

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>IN RE: TESTOSTERONE</b>	)	
<b>REPLACEMENT THERAPY</b>	)	<b>Case No. 14 C 1748</b>
<b>PRODUCTS LIABILITY LITIGATION</b>	)	
	)	<b>MDL No. 2545</b>
<b>This document relates to all cases</b>	)	

**CASE MANAGEMENT ORDER NO. 36**  
**(further deadlines for AbbVie bellwether trial cases)**

The plaintiffs' steering committee (PSC) and AbbVie have submitted position papers regarding the setting of a fact discovery cutoff date for the AbbVie bellwether trials. To oversimplify somewhat, the PSC says that the date should be February 17, 2017, which is also the date for the submission of summary judgment and *Daubert* motions, and AbbVie says it should be December 31, 2016, which is about three weeks before the deadline for completing expert witness depositions.

Both sides make fair points in support of their contentions. These include:

- Back in 2015, AbbVie's counsel made comments acknowledging and accepting that fact discovery would continue through the period of expert discovery and has only more recently changed its position on this.
- Discovery regarding Besins (which is represented by AbbVie's counsel) began only recently due to the timing of briefing of and the Court's ruling on Besins' motion to dismiss.
- The remaining fact discovery coming from AbbVie concerns two subjects—pharmacovigilance, on which AbbVie's document production was only completed very recently, and marketing during the period when Solvay marketed AndroGel, on which the relevant documents have been difficult to gather.
- The parties need to know the universe of information upon which their experts will rely, and expert disclosures and discovery are ongoing now.
- The parties also need to know the universe of information upon which *Daubert* and summary judgment motions are to be based, and that needs to be before the

deadline for such motions.

There is no humanly possible way to accommodate or reconcile all of these points. One big reason is the fact that the first AbbVie bellwether trial will begin on June 5, 2017. The Court has advised the parties, repeatedly, that this date is set in stone. The Court has also advised the parties that *all* of the AbbVie bellwether trial cases are to be trial-ready before that date, so that if one or more cases is dismissed for one reason or another, others will move up in line to meet the June 5 start date. For these reasons, it is not reasonably possible to move the *Daubert* / summary judgment briefing schedule, which currently ends on April 10, 2017, with a May 8, 2017 target date for rulings. As it is, this is barely enough time for the Court to rule, given the likelihood of summary judgment motions in all eight (or up to eight) bellwether trial cases as well as multiple *Daubert* motions the parties are likely to have. The Court is unwilling to give itself less than four weeks to rule on what is likely to be something like two or three dozen serious motions involving serious briefing.

In addition, and importantly, it is crucial for the bellwether trials—any and all of them—to be reasonably representative. For this reason, and because of the need for all of the bellwether trial cases to be trial-ready before June 5, rolling deadlines that contemplate that discovery will be used in later bellwether trials but not earlier ones *cannot* be the plan. Unusual circumstances that appear later might require an exception or extremely limited exceptions to this, but the parties cannot and should not expect this to be the norm.

The bottom line is that something (or more than one thing) has to give. It is not going to be the trial schedule. Nor is it going to be the four-week interval between the end of the summary judgment / *Daubert* briefing schedule and the target ruling date. So the Court is going to do the best that it can to deal with each side's points and concerns. The Court will use the basic structure set forth in the attachment to the PSC's last submission, with some modifications.

The Court orders as follows:

1. The PSC must identify any AbbVie witnesses that it wishes to depose for any of the AbbVie bellwether trials by November 30, 2016. Any such depositions are to be scheduled for completion by no later than December 23, 2016. This December 23

deadline may be modified only if and to the extent that both sides agree to do so, and only on the condition that such a modification will affect no other dates or deadlines set by the Court.

2. Non-party discovery of any of the following entities must be completed by no later than ten days before the summary judgment / *Daubert* deadline, that is, by February 7, 2017: (a) Edelman Worldwide; (b) The Endocrine Society; (c) Dr. Abraham Morgenthaler; (d) The Androgen Study Group; (e) 3D Communications; (f) Dr. Daniel Shames; and (g) EDU-Medical. The parties are directed to cooperate in scheduling as much of this discovery as possible as much *before* February 7, 2017 as possible. The parties are directed to bring to a head as promptly as possible any disputes that cannot be resolved amicably, so that the Court may rule on such disputes as much before February 7, 2017 as possible.

3. The PSC and Besins are directed to meet and confer by no later than December 7, 2016 regarding all objections to any outstanding discovery requests. Any disputes are to be presented to the Court by way of a motion that is to be filed by no later than December 12, 2016, with the response to the motion due by no later than December 14, 2016, so that the matter may be addressed and, if possible, ruled upon at the December 15, 2016 case management conference.

4. The parties are directed to agree on a reasonable deadline for disclosure of witnesses for trial, subject to the Court's approval. The proposed deadline is to be included in the joint status report filed in advance of the December 15, 2016 case management conference. If a party lists for trial a witness whose deposition has not been taken, the party must provide a particularized disclosure of all subjects and contents of the witness's testimony. If an opposing party wishes to take that witness's deposition, the parties are to cooperate in arranging for this to be done promptly after the designation of the witness, subject to the disclosing party's right to promptly move the Court for a protective order precluding the deposition for good cause.

5. Any supplementation of a party's Rule 26(a)(2) disclosures must be done in accordance with and by the time limitation specified in Rule 26(e). The relevant trial date for purposes of calculating the ultimate deadline for such supplementation is June 5, 2016.

6. Any request to modify any of these deadlines (except as provided in the last sentence of paragraph 1) must be made by a motion noticed for presentment to the Court on no more than three business days' notice. Any such motion must include a particularized explanation of the good cause for the requested modification and a particularized showing of the requesting party's promptness in bringing the matter to the Court's attention as soon as the basis for the requested modification arose.

7. The parties may, if they wish, negotiate later dates for the filing of summary judgment and/or *Daubert* motions and responses, but the previously set reply brief date may not be modified. In other words, the parties may squeeze their own time, but not the Court's.

8. A *detailed* discussion of contemplated and scheduled document and deposition fact discovery and any other matters related to the points identified above is to be included in the joint status report to be filed in anticipation of the December 15, 2016 case management conference.

Date: November 23, 2016

  
MATTHEW F. KENNELLY  
United States District Judge