

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	MDL No. 2545
This Document Relates to All Cases	Master Docket Case No. 1:14-cv-01748 Hon. Judge Matthew F. Kennelly

**JOINT STATUS REPORT
FOR SEPTEMBER 17, 2015 CASE MANAGEMENT CONFERENCE**

The Court directed counsel to file this joint report regarding the status of the parties' discussions, agreements and disagreements on the proposed agenda items for the September 17, 2015 case management conference.

I. Product Liability Cases

A. Status of production of AbbVie Custodial Files:

The parties have fully briefed their competing submissions and submitted a Joint Status Report to the Court on August 24, 2015.

B. Report on Other AbbVie Discovery Issues

1. ***Other non-custodial file productions.*** The parties have continued to meet and confer concerning the production of non-custodial departmental, shared drive, and SharePoint sources of responsive documents. In that regard, AbbVie has agreed to complete production of responsive documents from the following sources by October 9, 2015:

- (a) PharmaDocs;
- (b) Insight;
- (c) Global Labeling System ("GLS"); and
- (d) the Marketing Department network shared drive.

There are still a few non-custodial areas that AbbVie is working on collecting and/or assessing that the parties will continue to discuss (e.g., GLASS, SCORE and AbbVie Learning Center) as well as some other departmental SharePoints, including but not limited to Solvay share drive and/or SharePoint;

2. *Compliance with CMO 13 Section 3.B.3.*

Plaintiffs' Position: On September 14th, after repeated requests by the PSC that AbbVie certify the completeness of its productions as mandated in CMO13, AbbVie produced Certificates of Completion for Pablo Hernandez, whose deposition completed in August, and the next four deponents, which were scheduled for completion two weeks prior. Given the extremely tight timeline between production of documents and depositions for the scheduled deponents, the PSC requires the completion of document production, together with the required Certificate of Completion, on the scheduled production completion dates.

Defendants' Position: There is no real dispute that AbbVie is making timely, full and substantially complete production of files in ample time for the PSC to fairly depose AbbVie witnesses. On the other hand, because it is inevitable in litigation of this size and scope that occasional supplemental productions may be necessary AbbVie is trying to exercise caution before actually certifying completeness. With respect to these particular files, in light of the Court's ruling on Plaintiffs' motion regarding discovery of other TRT products, AbbVie could not certify complete productions until it confirmed that documents were produced that had been previously withheld as non-responsive. In fact, this double-checking by AbbVie resulted in an additional 150 documents being produced for these witnesses. AbbVie believes this good faith approach is appropriate and responsible and does not cause any prejudice to Plaintiffs.

C. *Update on AbbVie Depositions*

(1) *Pablo Hernandez Deposition.*

Plaintiffs' Position: Pursuant to the Court's guidance at the last case management conference, Mr. Hernandez's deposition was taken on August 20-21, 2015 in cooperation with the Cook County TRT litigation. The Court is aware of the circumstances that preceded this deposition, including the scope and timing of the production of Mr. Hernandez's custodial file and the PSC's efforts at coordination. The PSC seeks the Court's guidance concerning certain deposition defense practices of AbbVie's counsel at the deposition. The PSC respectfully submits that defense counsel's instruction that the witness not answer certain questions concerning plainly discoverable areas (e.g., time spent preparing for the deposition; whether Mr. Hernandez met with counsel in preparation for his testimony; whether in preparation for the deposition, documents were reviewed with counsel; and, consistent with Fed. R. Evid. 611, whether such materials refreshed Mr. Hernandez's recollection concerning the areas upon which he was examined) are improper as this area of examination does not impinge on any recognized privilege. Additionally, there were several instances in which defense counsel's speaking and coaching instructions resulted in the witness "parroting" counsel's words, which is not an acceptable in practice. Given the substantial delays attendant to the production of documents by AbbVie, and the consequent need to compress the preparation for and taking of AbbVie corporate witnesses, the schedule simply does not afford time for re-deposition of AbbVie witnesses following improper and abusive defense counsel behavior. Accordingly, the PSC seeks the Court's guidance to the parties in advance of such depositions to assure that no defense counsel "impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. Proc.

30(d)(2) (authorizing sanctions against defending counsel in the face of such conduct during depositions).

AbbVie Position: On August 20-21, Pablo Hernandez was deposed pursuant to this Court's directive in coordination with the Cook County litigation. The Cook County Plaintiffs used their entire 4 hours of allotted questions. The MDL Plaintiffs elected not to use their entire 7 hours of allotted time and voluntarily ended their questioning midday on August 21st. The record reflects that Mr. Hernandez was permitted to answer and did answer every question related to his sales and marketing role that the PSC chose to ask. Indeed, this was true even when questions were deemed objectionable as they were misleading or confusing, required the witness to speculate regarding the intentions or thoughts of others, or were not reasonably amendable to any single fair answer because they were not tethered to any specific time period. Notwithstanding the PSC's vague claim of improper speaking objections, the record on the whole plainly evidences that Mr. Hernandez answered questions fully and in his own words -- often multiple times.

In addition, Mr. Hernandez was allowed to answer questions of no real substantive relevance, including whether he met with counsel (397:9-14); whether he looked at documents to prepare for his deposition outside of the presence of counsel (399:19-21) and whether he spoke with non-lawyers in preparation for his deposition or in considering possible areas of testimony (400:20-401:17). AbbVie believes that Plaintiff counsel's additional inquiries as to the details of Mr. Hernandez's meetings with counsel -- including broad questions regarding what documents were shown to him (not connected to whether any individual document refreshed his recollection on any subject), as well as questions regarding how he interacted with counsel and the extent to which he prepared for his deposition in consultation with counsel --

impinge upon the work-product of AbbVie's lawyers, including their mental processes regarding the anticipated deposition and privileged exchanges with the witness. Indeed, the PSC knows without asking that all witnesses will necessarily meet with counsel before being deposed. They ask such questions to push back the boundaries of privileged and work-product protected subject matter. Thus, while AbbVie does differ with the PSC regarding the scope of what was and is appropriate questioning regarding deposition preparation, AbbVie agrees that having the Court's guidance going forward would be of assistance to all parties.

(2) *Status of Scheduling Future AbbVie depositions.* Of the initial nine (9) potential AbbVie witness deponents requested for October and November, the PSC and AbbVie have scheduled three (3) depositions for October and exchanged dates for the next 5 witnesses to be deposed in either November or the first week of December, conditioned on the custodial files being produced by the end of September. One of the witnesses is a former employee and the parties are working to get his deposition scheduled. Additionally, pursuant to the agreement reached by the parties, on September 10th the PSC identified the next three custodians who will be deposed (with a target of taking these depositions in December as well).

D. Report on Discovery Status Regarding the Other Defendants (the Non-AbbVie Defendants):

Auxilium:

Auxilium began production of the first tier of requested custodial files on August 31, 2015—comprising 16 custodial files—and will produce an additional 21 custodial files by October 31, 2015. These custodial file productions follow a series of 14 rolling non-custodial productions based on a list of more than 500 agreed upon search terms. Given the initiation and

progress of the custodial file productions, the parties now intend to begin coordinating and scheduling Auxilium corporate depositions in the coming months.

Lilly/Acrux (Axiron):

Since the August 2015 status report, Lilly has produced 10 custodial files to the PSC. An additional 6 custodial files will be produced to the PSC by Lilly in September. Thus a total of 16 custodial files will have produced by the end of September. Thereafter, additional custodial files will be produced on a negotiated schedule.

The parties have begun to discuss search terms to be used for the Acrux document production. The parties expect to reach agreement for search terms to be used with Acrux at or before the October 15, 2015 Case Management Conference.

Actavis:

The PSC and Actavis have engaged in negotiations to reach an agreement on search terms that will apply to collection of custodial files. The PSC proposed using a list based on the list agreed to by Lilly, and Actavis has asked that list be further reduced. Negotiations are ongoing, and to date no agreement has been reached but the parties are optimistic one is obtainable.

Actavis has delivered its objections and responses to the PSC's amended interrogatories. Actavis has also delivered organizational charts and related information in what the parties hope will be a substitute for a Corporate Organizational Rule 30(b)(6) deposition.

The PSC anticipates resolving the open search terms issue with Actavis, then requesting the first set/tiers of custodial files before the October 15, 2015, Case Management Conference, or judicial intervention might be sought at that time.

Endo (Delatestryl and Fortesta):

Endo's non-custodial production is ongoing, and the parties have negotiated a goal to complete those productions by October 16, 2015. Endo and the PSC have reached agreement on the search terms to be utilized for Endo's custodial production, subject to a further meet and confer regarding one search term requested by the PSC and for which Endo is awaiting analytics. Subject to final agreement on all search terms, the parties have agreed that Endo will produce the First Tier of custodial production by November 30, 2015, which shall comprise the custodial files of the 13 custodians identified by Endo pursuant to CMO 7. Subject to receipt by the PSC of the remaining non-custodial production by October 16, 2015, the parties have further agreed that, by on or before November 16, 2015, the parties will reach agreement on the custodians who shall be included in the Second Tier of custodial production, or if an agreement cannot be reached by that date, the PSC will seek court intervention regarding the custodians who shall be included in the Second Tier production. The parties are continuing to meet and confer regarding the scope of document production that pertains to Endo's TRT product Aveed, a product which has not been alleged to have caused injury in any case pending in the litigation. To the extent the parties cannot reach agreement regarding the scope of any document production pertaining to Aveed, this will not prevent the production of other discoverable documents, pending the Court's ruling on this issue. The parties anticipate that substantive depositions shall commence in early 2016.

Pfizer (Depo-Testosterone):

With the exception of production of adverse event data, Pfizer has largely completed its non-custodial production. The parties have engaged in multiple meet and confers regarding search terms and the list of individuals for whom Pfizer will produce custodial files, and have

made substantial progress, but have not yet been able to reach an agreement on those issues. The parties intend to continue to meet and confer in order to determine in the near future whether they can reach agreement on these issues without court intervention. In addition, the PSC has provided Pfizer with its proposed terms for adverse events, and the parties are continuing to meet and confer regarding the format and scope of the production of Pfizer's Adverse Event database.

E. Report on the Bellwether Selection Process

(1) Status Report: In accordance with the Court's guidance, the parties met and conferred and, using a random number generator, randomly identified 100 cases among the 471 AndroGel-only cases to serve as the pool for selection of the 32 discovery bellwether cases. The PSC and AbbVie counsel have further exchanged with one another their respective considerations for the pool. Both sides are actively working to review and finalize the pool. Members of the PSC are working to address *Lexecon* issues and secure *Lexecon* waivers for the cases where necessary. AbbVie Counsel is in the process of preparing DFS responses for the cases.

(2) Supplemental Request for Information on Case Pool:

Plaintiffs' Position: Plaintiffs have requested information from AbbVie concerning (a) the relationships that it and its predecessors have/had with the prescribing physicians in the 100 randomly identified cases (consultancies, grants, speakers' bureaus), (b) the availability of narrative sales call notes and field contact reports for the sales representatives calling on such positions, and (c) the availability of custodial files for sales representatives calling on said physicians. The PSC learned at the August 2015 deposition of Pablo Hernandez that the use of narrative sales call notes (i.e., free text) was terminated by the Androgel sales force in the late 2000s. Consequently, reports and messaging of sales representative/physician

details for a number of cases (potentially, a substantial number) will need to be separately developed through field contact reports—electronic and hard copy summaries of physician interactions with sales representatives. Further, the presence or absence of a custodial file for a sales representative that detailed a bellwether plaintiff’s prescribing physician could materially impact discovery in that case. The PSC believes that the existence and availability of such records, and its consequent availability in discovery of the 32 discovery bellwether cases, is relevant to the selection of the 32 bellwether cases, and should be provided to the PSC to enable informed bellwether selection.

AbbVie Position: The Defense Fact Sheet (“DFS”) is the result of extensive negotiation, motion practice, and argument before the Court. Throughout that process, Plaintiffs argued that they required the information in the DFS for bellwether selection and the Court agreed with them. As a result, AbbVie currently is preparing its DFS responses for the 100 randomly selected cases that now comprise the bellwether selection pool (to be produced by September 25th). In addition, AbbVie will also produce sales representative call notes in those same 100 cases. Those are the only cases under consideration for bellwether selection, and therefore, the only cases for which DFS responses are necessary now.

Plaintiffs’ belated request for additional discovery at this time should be denied. Additional case specific discovery will of course follow after the 32 bellwether discovery cases are selected, but AbbVie should not be required at this late date to search for new information for the bellwether pool beyond what was requested in the DFS. Further, Plaintiffs’ stated reason for requesting this new information is wrong. Plaintiffs have misrepresented Mr. Hernandez’s testimony. He was asked repeatedly when narrative call notes stopped being used and he repeatedly answered that he *did not know*. He also described “field

contact reports” as something entirely separate from and not related to call notes, and certainly not summaries of sales representatives’ interactions with physicians. In fact, field contact reports were described as records kept by managers to help evaluate and train sales representatives. Plaintiffs’ attempt to equate them to call notes is unsupported. The fact is that AbbVie will be producing the call notes to Plaintiffs for the bellwether pool cases and Plaintiffs will be able to see for themselves what those call notes contain. Once again, Plaintiffs are requesting additional discovery before they receive and review the agreed upon production.

F. Voluntary Dismissals: The parties will come to the Case Management Conference with a list of cases that they agree may be properly dismissed together with the terms of such dismissals.

G. Plaintiffs’ Counsels’ Motions to Withdraw: In two cases (*Knight v. AbbVie Inc. et al.* (15-cv-00707) and *Corbett v. AbbVie Inc. et al* (15-cv-03027)), Plaintiffs’ counsel filed motions to withdraw as counsel and noticed the motions for presentment at the September 17th case management conference. Defendants filed oppositions in both cases arguing that: (1) the Court should deny the motions because Plaintiffs’ counsel has not demonstrated a compelling reason to withdraw as counsel; and (2) the Court should dismiss the actions with prejudice pursuant to Amended CMO 9 and FRCP 41(b).

H. Agreed Amended CMOs: On August 10, 2015, the parties submitted to the Court via the Court’s proposed order email address (Proposed_Order_Kennelly@ilnd.uscourts.gov) two agreed proposed amended CMOs: (1) Second Amended CMO 9 (PFS); and (2) Third Amended CMO 18 (Service of Process). The parties request that the Court enter these amended CMOs before the September 17, 2015 case management conference.

I. Defendants' Request for FDA Documents Obtained by PSC via FOIA Request: On or about August 18, 2015, counsel for Endo and Auxilium informed the PSC Co-Lead Counsel that Defendants were requesting that the PSC produce all documents relating to all major testosterone products obtained from the government through the Freedom of Information Act (FOIA). The Co-Lead Counsel told counsel for Endo and Auxilium to formalize the request in a letter. On August 24, 2015, Counsel for Endo and Auxilium sent the PSC Co-Lead Counsel a letter formally requesting these documents and requested that the PSC produce the documents by September 9, 2015. The PSC intends to formally provide its response and position on the request by Monday, September 21, 2015.

J. Plaintiffs' Motion to Compel Production of Documents Pertaining to the Safety of Exogenous Testosterone: On August 27, 2015 the parties submitted a proposed order containing competing language for the Court's consideration.

K. Plaintiffs' Motion to Compel Privilege Log Information from Auxilium: This motion has been fully briefed.

L. Cooperation with State Court

In an effort at cooperation and coordination with the Cook County state court litigants, the PSC has coordinated its proposed dates for the initial AbbVie witness deponents for October, November, and December with the Cook County state court litigants. The dates work for both jurisdictions.

M. PSC Reappointment: The Plaintiffs' Steering Committee has filed a motion and tendered a CMO asking the Court to re-appoint all current PSC members for another one year term in their respective roles as co-lead counsel, executive committee members and members at

large. The motion was unopposed and supported by declarations from each PSC member summarizing their contributions to the litigation on behalf of all plaintiffs.

II. Update on Medical Mutual of Ohio: Plaintiff Medical Mutual filed a motion to strike the Declaration of William F. Cavanaugh, Jr. in Support of Defendants' Joint Motion to Dismiss.

The parties have agreed to a briefing schedule. Defendants will file their response on September 17, 2015, and Plaintiff will file its reply on September 24, 2015.

Dated: September 15, 2015

Respectfully submitted,

/s/ Trent B. Miracle

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 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/ Trent B. Miracle