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

BELLWETHER PROPOSAL OF ABBVIE INC. AND ABBOTT LABORATORIES

Amended CMO 14 is intended to establish a bellwether discovery, motion practice, and trial program that is "representative and productive." Amended CMO 14 at 1. Pursuant to that CMO, the parties submitted initial bellwether selection proposals on August 10, 2015 (Docket Nos. 932, 933). Plaintiffs proposed that the attorneys should select all 32 cases. Their proposal had no criteria to guide the selection process so that the results were "representative" of the pool and made no provision for using the bellwether cases "productively" in pretrial litigation. By contrast, AbbVie proposed that all 32 bellwether discovery cases should be chosen using an available technique of random selection and 16 objective criteria (or "case categories"). Because an indispensible part of AbbVie's proposal is full fact/expert discovery and dispositive/*Daubert* motion practice to ensure we address important cross-cutting issues pretrial,[1] AbbVie also proposed a slight modification to the schedule.

[1] *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"); *Standards and Best Practices for Large and Mass-Tort MDLs*, Duke Ctr. for Judicial Studies 27 (2014) ("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.") ("*Standards and Best Practices*"); Barbara Rothstein and Catherine Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, Fed. Judiciary Ctr. 36 (2011) ("[a] transferee judge should go beyond mere pretrial discovery and

Without deciding finally the method for bellwether selection, the Court on August 18 directed both sides to submit 16 proposed discovery bellwethers and file objections to the other side's proposals, so that the Court can then "arbitrate." The Court also ruled that it was persuaded by AbbVie's proposal that the parties conduct full fact and expert discovery in all 32 cases and be provided time to brief dispositive/*Daubert* motions. Aug. 18, 2015 Hearing Tr. at 85:8-86:17 ("August 18 Tr."). As set forth in AbbVie's August 10 proposal (i.e., the "red" timeline, attached as Exhibit 1 to this Submission) and discussed with the Court subsequently both in off-the-record conferences and at the October 15 hearing,[2] the schedule in Amended CMO 14 requires a slight modification as a result.

Therefore, AbbVie respectfully submits the November 12, 2015 Case Management Conference should focus on the two remaining bellwether selection issues: (1) selection of the 32 bellwether cases; and (2) an appropriate modification of the schedule to allow full discovery and full pretrial motion practice on cross-cutting issues. In accordance with the Court's direction on August 18, AbbVie now proposes a "slate" of 16 cases and, as the preferred alternative, also modifies its August 10 proposal by replacing "rejective" random selection of all 32 cases with simple random selection.

Background

Amended CMO 14 reserves to the Court the ultimate decision on which bellwether selection process to use. Amended CMO 14 at 2. To that end, the Court held a hearing on August 18, 2015, during which the Court reemphasized that the "right" bellwether selection

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should encourage the resolution of scientific disputes. Judges must grapple with scientific issues in their roles as gatekeepers.") ("*MDL Pocket Guide*"). *See generally* AbbVie's Aug. 10 Bellwether Submission, at 8-12 (Docket No. 932) (discussing need for productive pretrial proceedings that test cross-cutting issues).

[2] Oct. 15, 2015 Hearing Tr. at 5:1-21.

method will get "something that's representative." Aug. 18 Tr. at 84:14-15. The Court also explained its hope for a productive bellwether program, where "issues that are going to affect a lot of cases are going to come up and are going to get litigated pretrial." *Id.* at 30:23-31:8.

There was no decision on the bellwether selection process at that hearing, but the Court shared its reservations about both sides' proposals. Attorney selection "incentivizes picking cases on the far ends," as both sides choose cases they think are the strongest for their respective positions. *Id.* at 68:1-6; *see also* July 9, 2015 Hearing Tr. at 14:4-8 (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."). But the Court also commented that AbbVie's proposal was not "really random" because it used case categories the Court found to be "to a certain extent subjective." *Id.* at 68:7-13. To address that concern, the Court invited the Plaintiffs to identify the case categories that they believed should be added to or deleted from AbbVie's list. *Id.* at 61:13-21. At the same time, the Court suggested the parties should select 100 "AbbVie-only" cases on a purely random basis, and then pick the 32 bellwether discovery cases from that subset. *Id.* at 86:8-17. Without deciding upon a method for selecting the 32 cases, the Court suggested that the parties make proposals for the bellwethers and that it would be left to the Court to "arbitrate" the matter. *Id.* at 87:17-24. In this fashion, the Court can apply the requirements of "representative and productive" in the context of concrete proposals from a smaller pool. All methods of selection are still available to it. Indeed, the Court cautioned in Chambers at one point that it might decide to start back at square one if the selection process was not working.

Since the August 18 hearing, the parties, following the Court's instruction, have chosen 100 cases at random using the website www.randomizer.org. All Plaintiffs consented to trial

before this Court and waived their rights under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).[3] Because AbbVie has already agreed the Court may preside over any case selected for an "AbbVie-only" bellwether trial, there is no risk that AbbVie or a bellwether Plaintiff can strategically withhold a *Lexecon* waiver to avoid trial before the Court.

In accordance with the Court's instructions, Plaintiffs' counsel also shared their proposed bellwether case categories. Their list was very similar to AbbVie's original categories, except that Plaintiffs proposed: (1) the cardiovascular ("CV") picks should test myocardial infarction ("MI") and stroke cases, and the clot picks should test deep vein thrombosis ("DVT") and pulmonary embolism ("PE") cases; (2) each case category should test Plaintiffs younger and older than 65 at the time of injury; and (3) the bellwether discovery program should specifically test cases where the Plaintiff allegedly died as a result of his CV or clot injury. Ultimately, however, the parties have not agreed on a selection method or on a particular slate of bellwether cases. The two approaches before the Court are attorney selection of all 32 bellwether discovery cases (16 per side), subject to the Court arbitrating disputes about the representativeness of the cases chosen, or simple random selection of all 32 cases.

Attorney Selection Approach

Although attorney selection is easy at the outset of the bellwether process, it is more likely to result in a non-representative slate, as each side picks what it perceives to be its strongest cases. *See Standards and Best Practices* at 29 ("[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."). This problem may persist even after the Court arbitrates the selections on a case-

[3] The final bellwether pool consists of 99 cases because one Plaintiff amended his PFS to allege other TRT product use and thus is excluded from consideration.

by-case basis. It is also probable there will be strategic dismissals, which, as the Court noted, would "skew the sample." August 18 Tr. at 68:24-69:1. This has happened in the *Zimmer NexGen Knee Implant* MDL before Judge Pallmeyer, where gamesmanship and strategic dismissals of all defense picks have caused considerable delay and waste, frustrated the MDL Court's management goals, and led to a fundamentally unfair pool of trial-ready cases chosen by only one side.

Therefore, if the Court is inclined to allow the attorneys to select the bellwether discovery cases, the Court should arbitrate selection disputes consistent with the stated goals of the bellwether program: representativeness and productiveness. In doing so, the Court should consider whether proposed bellwether slates represent the larger pool of 100 and whether the proposed cases sufficiently reflect the key cross-cutting issues to be tested pretrial. Doing so preserves the Court's important pretrial function of evaluating claims and scientific evidence, and issuing rulings that may more broadly apply to the litigation. Looking down the road, the Court should also curb strategic gamesmanship and waste by imposing sanctions in the event Plaintiffs dismiss cases after selection. At a minimum, those dismissals should be with prejudice, AbbVie should be allowed to select the replacement case, and the Court should entertain further sanctions if supported by the individual circumstances of the case—including monetary sanctions where appropriate, and in extreme circumstances, revisiting the bellwether program in its entirety if the abuses persist.[4]

[4] The PSC has represented to the Court that it "will not dismiss" any PSC cases that are selected, but has also cautioned that it cannot control non-PSC firms. August 18 Tr. at 8:18-23, 12:17-13:1. But it is no solution to restrict the bellwether program to PSC cases, because the resulting slate would not be truly representative of the pool as a whole; almost half of the cases have been filed by non-PSC firms.

To initiate this process, AbbVie has chosen the following cases for its proposed slate of 16 discovery bellwethers:

CV Cases

Plaintiff Name	Docket Number
Agard, Walter	1:14-cv-09742
Cribbs, Edward	1:15-cv-01056
Martina, Randy	1:14-cv-08598
Mitchell, Jesse	1:14-cv-09178
Palmer, Larry	1:14-cv-09325
Roberts, William	1:14-cv-03062
Truax, Roccie	1:14-cv-02935
Trusty, Joe	1:15-cv-01015

Clot Cases

Plaintiff Name	Docket Number
Adkins, John	1:14-cv-09753
Camp, Randall	1:15-cv-02243
Cannon, Richard	1:15-cv-01835
Diesslin, Theodor	1:14-cv-06770
Garcia, Froylan	1:15-cv-01086
Hession, Kevin	1:14-cv-08222
Myers, Arthur	1:15-cv-01085
Shepherd, Dale	1:15-cv-00404

These selections cover the cross-cutting issues AbbVie has identified as "key," and therefore at a minimum will be productive for testing those issues pre-trial.

Simple Random Selection Approach

Simple random selection remains the only clear, objective, and easily executable path to "representing" the selection pool of 100 cases and therefore the 469 case selection pool as a whole. It also is the only path that minimizes the impact of Plaintiffs' superior knowledge of their cases.[5] Random selection will also obviate the need to resolve case-by-case objections and can assure a ready means to replace any selected bellwether Plaintiff who drops out.

The Court has recognized the importance of the "representativeness" requirement, but has also expressed concern that AbbVie's prior rejective random sampling proposal used case categories the Court found to be subjective to some degree. August 18 Tr. at 68:7-13. Plaintiffs' counsel likewise argued that any random selection process should be "truly random, meaning not driven by any—by any data generated either by the defendants or the plaintiffs." *Id.* at 5:11-14. To respond to these concerns, AbbVie has modified its proposal, and now suggests the Court should use simple random sampling to select all 32 cases—*i.e.*, pick 32 cases at random from the current pool using the randomizer website, without regard for whether the chosen Plaintiff falls into a particular case category.[6] The parties are familiar with simple random selection, having used it to narrow the larger "AbbVie-only" pool to 100 cases without problem or objection. It is also a well-accepted method for choosing representative bellwethers. *See* ANNOTATED MANUAL FOR COMPLEX LITIGATION § 22.315 (4th ed. 2014) ("To obtain the most representative cases from

[5] Notably, AbbVie's knowledge is still limited to the PFSs and attached medical records. Of the 99 Plaintiffs in the bellwether pool, 18 have supplied fewer than 100 pages of records, and 40 have supplied fewer than 200 pages.

[6] Alternatively, if the Court wanted to ensure 16 CV cases and 16 clot cases, the parties could segregate the two groups of cases before running the random selection program.

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."); *MDL Pocket Guide* at 36 (recommending random selection as one sampling method, and concluding, "[w]hether the aim is discovery, settlement, or a bellwether trial, any sample should be representative of the claims and claimants, taking into account relevant factors such as the severity of the injuries, the circumstances of exposure to the product, the mechanisms of causation, the products and defendants alleged to be responsible, any affirmative defenses, and the applicable state law."); *Standards and Best Practices* at 27 (noting both random and attorney selection with strikes are "popular" methods).[7]

Crucially, simple random selection will also yield bellwethers that are "productive" for pretrial litigation of cross cutting issues, as well as for informative trials. For any issue-related category identified by the parties that comprises more than 5 claimants out of the 99 in the pool, simple random selection of 32 bellwethers has a greater than 88% chance of selecting at least one claimant from that pool. As the Court already appreciates, it is AbbVie that has pressed for a selection process that is "productive" for pretrial litigation. Its original proposal of "rejective" random sampling assured selection of cases that were both random and also covered such issues. While switching to simple random selection addresses the Court's concern that the original

[7] Plaintiffs' bellwether submission asserted that "random selection of bellwether discovery or trial cases in [sic] 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.')." PSC's August 10, 2015 Memorandum In Support Of Its Proposal For Selection Of AbbVie-Only Bellwether Cases, at 6 (Docket No. 933). Plaintiffs' selective edit to the Pocket Guide quotation is misleading. The quoted sentence actually reads, "[s]electing cases randomly ***or allowing attorneys to choose bellwethers*** is unlikely to produce a representative set of verdicts that will assist the parties in reaching a global settlement." (omitted language emphasized).

proposal might be subjective in some respect, it does sacrifice a little of the certainty that all of the cross-cutting issues proposed by AbbVie will be picked up. But AbbVie believes this sacrifice is outweighed by the goal of getting 32 bellwethers that are truly, objectively representative and are not tainted by the imbalance created by Plaintiffs' clearly superior knowledge of their cases. If the Court were to order random selection of bellwether discovery cases, the parties could identify those cases the same day and immediately proceed to collect full medical records and begin fact discovery. Further, the parties would have an even-handed, objective way to replenish the pool in the event of dismissals: simply select another case at random. This replenishment method would not encourage dismissals, nor would it give a strategic advantage to either side.

The Bellwether Schedule

Amended CMO 14 currently contemplates an abbreviated 75-day period of "core bellwether discovery" in all 32 bellwether discovery cases. Amended CMO 14 at 3. Full fact and expert discovery, and dispositive/*Daubert* motions practice, would occur only in the six cases chosen as "trial cases." *Id.* at 3-4.

At the August 18 hearing, however, in "a departure from what was in the case management order," the Court agreed the parties should conduct "broader discovery" in all 32 bellwether discovery cases, including expert discovery, both to help identify the proper cases to be tried, and to "deal with common issues." August 18 Tr. at 85:8-86:17. The Court has been "persuaded" the parties should conduct full fact and expert discovery in all 32 bellwether cases, "to identify the proper cases" for trial and to deal "with common issues" pretrial. Aug. 18 Tr. at 85:8-86:4. The Court also has said it intends to use the bellwether program "to be ruling on

cross-cutting issues." *Id.* at 30:1-3.[8] Since the August 18 hearing, both on the record and in chambers, the need to modify the discovery schedule has been raised and the Court has acknowledged that this remains an issue. *See, e.g.* Oct. 15 Hearing Tr. at 5:18-21.

Accordingly, AbbVie attaches as Exhibit 1 its now familiar chart showing the original and proposed revised bellwether schedules. Under both schedules, fact discovery closes April 15, 2016, the parties file dispositive and *Daubert* motions on August 1, 2016, and bellwether trials begin in late 2016, with the first scheduled for October 31, 2016. The only meaningful differences are: (1) expert discovery would begin in February 2016 (three months earlier than Amended CMO 14) and continue through July 15, 2016 (four days later); and (2) the parties would propose trial cases on August 1 after fact and expert discovery closes. Further scheduling for those cases should depend on the Court's rulings on dispositive/*Daubert* motions, and if a proposed pick is dismissed, another can be put in its place with any necessary adjustments made to the trial date.

CONCLUSION

For the foregoing reasons, AbbVie respectfully requests the Court to review the parties' proposed bellwether selections in light of the requirements that the selection be both "representative and productive" and in light of the alternative of using simple random selection to choose 32 bellwether discovery cases. AbbVie further requests the Court to adopt AbbVie's proposed revisions to the current post-selection schedule, in accordance with the Court's August

[8] AbbVie appreciates the Court's admonition that it will not rule on *Daubert* motions in all 32 bellwether discovery cases. August 18 Tr. at 85:13-17. AbbVie's intention is to file certain cross-cutting motions, such as general causation challenges, which could apply broadly to similar cases. Other *Daubert* and dispositive motions, although filed in selected individual cases, could also have a wider application and impact on the litigation. At a minimum, rulings resulting from these targeted motions will be very instructive to the parties and the Court, to the extent they address the science and methodology relied on by Plaintiffs' experts, or other cross-cutting issues common to some or all Plaintiffs.

18 ruling that full fact and expert discovery may be taken in the 32 bellwether cases, to permit dispositive motion practice on "cross-cutting" issues.

Dated: November 2, 2015

Respectfully submitted,

By: */s / David M. Bernick*

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CERTIFICATE OF SERVICE

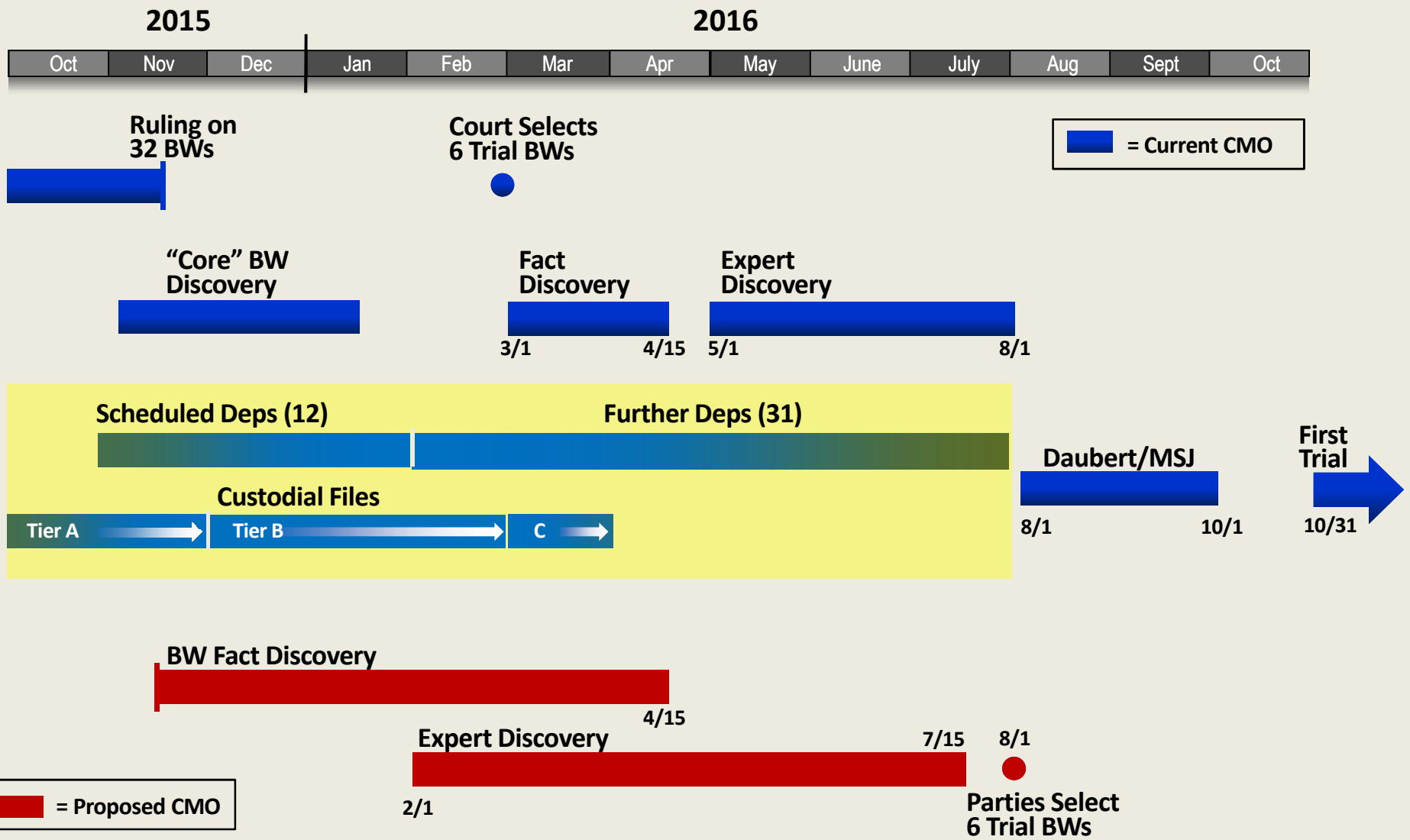
I, Christopher S. Burrichter, hereby certify that on November 2, 2015, the foregoing document was filed via the Court's CM/ECF system, which will automatically serve and send email notification of such filing to all registered attorneys of record.

/s/ Christopher S. Burrichter

Christopher S. Burrichter

EXHIBIT 1

PENDING CASES: MDL CASE SCHEDULE



Ex. 2