlement."); *see generally* Eldon E. Fallon, et al., *Bellwether Trials In Multidistrict Litigation,* 82 Tul. L. Rev. 2323, 2348, 2361-2362 (2008)

(stating the random selection "can be problematic"); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, Am. CMO No. 24 at para. 4 (S.D. Ill. Oct. 13, 2010) (copy attached as Ex. E) ("Likewise, the Court will not take a chance with random selection despite its endorsement by the Complex Litigation Manual.").[4]

"In designing a selection protocol, the transferee judge should be mindful that bellwether trials are most beneficial if they: (a) produce decisions on key issues that can then be applied to other cases in the proceeding (e.g., *Daubert* issues, cross-cutting summary-judgment arguments, the admissibility of key evidence); and (b) help the parties assess the strengths and weaknesses of various types of claims pending in the MDL proceeding. In the end, the key is to select cases that are representative of the entire claimant pool (or of specified categories in that pool)." Duke L. Ctr. for Judicial Studies, *Standards and Best Practices for Large and Mass-Tort MDLs* 19

[4] In its effort to distance itself from the party-selected case approach—contrary to CMO No. 14—the PSC anticipates that AbbVie will invoke the cursory discussion of random case selection in Section 22.315 of the Manual for Complex Litigation (4th ed.) (hereinafter "MCL"), but random selection should not be employed in this litigation. The MCL states that "[t]o 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." *Id.* (emphasis added). Though the MCL proposes as one option the approach adopted by CMO No. 14, AbbVie now contends that a random approach is better. The PSC disagrees. The MCL recommends selection by the parties, and it is important to note that the sole case cited in MCL § 22.315 for the proposition that test cases should be selected randomly is an older case, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), with entirely different circumstances than those at issue in this MDL. *See* MCL § 22.315 n.1075 and n.1076. *In re Chevron U.S.A., Inc.* required statistical evidence and a sample of sufficient size to allow a unitary trial of 30 cases selected by the parties (15 by plaintiffs and 15 by defendants, with no input from the court) to have preclusive effect for the other 2,970 cases in those consolidated proceedings. *In re Chevron U.S.A., Inc.*, 109 F.3d at 1019. That, however, is not what either the PSC or AbbVie propose in this case. In contrast, the parties here have proposed a bellwether process of early trial cases that do not purport to have preclusive effect over the other cases pending in this MDL, but would allow the parties to become informed about key issues in the litigation. Judge Fallon has called this a "modern approach." Eldon E. Fallon, et al., *Bellwether Trials In Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2337 (2008).

(Dec. 19, 2014) [hereinafter *Duke MDL Standards and Best Practices*]).[5] "[C]ollaborative approaches give the parties 'better control over the representative characteristics of the cases selected' and are therefore more likely to result in bellwether cases that are typical of the litigation pool." *Duke MDL Standards and Best Practices* at 20 (quoting *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, 2010 U.S. Dist. LEXIS 108107, at *7 (S.D. Ill. Oct. 8, 2010)).

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, 2343 (2008) ("the trial selection process should . . . illustrate the likelihood of success and measure of damages" of all cases in the litigation and "[a]ny trial-selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact"). The PSC agrees that "representative" cases are important, but disagrees with AbbVie regarding what constitutes a "representative" case.

Judges that have used a random selection method have, in hindsight, not been satisfied with the results because of its inherent flaws. As observed by one of New Jersey's designated mass tort judges, the Honorable Jessica R. Mayer, before a trial in the New Jersey Seroquel mass tort, the random selection process used for bellwether trial picks in that litigation proved problematic. *See, e.g.*, Hr'g. Tr. Nov. 10, 2009 at 43:2-43:3, *In re Risperdal/Seroquel/Zyprexa Litig.*, Case Code 274 (N.J. Super. Ct.) (attached hereto as Ex. F) (commenting on the suitability of the randomly selected cases as potential trial bellwethers and stating "none of them would be

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

my pick for a bellwether; that would be for sure"); *see generally* Hr'g Tr. Feb. 9, 2010, *In re Risperdal/Seroquel/Zyprexa Litig.*, Case Code 274 at 13:16-13:22 (N.J. Super. Ct.) (attached hereto as Ex. G) (stating "you know my feelings on the method of selection in this particular case. I don't feel that it gave us what we really needed….").

In addition to the fact that AbbVie's random selection proposal is contrary to the framework of CMO No. 14 and the objectives of assuring an informative bellwether process, AbbVie's proposal suffers from several readily apparent practical problems. Among the other unnecessary changes to Amended CMO No. 14 that AbbVie wants to pursue, AbbVie now seeks to dispense with streamlined "core" discovery and, instead, wants the 32 discovery bellwethers to go through full fact and expert discovery (generic and case-specific). AbbVie argues that a full fact discovery and expert work up of all 32 cases can be achieved without an impact on the overall trial schedule. Working up all 32 cases in full—which is not necessary to pick six bellwether plaintiffs for trial—will most assuredly negatively impact and delay the trial schedule.

That delay will flow from AbbVie's approach is perhaps best evidenced by the fact that AbbVie has not been able to produce more than one complete custodial file over the last several months, and has informed the Court that it is having difficulty reviewing discovery materials expediently. The idea that AbbVie can pursue unlimited case-specific discovery in 32 cases within a circumscribed timeframe, while satisfying its obligations on general discovery for the broader litigation, is contradicted by its repeated protestations regarding the length of time necessary to collect medical records and review custodial files. AbbVie's assertion that its randomization program will provide sufficient efficiency gains to maintain the August 1, 2016 deadline for dispositive and *Daubert* motions, and the first trial date on October 31, 2016, is unsupported and ultimately implausible.

Additionally, and without explanation, AbbVie wants the first six trial cases to be selected by the parties rather than the Court (AbbVie has not explained to the PSC how those picks would actually be made), even though the 32 bellwether discovery cases are to be picked by its purportedly random selection process. This is also in contravention of Section II.C of Amended CMO No. 14 and should not be permitted.

Furthermore, AbbVie wants all plaintiffs in the 666 cases eligible for selection as discovery/trial cases to waive their rights under *Lexecon* in advance of using its purportedly random selection process, or be ineligible for selection. While all the cases that are ultimately selected for bellwether discovery should have *Lexecon* waivers, it is impracticable to obtain those waivers in advance. The PSC expects that, under its proposal, all of the 16 cases it puts forward will have executed *Lexecon* waivers, but it cannot guarantee in advance that all the plaintiffs in the cases selected by AbbVie will ultimately waive their rights. The PSC's proposal includes a procedure for replacing cases selected by AbbVie for which a *Lexecon* waiver is not able to be obtained. (*See* Ex. A § A.2.)

IV. CONCLUSION

Based on the foregoing, the PSC respectfully requests that the Court enter an order adopting its proposal for selecting bellwether discovery cases, attached as Exhibit A hereto.

DATED: August 10, 2015

Respectfully submitted,

/s/ Christopher A. Seeger

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2015, the foregoing PSC's Memorandum in Support of its Proposal for Selection of AbbVie-Only Bellwether Discovery Cases 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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