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 Honorable Matthew F. Kennelly

JOINT STATUS REPORT
FOR NOVEMBER 30, 2017 CASE MANAGEMENT CONFERENCE

The Court directed counsel to confer and submit a proposed schedule regarding the "mixed use" cases consistent with the Court's comments during the August 24, 2017 Case Management Conference. *See* Dkt. No. 2140. Accordingly, the parties submit the following:

PSC's Proposal:

The PSC submits this portion of the Joint Report in response to Case Management Order ("CMO") 78 to address three issues raised therein. First, in response to the Court's request for a plan to increase the number of trial-available cases, the PSC's proposed Supplemental Discovery & Trial Plan is attached hereto as Exhibit A and is discussed in further detail in Section I, below. Second, the PSC is receptive to the implementation of a supplemental Plaintiff Fact Sheet ("PFS") or Plaintiff Profile Form ("PPF") to be completed for all filed cases, however, the parties have not been able to reach an agreement on this issue. However, as discussed in Section II, the PSC simply cannot agree to the supplemental PFS proposed by Defendants. Third, with regard to the development of a "Plan B" process to ensure that for Defendants with only one or two bellwether trials scheduled if a bellwether case is resolved on summary judgment or otherwise there will be ample cases to serve as back-up bellwether trial cases under the current schedule should the ones currently slated for trial be disposed of in some fashion. To this end,

the PSC submits various proposals for each Defendant, some on agreement and others where the PSC and the given Defendant do not agree. See *infra* Section III.

I. Supplemental Core Discovery & Trial Pool Cases

To date, this Court has created and overseen a robust bellwether program, which resulted in trials involving both AbbVie and Auxilium in 2017, with additional trials for those two Defendants in 2018. Trials involving Eli Lilly & Co. ("Lilly"), Actavis, and Endo have also been set for 2018.[1]

In response to CMO 78, the PSC respectfully submits Exhibit A as its proposed CMO for establishing an expanded and accelerated discovery course for the many TRT cases currently pending before this Court, which have not proceeded past the PFS stage. The PSC's proposal entails preparing an additional and significant number of cases for trial.

The PSC proposes selecting 164 cases to go through Core-Discovery, as established and defined by CMO 14, with an anticipated Core Discovery completion date of May 21, 2018.[2] *See*

1 In brief, the pre-trial workup for the trial set cases has involved the following: (1) for AbbVie, 32 cases were worked up through Core-Discovery with eight cases selected as eligible for early trial, two of which were tried to verdict, one of which was dismissed on May 8, 2017 pursuant to CMO 46.and two of which are slotted for trials in 2018. *See e.g.* CMOs 14 (and amendments thereto), 30 and 38; (2) for Auxilium, eight cases were worked up through Core-Discovery with two selected as trial cases, one of which was tried to verdict and the other which summary judgment was granted, and two substituted as potential trial cases on April 9, 2018. *See e.g.* CMOs 31 & 79l (3) for Lilly, 16 cases were worked up through Core-Discovery with two selected as trial cases. See e.g. CMOs 19-C, 32 & 80. (4) for Actavis, six cases are currently being worked up through Core-Discovery, with two to be selected as trial cases on December 8, 2017. *See e.g.* CMOs 19-D & 37.; (5) for Endo, six cases are being worked up through Core-Discovery, with two to be selected as trial cases on February 23, 2018. *See, e.g.* CMOs 33 & 74.

2 As noted in the PSC's proposal, following the completion of Core-Discovery, once the case(s) is/are designated as trial cases, they will undergo a Final Work-Up phase, which the PSC estimates will take between 90-120 days. As such, the cases that are first designated for trial from this pool should be ready for trial by September/October 2018.

2 As noted in the PSC's proposal, following the completion of Core-Discovery, once the case(s) is/are designated as trial cases, they will undergo a Final Work-Up phase, which the PSC estimates will take between 90-120 days. As such, the cases that are first designated for trial from this pool should be ready for trial by September/October 2018.

Exhibit A, at §§ 1, 4.[3] At that time, the Court will have approximately 160 cases from which to select cases for trial on a regular basis, as the Court deems those trials should be conducted. *Id.* at §§ 6, 7, 8, 9.

Regarding the latter point, the Court will have various trial options and flexibility to fashion numerous different trial scenarios as the circumstances may warrant, including: (1) simply allowing cases to be tried in this District before Your Honor; (2) allowing cases to be tried in this District before other sitting judges, (3) allowing multi-plaintiff-trials in this district either before Your Honor or other district judges;[4] (4) granting remand of appropriate cases to the transferor forum to be tried by Your Honor, by designation; and/or (5) granting remand of appropriate cases to the transferor forum to be tried by forum judges, should the Court determine that circumstances then warrant remand of particular cases (*Id.* at § 7). This trial flexibility is a hallmark of the PSC's proposal and one that is lacking in Defendants' proposal.

With approximately 160 worked up cases to choose from, the Court can then designate cases for expert discovery, pre-trial motions, and trial. This Final Pre-Trial Workup phase can be completed within 90-120 days. (*Id.* at § 6). Further, under this plan, the PSC anticipates that these trials should be able to commence as early as the Fall of 2018. (*Id.* at §§ 9, 10.) Central to the PSC's proposal is that the Court will be able to create trial groupings and/or trial categorizations (including multi-plaintiff trials) as it deems most relevant and most important by

[3] As noted at length in Section I.B.2 below, there are numerous strong and compelling reasons, as well as significant precedent in similar coordinated proceedings, as to why the PSC should select the 164 cases to move forward.

[4] The PSC submits that consolidation via multi-plaintiff trials is a critical element to the future of this MDL. To this end, in Section IV, *infra*, the PSC sets forth its argument and authority in support of multi-plaintiff trials in litigations like this.

virtue of having a stable of approximately 160 cases that have had Core-Discovery completed and each of these 160 cases being just 90-120 days from being ready to tried. Doing so will achieve the Court's goals set forth in CMO 78 and, "will also advance the overall progress of the MDL in a way that will lead to its conclusion within a reasonable period of time." *See* CMO 78, p. 3.[5] Indeed, the 2018 trial schedule for existing bellwether cases is already full, so it makes sense, both economically and efficiently, to devote the first half of 2018 to Core-Discovery on these approximately 160 cases. Further, the PSC submits that its proposed plan of Core-Discovery being completed on approximately 160 cases will allow the already scheduled trial cases against AbbVie, Lilly, Auxilium, Actavis and Endo to play out through 2018, as well as allow for the continuation of any settlement discussions. Furthermore, additional

The stark difference between the PSC's proposal and that of the Defendants is that: (1) Defendants' plan will result in delay; (2) Defendants plan will select far fewer cases to be worked up or to simply rely on previously worked up bellwether cases that have not yet been tried; and/or (3) Defendants will likely advocate for the continued use of the randomized selection of any new cases that might be selected. As noted below in Section I.B, the PSC opposes each of these positions and submits that the record of this MDL in litigating these cases to date equally supports abandoning these concepts as well.

A. The PSC's Proposal Will Promote Efficiency and Provide the Court with Access to a Larger Pool of Trial-Ready Cases

As outlined above, the PSC's proposed CMO looks to accomplish the Court's stated goal of having trial-ready cases to substitute for others as needed. To be sure, the PSC's proposal

[5] And as the Core-Discovery unfolds and/or case selected for trial from the Core-Discovery cases, t a new wave of 100 plus case can be selected and undergo Core-Discovery under the same parameters, and this process can continue.

could have taken a different approach and focused on fully working up much smaller waves of cases for trial (*i.e.*, Core-Discovery as well as expert discovery and motion practice), but that process did not seem as fundamentally sound as the approach the PSC ultimately has proposed, which will result in a larger group of cases that will be ready for trial with back-up cases waiting in the wings should an set of cases not reach trial. In this regard, the PSC's approach would have the following benefits, such as (1) permitting the Court better access to control of its trial calendar as well as those of other judges it may seek to enlist; (2) allowing a greater number of cases to be developed, thus, resulting in substantially more information learned of the selected cases; (3) allowing broader participation by individual plaintiffs' attorneys in developing their clients' claims; and (4) allowing allow a larger swaths of cases to serve as substitute trial cases, if necessary. The larger number of cases being worked up will effectuate the Court's objective of having cases ready for trial and also allowing for significant trial options should they be needed and warranted.[6]

B. Defendants' Proposal is Flawed for a Variety of Reasons

Defendants' proposal should not be accepted for a host of reasons. One hallmark distinction of the defense proposal and the PSC's is that they want expert disclosures in all cases that are worked up under any new plan. As the Court has learned, with new studies, new medical procedures, and new arguments constantly being advanced, disclosing experts

[6] Regarding the latter point, the PSC's proposal states that that of the 160 or so cases worked up for trial, the Court *may* select 10-20 cases in trial Wave 1. This is simply a reference figure. (Ex. A, § 8.) Indeed, the circumstances may warrant less than 10-20 cases or more than 10-20 cases be picked for trial. Likewise, the circumstances may warrant that multi-plaintiff trials or specialized groups of cases are selected for Final Trial Workup. This trial flexibility is a critical component to the PSC's proposal and will likely distinguish it from Defendants' proposal which likely suggests working up a handful of cases from inception though experts and/or dispositive motions. Under this type of scenario, the Court has limited trial flexibility, and is stuck with what it has. This is not efficient or effective, especially when compared to the PSC's proposal, which provides for a large staple of cases ready to be extracted from a waiting pool of approximately 160 cases that have already undergone Core-Discovery and which are simply 90-120 days from being trial ready (i.e. expert reports and dispositive motions practice).

sometimes a year or longer before trial leads to serial supplements, and supplemental depositions, and proves very inefficient. We have seen this in the bellwether process already. Tendering experts relatively near in time when the date and case setting is firm allows expert disclosures and discovery to proceed efficiently, and without needless expense. Another significant difference, the most important and troubling of which is that the PSC has learned that it is the strategy of certain Defendants to propose procedures that will require waves of cases to be fully worked-up for trial versus the PSC's proposal have the ultimate effect in delaying this MDL as long as possible. Such a strategy should not be countenanced. For the reasons set forth herein, Defendants' approach should be rejected.

1. Limited Numbers of Discovery Cases Limits the Parties' Knowledge Gain and the Court's Flexibility

Defendants' proposal does not support the Court's stated goal because it would have this Court select a substantially far fewer number of cases than that proposed by the PSC. The AbbVie Defendants have intimated that they plan to propose that a pool of only five to fifteen cases should be worked up, and they have been unwilling to provide any more specificity. As to the other Defendants, they have merely suggested that the cases that have already been through the bellwether workup process be the ones that are further worked-up for trial. Each Defendant's position appears to miss the point of the Court's prior directives and CMO 78.

To be sure, the time for trickle litigation is for the most part over, with discovery as to all bellwether cases almost complete, with all trials to be finished in early 2019 or before. The goal of the original bellwether process was to select trial cases that were the most representative of TRT cases, and to allow them to proceed to trial to provide guidance to the parties and the Court. Once the original bellwether trials are completed, the aim of the parties and the Court should shift to select cases in a fashion that allows for the most systematic, efficient and fair approach to

litigating the remaining cases. In this regard, if the Defendants are not willing to engage in meaningful good faith settlement negotiations of these cases, then the parties need to litigate these cases towards resolution (trials), and not simply one-by-one or handful-by-handful. Indeed, there are thousands of cases that need to be worked through the judicial system, and to accomplish this, the parties need to start to preparing these cases for just that. The CMO proposed by the PSC is the blueprint for accomplishing this goal.

The recent MDL regarding C-8 exposure[7] provides the most relevant and on point example of why the core discovery, as advocated by the PSC, should take place now. There, following a bellwether process that had resulted in some plaintiff victories as well as some dismissals in favor of the defendants, the Court was faced with a large docket of cases where settlement prospects were not advancing. In that litigation, the defendants, like those here, proposed a process whereby only a handful of cases would be worked up for trial, and they ignored the remaining 3,500 plus cases sitting on the Court's docket and the plaintiffs whose cases were essentially parked in the MDL.

By contrast, the PSC advocated, like they do here, that because the bellwether process had yielded its needed information and because settlement had not be achieved, something had to be done on a large scale, to move the remaining cases along. The Court ultimately ruled that it would try 40 cases on a ten-month cycle, in which the most serious injury (*i.e.*, cancer) was alleged and that those cases needed to be worked up for trial before it as well as other jurists in the Southern District of Ohio and Southern District of West Virginia. *See* Pretrial Order No. 42, *In Re: E.I. DuPont De Nemours and Company C-8 Personal Injury Litigation*, 13-md-2433 (S.D. Ohio Feb. 2, 2016), ECF No. 4294 (attached hereto as Exhibit B). As a result of this process

[7] *See generally, In Re: E.I. DuPont De Nemours and Company C-8 Personal Injury Litigation*, 13-md-2433 (S.D. Ohio 2013).

(and excluding the bellwether cases tried), one additional case was tried to verdict over the course of 7 months, and an additional 10 were designated as trial cases and assigned to various District Court Judges throughout Ohio, before a global settlement was reached less than five months later. *See* Case Management Order No. 21, *In Re: E.I. DuPont De Nemours and Company C-8 Personal Injury Litigation*, 13-md-2433 (S.D. Ohio Oct. 18, 2016), ECF No. 4294 (attached hereto as Exhibit C).

2. The Court Should Allow the PSC to Select the Cases for Core Discovery Rather than Random Selection as Advocated by Defendants

After the extensive bellwether work-ups and pending schedule, one must recognize that the bellwether process is running its course and winding down, and that the next wave of cases are no longer truly "bellwether cases" in that they are not meant to be representative of the other cases in this MDL and are not meant to necessarily exhibit "cross-cutting issues." At the outset of the bellwether process the defendants represented to this Court that they only needed to try a handful of cases to test "cross-cutting" issues in order to evaluate the cases for resolution. Those handful of trials are occurring, and a resolution of the remaining thousands of cases appears anything but imminent. The PSC's proposal, which would allow the plaintiffs to designate the cases to be subject to core discovery, takes these facts into account and is intended to ensure that whatever cases are ultimately selected are populated fairly, efficiently, and in an economically-balanced fashion and that each case is appropriate for trial.

The PSC's proposal accomplishes the Court's goals, is fair and equitable and will allow the thousands of cases in this MDL access to their day in Court. First, the plaintiffs bear the burden of proof at trial. Thus, they should be permitted to designate the approximate 160 cases for Core Discovery. Further, unlike the typical early trial and/or bellwether protocols, whereby the parties attempt to garner information applicable to scores of cases based on the trials of, or

settlements from, a few early test cases, these 160 cases or so will each be tried in the context of a typical single event case,[8] and will simply be systematically worked through, independently. Because each plaintiff is required to prove each element of his/her case solely for his/her own benefit, and bears the burden of proof in this regard, the plaintiffs should be permitted to choose, which of those cases they want to try and in what order.

Notably, plaintiffs' selection of which cases they choose to try has been followed in several mass tort litigations. *See, e.g.*, Trial Transcript at 6-11, *In Re: E.I. DuPont De Nemours and Company C-8 Personal Injury Litigation*, 13-md-2433 (S.D. Ohio Apr. 18, 2016) (attached hereto as Exhibit D). *In Re: Vioxx Litig.*, Oct 11, 2006, Order (N.J. Super. Ct. Law Div., J. Higbee) (stating that plaintiffs were to submit a list of proposed cases for trial and only permitted defendants to object to cases that plaintiffs identified) ; *see also New Jersey Levaquin Litig.*, Case Code 286, April 15, 2010, Case Management Conference Hearing Transcript at 38:20-23 (Honorable Judge Higbee holding that plaintiffs would be permitted to prepare their "classic best case" for trial and adopting plaintiffs' trial selection protocol while permitting defendant to select eight cases for limited work-up)(attached hereto as Exhibit E); *In re: DES Consolidated Litig.* (long-standing rule in the Diethylstilbestrol "DES" cases, which have been consolidated before the Honorable Jack B. Weinstein, that the trial cases are selected by plaintiffs). Indeed, it is not uncommon for jurists in mass tort litigation to allow plaintiffs to select trial cases to follow a bellwether process and particularly when Defendants seem content for protracted and delayed resolution. In short, if every case needs to be tried, then the plaintiff should be allowed to determine the order of the cases it wants to try.

[8] The PSC still may attempt to test issues by selecting cases with certain criteria, including but not limited to cases relating to a particular product and/or cases with particular diagnosis date(s) and/or exposure date(s) as the PSC believes that such a process could still prove beneficial, and further underscores why the random selection process is not the prudent course.

Second, and importantly, plaintiffs are in a better position to identify which plaintiffs have suffered the most severe injuries and/or which are plaintiffs *in extremis*, including but not limited to situations involving advanced age, financial distress, and/or other individualized factors which deserve consideration for earlier trials. For these individuals, fundamental notions of justice and fairness dictate that their cases should be tried as part of the initial wave of approximately 160 cases. Because plaintiffs' counsel has the benefit of being able to speak to their clients at any time, ascertain the current status of their health, and more easily obtain significant particularized knowledge regarding the severity of each plaintiff's alleged injury, plaintiffs' counsel are better equipped to determine which plaintiffs, from a fairness standpoint, should have their claims heard first. Randomly selecting cases will not take this critical consideration into account.

Third, and in a similar vein, plaintiffs' counsel can more equitably select cases that include cases from the various law firms involved in this litigation in a fair and proportionate manner. Selecting cases randomly will not address this critical issue, and might unintentionally over burden certain firms while simultaneously freezing out others, which could also lead to a prejudicial effect, globally, to the clients of those firms bearing a disproportionate load of the selected cases and/or those being excluded.

Fourth, while some plaintiffs may be eager to have their cases tried and heard by the Court as soon as possible, others may be equally willing to wait to have their day in Court. This is information that is uniquely in the possession of plaintiffs and their counsel. Similarly, with respect to availability, while some plaintiffs may have very flexible schedules in 2018 and early 2019, and thus be willing and eager to be one of the initial trial cases, others, for varying reasons, may find it necessary to wait. This, too, is information solely in the possession of plaintiffs and

their counsel. And again, because the original bellwether process is nearly over, and the parties and the Court are simply attempting to find the best way to litigate and try hundreds of cases, considerations of fairness, scheduling, and plaintiffs' own preference are important concerns in selecting these 160 or so cases.

Fifth, allowing the PSC to select the initial cases to be part of Core-Discovery beginning in 2018, allows for the possibility that, in the future, some of these cases could potentially be tried together in a multi-plaintiff trials. Indeed, in order to secure justice for the hundreds, if not thousands, of victims Defendants have harmed, the Court may choose to invoke multi-plaintiff trials as set forth in the PSC's proposed CMO. (Ex. A., § 7.) To this end, in selecting the 160 or so cases, plaintiffs will attempt to select cases that have some common characteristics, including but not limited to state of residence, diagnosis date(s) and product manufacturer(s), which might allow for some limited/small clustering of cases for multi-plaintiff trials in the future, should the Court allow such trials to proceed. [9]

Sixth, the PSC respectfully submits that the random selection of cases, which the PSC believes Defendants will advocate for, should not be used for the selection of future cases. Notably, though the random selection method has been variously used in selecting bellwether pools, Judges who have utilized the method have similarly identified its inherent flaws. By way of example, during a conference prior to a *Seroquel* mass tort trial, the Honorable Jessica Mayer noted that the random selection process utilized for trial selections in that

[9] To the extent defendants have a particular issue that they would like to see explored in the Discovery Wave Cases, the PSC does not oppose the inclusion of a limited number of such cases to address such issues (as opposed to selections designed to push a case through discovery only to raise a specific and narrow case specific issue that threatens to jeopardize trial dates and the valuable trial time allocated by the Court). The PSC believes, however, that the predominant focus should be on identifying cases to proceed through discovery to assure a rich population of cases for trial.

litigation produced less than ideal cases, commenting that "none of them would be my pick for a bellwether; that would be for sure." (Transcript of Nov. 10, 2009 Conf., *In re: Risperdal/Seroquel/Zyprexa Lit,* Case Code 274 (N.J. Super. Ct. Law Div.) at 43:2-43:3) (attached hereto as Exhibit F). Similarly, although in the context of bellwether selection, in the *In re Yasmin and Yaz (Drisporenone) Market'g and Sales Practices and Prods. Liab. Litig*., 09-md-02100, the Honorable Judge David R. Herndon noted in CMO 24 at ¶4, that the "the Court will not take a chance with random selection despite its endorsement by the Complex Litigation Manual." (Attached hereto as Exhibit G). Random assures random. Not necessarily representative—and most assuredly, in the present context, not what the parties need to resolve this litigation. At this point, looking beyond the early bellwethers, the PSC believes that what will best enhance the potential for resolution with decision makers on both sides is what happens when juries are presented with cases that the PSC believes are sound trial picks.

In short, as the bellwether process is nearing its completion, it appears that every TRT case will need to be fully litigated and tried on its individual facts. Therefore, it is essential that these cases be selected in a fashion that is as efficient as possible, as equitable as possible, and in a way that does not require one firm to be unfairly burdened with the expense of several trials occurring at the same time.

The PSC respectfully submits that the considerations highlighted above are important to take into account in selecting the proposed initial 160 or cases, and that it is plaintiffs, not Defendants, who are in the best position to take these considerations into account in selecting these initial cases for Core Discovery.

Accordingly, for the reasons set forth herein, the PSC respectfully requests that their proposal as set forth in Exhibit A be adopted by this Court.

3. The Trial Selection Process Should Not be Delayed Pending the Submission of Supplemental PFSs by all Plaintiffs

It is the PSC's understanding, after engaging in the meet-and-confer process, that Defendants will likely advocate that CMO 78 directs that cases cannot be selected for this next wave of discovery until a supplemental PFS is provided by each plaintiff. The PSC submits that Defendants have misinterpreted the spirit of CMO 78 as well as the underlying guidance received from the Court regarding the supplemental PFS. To this end, the PSC has always understood from directives issued by the Court as well as CMO 78 that a supplemental PFS is an issue that it separate and apart from an expanded and accelerated bellwether process. Instead the supplemental PFS should be a tool that assists the parties in obtaining "additional information" regarding each plaintiff with a filed case in order for the Defendants to obtain a better grasp on an overall census of cases "out there" for categorization purposes as well as that of potential settlement. The PSC has never understood the purpose of a supplemental PFS to be a means to inject delay into the process or to prevent additional cases from being ready for trial until 2019. To be certain, the PSC supports a process whereby a supplemental PFS would be served by all plaintiffs with filed cases, but such a process should be on a parallel track with those cases that will go through Core-Discovery and trial work-up (which would also require the plaintiff to supplement their PFS).

II. Form and Timing of a Supplemental PFS

As mentioned above, CMO 78 also directed the parties to create and utilize a supplemental PFS. While the PSC is more than receptive to creating and utilizing such a supplement, it has met and conferred with Defendants' counsel over such a formal process, and it

was not until Monday, November 20, 2017, that the PSC learned that Defendants intended to use the same proposed supplemental PFS as they submitted to the Court back on July 13, 2017, in connection with the Mixed Use Bellwether CMO. Defendants' 2017 proposal was objected to by the PSC back then and continues to be objected to today. But more importantly, this Declaration and Lone Pine based proposal was rejected by this Court back then. *See*, Transcript of Court Conference at 54, *In Re: Testosterone Replacement Therapy Products Liability Litigation*,(NDIL Aug. 24, 2017) (attached hereto as Exhibit H). The PSC submits that, for similar reasons, it should again be rejected now.

As the Court will recall, Defendants' proposed supplemental PFS (which is more akin to a formal declaration) does not serve the purpose of a true supplemental PFS which is to provide additional factual information; rather it appears designed by Defendants to serve as a quasi-Lone Pine Order threatening sanctions or other punishment plaintiffs and/or their counsel. This is now Defendants' third attempt to seek a Lone Pine order or quasi-Lone Pine order, which has already rejected by this Court. *See, e.g.*, CMO 43; Transcript of Court Conference at 54, *In Re: Testosterone Replacement Therapy Products Liability Litigation*,(NDIL Aug. 24, 2017); and CMO 78. In fact, in CMO 78, when it held that a supplemental PFS would be beneficially, the Court specifically stated that it continued to believe that a Lone Pine Order was not called for at this stage. While the PSC fully supports providing information necessary for the \Defendants to evaluate the cases pending in the MDL, using such a tool as a backdoor run at their repeatedly rejected attempts to obtain a Line Pine order is improper and should be rejected by the Court.

With regard to the substance of Defendants' it is cumbersome and couched in the Declaration and punitive format.

Second, Defendants' proposal frustrates the purpose for which the Court expressed its desire for a supplemental PFS, which was so the parties (primarily the Defendants) could garner additional information about cases and claims, something that was expressly discussed between the parties and the Court, but has now been abandoned by the defense. In discussions with the Court all parties agreed that the purpose of a supplemental PFS was to provide census type data that would aid the process of evaluating and categorizing the cases for settlement negotiations. In fact, CMO 78 made it clear that the supplemental PFS was being implemented to fill an information void Defendants claimed existed about their knowledge of the case.[10]

Importantly, Defendants desire to seek sanctions or other punitive relief against Plaintiff should be rejected for a third time. The Court directed a supplemental PFS to garner information and data that the Defendants claim was missing and hampering their ability to evaluate cases for settlement. This should be done via a supplemental PFS that is concise and pointed with a set of agreed upon questions. The proposed PFS/Declaration format advanced by Defendants does not accomplish this goal and should once again be rejected.

The PSC submits a more streamlined version could easily be achieved. To this end, the PSC attaches a proposed Plaintiff Profile Form ("PPF")[11] that it believes would serve these purposes, and believes that such a document may be completed by either the plaintiff or his

[10] It cannot be forgotten that Defendants still have medical authorizations in their possession – produced with every PFS – and these, if processed fully (as they are in most litigations) would enable defendants to have an know all information they claim to be lacking from a fully verifiable source – hospital/doctor records.

[11] The PSC believes that in order to avoid confusion with completing this document and any supplementation of the underlying PFS, as well as to ensure clarity that this is a new document – and one that can be completed by counsel or plaintiff – it is prudent to give it a different name (although we recognize that it a document that is deemed to supplement the PFS). Hence the name Plaintiff Profile Form (PPF).

counsel since much of the information is medical in nature and can be garnered from medical records in counsel's possession, the content of which may be unknown to many clients. (*See* Exhibit I, attached hereto). Further proceeding in this manner provides the requested information and will alleviate delays and other difficulties associated with receipt of a signed supplemental PPF from a plaintiff. Moreover, the goal is to gain information and to gain it quickly. Therefore, whether the information is provided by the plaintiff or counsel should not matter, so long as the accurate data is provided and provided in the quickest fashion should be what the parties strive for. To this end, the PSC proposes that the PPF may be completed by counsel or plaintiff and that it be provided to Defendants on rolling bases over the next 90-120; with issues of deficiencies and non-compliance can be worked out by the parties in a separate CMO.[12]

III. Plan B Trial Options

As noted above, the PSC has set forth a schedule and proposed CMO (Exhibit A, hereto) that would allow the Court to have a ready and large stable of cases to select for trial beginning as early as the Fall of 2018. However, with respect to slotting "Plan B" cases in the current bellwether pools of cases, the PSC proposes the following for each Defendant:

AbbVie: The PSC and AbbVie are in agreement that a Plan B process is already in place given the current bellwether trial schedule involving AbbVie.

Auxilium: Per the Court's instruction, the Auxilium and the PSC have negotiated, and the Court has entered CMO 79, setting up a "Plan B" for the two remaining defense picks from

[12] The PSC submits hat its proposal comports with the Court's directives in CMO 78, including that, "[a]ny proposal should also include a reasonably prompt deadline for production of this information following entry of the relevant case management order. Finally, the Court anticipates that the process of ensuring compliance and sanctioning non-compliance should be shortened and simplified from that contemplated in the current version of Case Management Order 9.

CMO 31 (*Cunningham* and *Schleck*) to proceed thru expert discovery and motion practice with a trial in April 2018.

Lilly: As noted above on October 18, 2017, this Court issued a minute order directing the parties to present "Plan B" proposals for defendants with only one or two bellwether trials scheduled for the purpose selecting replacement cases if a bellwether case is resolved on summary judgment or otherwise. The PSC submits the following as a "Plan B' solution. First, the PSC and Lilly shall each select one Lilly case to be worked up through additional fact discovery and expert discovery. The cases eligible for selection shall consist of the remaining cases in the Lilly bellwether pool not currently set for trial and those cases that were removed from the Lilly bellwether pool as part of CMO 45. The complete list of eligible cases is as follows:[13]

Charles Boone, et al. v. Eli Lilly and Company, et al., Case No. 1:15-cv-06375

William Coleman v. Eli Lilly and Company, et al., Case No. 1:15-cv-07186

Bobby Cook v. Eli Lilly and Company, et al., Case No. 1:15-cv-01076

John Huntington v. Eli Lilly and Company, et al., Case No. 1:15-cv-04428

Daniel Malinowski v. Eli Lilly and Company, et al., Case No. 1:15-cv-09637

Michael C. Malkus v. Eli Lilly and Company, et al., Case No. 1:16-cv-00231

Michael A. Massa v. Eli Lilly and Company, et al., Case No. 1:15-cv-07717

Marvin Musgrove v. Eli Lilly and Company, et al., Case No. 1:15-cv-02767

Christopher Olaes v. Eli Lilly and Company, et al., Case No. 1:15-cv-09283

[13] The pool of eligible cases will be limited to the aforementioned group of cases because those cases have already undergone substantial record collection and substantial Core-Discovery and can be worked up through expert discovery in a more expedited fashion than any other cases currently available for selection.

Each party must exchange its case selection on or before December 15, 2017. Additional fact discovery on the selected cases must be completed by February 2, 2018. Expert discovery on the selected cases must be completed by April 20, 2018. The Court will select the back-up bellwether case to proceed to trial on April 27, 2018, if needed. In the event that one or more Lilly bellwether trial cases are resolved on summary judgment or otherwise the back-up bellwether case selected by the Court will proceed to trial. Trial on the selected case will begin on June 4, 2018

Actavis: The PSC and Actavis Defendants agree that, in its current form, CMO No. 37 provides a "Plan B" framework. Currently, in accordance with CMO No. 37, the parties are continuing with core discovery on six Actavis-only, Androderm-only Bellwether Workup Cases chosen by the parties. Pursuant to CMO No. 37, two of the six Bellwether Workup Cases will be selected as Bellwether Trial Cases, either by agreement of the parties or by determination of the Court. One of those cases will be selected as the August 6, 2018 trial case, and the other will be the back-up case. Both Bellwether Trial Cases will proceed through expert discovery and dispositive motion practice and will be trial-ready for August 6, 2018.

Endo Pharmaceuticals: Endo and the PSC are negotiating an amendment to CMO 33, which set up the original Endo Bellwether pool, and this amendment will include and propose adding an additional case to proceed thru expert discovery to ensure three viable Fortesta-only trial cases.

IV. Multi-Plaintiff Consolidated Trials are Warranted and Appropriate

The PSC's current proposal seeks to implement and further the goals of this Court, including the need for post-bellwether schedules to "be expanded and accelerated"[14] by allowing

[14] CMO 78 [DKT 2244].

for a large number of cases to go through Core Discovery and then available to be set for trial. To this end, multi-plaintiff trials are one vehicle that can successfully adjudicate numerous cases at one time. Multi-Plaintiff trials provide a procedural mechanism that the Court can employ to both expand the number of cases to be tried and to accelerate the timeline for those trials.

A. <u>This Court Has Authority to Consolidate the Cases Before It</u>

The authority of a federal district court to consolidate cases and have multi-plaintiff trials derives from, "the inherent power to administer their dockets so as to conserve scarce judicial resources." *Trippe Mfg. Co. v. Am. Power Conversion Corp*., 46 F.3d 624, 629 (7th Cir. 1995) (*citing*, *Ridge Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 572 F. Supp. 1210, 1213 (N.D. Ill. 1983)). Beyond conserving judicial resources, consolidation "also reduces the resources ultimately expended by the litigants." *Abbott Labs. v. Selfcare, Inc*., 1999 U.S. Dist. LEXIS 3352, at *5 (N.D. Ill. 1999) (*citing*, *Keppen v. Burlington N. R.R. Co*., 749 F. Supp. 181, 183-84 (N.D. Ill. 1990)). Indeed, that authority is codified in Fed.R.Civ.P.42(a), which provides:

> **Consolidation:** When actions involving a common question of law or fact are pending before the court, ***it may order a joint hearing or trial*** of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (emphasis added)

Specifically, consolidation is proper under Fed.R.Civ.P. 42(a) when actions involve common parties, substantially the same witnesses, and common events or facts. *See In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 1991 WL 152914 (N.D.Ill. 1991); *SJ Properties Suites, BuyCo, EHF v. Development Opportunity Corp., 2009 WL 3790009 (E.D.Wis. 2009); Blasko v. Washington Metropolitan Area Transit Authority*, 243 F.R.D. 13, 15 (D.D.C. 2007); *In Re: Welding Fume Products Liability Litigation*, 2006 U.S. Dist. LEXIS 72669 at 21 (N.D.Ohio 2006); *State of Ohio v. Louis Trauth Dairy, Inc.*, 163 F.R.D. 500 (S.D. Ohio 1995);

See also Manual on Complex Litigation (Fourth) Washington D.C., (Federal Judicial Center 2004), § 11.631. Further, "[c]onsolidation is appropriate even if some of the issues or parties are not common to both actions as long as the common questions are central ones." *Static Control Components, Inc. v. Lexmark, et al. and NER Data Products, Inc., et al. v. Static Control Components, Inc., et al.*, 2005 U.S. Dist. LEXIS 42509 (10 Aug. 2005, E.D. Ky.).

In addition to the Court's inherent authority and the Federal Rules of Civil Procedure, consolidation is consistent with the Local Rule 40.4 of this District, stating that cases that "involve **some** of the same issues of fact or law" are related (emphasis added). Further, this Local Rule even provides that when such related cases are calendared to different judges, the related case should be reassigned to one of the judges, potentially for a multiple-plaintiff trial, when:

> (1) both cases are pending in this Court;
> (2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort;
> (3) the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially; and
> (4) the cases are susceptible of disposition in a single proceeding.

Because the TRT cases that may be set for trial in a post-bellwether schedule are all presently before Your Honor, we need not discuss the reassignment portion of this rule.[15] However, it is significant that the four requirements for case consolidation and reassignment, as set forth above, are all met in the TRT litigation. As such, it is evident that consolidation and multiple plaintiff trials of the TRT cases is supported by this District's Rules and will likely, "result in a

[15] However, pursuant to CMO 78, the Court is currently contemplating having other Judges try TRT cases as this MDL moves forward. Accordingly, this is the Local Rule that outlines the parameters for reassignment to another District Judge; notably, it provides that the cases may be tried together to promote judicial efficiency – which is exactly what the PSC is proposing to do with multiple-plaintiff trials.

substantial saving of judicial time and effort." *KPASA, LLC v. United States*, U.S. Dist. LEXIS 8720, at *8, (N.D. Ill. 2004).

B. Consolidation of Multi-Plaintiff Trials is Regularly Favored & Utilized by Courts and Should be Utilized in this Litigation

As a mature mass tort litigation, these cases have been in active litigation for over three and a half years and are ripe for multiple-plaintiff trials. Presently, three bellwether trials have been tried to verdict and future bellwether trials are slated through 2018. However, where, as here, the bellwether process has nearly run its course and Defendants are unwilling to discuss a reasonable resolution of their claims, there becomes a need for a post-bellwether schedule where an increased amount of cases are tried multiple-plaintiff trials are the most efficient means of meeting this need.

Indeed, in order to secure justice for the many victims that plaintiffs allege have been harmed by testosterone replacement therapy, the Court will likely need to invoke multi-plaintiff trials. To this end, the TRT cases concern, "the same issues of fact or law," which allow for multi-plaintiff trials and will further the goals on which this MDL created.[16] *State of Ohio v. Louis Trauth Dairy, Inc.*, 163 F.R.D. 500 (S.D. Ohio 1995) (Federal Courts will balance, "the value of time and effort saved by consolidation against the inconvenience, delay or expense increased by it."). Even where variations among the facts exist – the TRT cases at bar are still ripe for consolidation and multiple-plaintiff trials pursuant to The Manual for Complex Litigation, which discusses consolidation and provides:

[16] The MDL was originally created to coordinate related actions involving common questions of fact, provide a more convenient means of litigating those actions for the parties and the witnesses involved, reduce unnecessary duplicative efforts, conserve the resources of the parties, their counsel, and the judiciary, prevent inconsistent rulings, and ultimately further the just and efficient resolution of the parties' claims.

> Once cases have been assigned to a single judge, that judge can determine the nature, extent, and purpose of the coordination *or consolidation . . . if there are some variations among cases within a single district, subdividing them into groups or clusters of cases that raise similar issues or present similar case-management needs can also be an efficient approach.*

See Manual for Complex Litigation, Fourth, § 23.32, p. 364 (emphasis added). The Manual even provides examples of the different ways in which multiple-plaintiff trials may be conducted in order to, "achieve greater efficiency and expedition in resolving mass tort cases." *Id.* at 466.[17] Accordingly, the various available options for how a multiple-plaintiff trial is conducted, in additions to specific jury instructions given by the Judge, remedy any possibility of prejudice to either party.

Courts across the country dealing with the issues of consolidating cases for trial in products liability actions have routinely embraced multi-plaintiff trials. Chief Judge Garrett Brown of the District of New Jersey consolidated the claims of two test cases in the Ephedra products liability litigation for a consolidated trial under Rule 42(a), despite defendants' strenuous objections. *In re Nutraquest*, D.N.J. Civ No. 03-5869. Similarly, in the Welding Rods litigation, Judge Kathleen O'Malley of the Northern District of Ohio ordered that the claims of two plaintiffs, be tried in a single proceeding. *In Re: Welding Fume Products Liability Litigation,* 2006 U.S. Dist. LEXIS 72669 at 21 (N.D.Ohio 2006); *see also, Hamilton v. Breg*, No. 2:09-CV-146, 2011 U.S. Dist. LEXIS 9426, at *6 (S.D. Ohio 2011). In the Dalkon Shield litigation where women developed pelvic inflammatory disease ("PID") from use of the defendant's intrauterine device ("IUD") the court of appeals in California upheld consolidation of three plaintiffs' actions based on the fact that "a large portion of the trial would be devoted to issues common to the three

[17] Examples of which include: (1) A series of consolidated trials on all issues, if they are sufficiently common.; and (2) A consolidated common issues trial with some plaintiffs presenting their claims against defendants on all issues, yielding findings on common issues.

cases," and thus consolidation would avoid repetition of presentation of such evidence. *Todd-Stenberg v. Dalkon Shield Claimants Trust,* 48 Cal.App.4th 976, 980 (Cal. App. 1 Dist. 1996). Based on similar reasoning, the court in *Batson v. Lederle Laboratories,* 290 N.J. Super. 49 (N.J. Super. App. 1996) found no reason to conduct two trials on the same issues. *Id.* At 55. The examples of joint trials being permitted are plentiful. *See e.g., Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (Courts may consider the time and cost required to in the, "single-trial, multiple-trial alternatives."), citing *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1496 (11th Cir.); *see also, In Re: Welding Fume Products Liab. Litig.*, 2006 U.S. Dist. LEXIS 72669 at *21 (N.D. Ohio 2006).

By way of very recent example, in the *In Re: DePuy Orthpaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*,11-md-02244, the MDL Court has allowed three trials to proceed as multi-plaintiff trials (Order attached hereto as Exhibit J). As to its rationale in proceeding with the first multi-plaintiff trial, the Court noted that because the defendant was unwilling to engage in meaningful settlement discussions, it needed to develop a method whereby it could prepare the thousands of cases on its docket for trial. In looking at the first bellwether trial that had proceeded to verdict, that trial had consumed 26 days of testimony. Thus, in relying upon statistics from that trial, the Court feared that, at its current rate, it would take 130 days of testimony to try five individual cases. As such, the Court decided to try a five-plaintiff trial and the time saved was extraordinary. The five-plaintiff trial consisted of only 35 days of testimony, thereby saving nearly 100 days of trial testimony, assuming the trials remained approximately the same length each time. If one were to extrapolate these results to the numbers relevant in this litigation, *i.e., i.e.* the current pending cases, the benefits of multi-plaintiff trials, including the amount of time and money that will be saved, becomes very obvious. Similarly in another hip

related products liability case, Judge Brian Martinotti, a state court judge at the time (he is who now is a Federal District Judge in New Jersey) ruled, over strenuous objection by defendants, that multi-plaintiff trials in were proper. (*See*, Order attached hereto as Exhibit K).

Other pharmaceutical mass torts that where courts have also permitted multi-plaintiff consolidated trials include cases involving the drugs: Actos (attached hereto as Exhibit L), Accutane (attached hereto as Exhibit M), Vioxx, diet drugs (Fen-Phen) and phenylpropanolamine (PPA), to name a few. In addition, Judge Jack B. Weinstein of the Eastern District of New York in the Zyprexa MDL, ordered the cases of five representative plaintiffs be consolidated for trial. (Attached, hereto as Exhibit N is a copy of the *Zyprexa* decision). Of note, these joint trials would have been the first Zyprexa trials.

C. Multi-Plaintiff Trials Are Warranted

In short, because the bellwether process is moving forward to completion, a post-bellwether schedule as the Court requested in CMO 78 is needed. Furthermore, a schedule that calls for multiple-plaintiff trials is most consistent with the goals set forth by this Court in CMO 78 and in the implementation of justice by allowing the thousands of MDL plaintiffs to have their cases heard.

By way of example, assuming 20 trials per year, a proposal we doubt the defense is willing to make, this MDL would take another 500 years. [18] Of course, even assuming the PSC's modest proposal of setting 100 cases for Core-Discover against AbbVie and trying all 100 each year, would take about 45 years. This is simply not justice. This is why the PSC proposes its initial plan of 160 cases for Core-Discovery is established and the prospect for multi-plaintiff trials permitted.

[18] This presumes approximately 4,500 cases against AbbVie.

There can be no argument that given the posture of this litigation consolidated multi-plaintiff trials will benefit the convenience of the parties, witnesses and the Court. In sum, given the volume of cases and lack of settlement prospects anything short of multi-plaintiff trials will not achieve the goals of resolving these cases.

DEFENDANTS' PROPOSAL

In CMO 78, this Court observed the "need for enhanced information regarding the claims of individual plaintiffs," in part to accomplish "further appropriate winnowing" of the cases. (Dkt. #2244 at 2–3.) The Court also advised that it seeks an "expanded and accelerated" trial schedule. (*Id.* at 3.) The proposals that Defendants set forth below achieves the Court's goals. For example, AbbVie has put forth a proposal that would result in randomly selecting 105 bellwether cases after the Supplemental Declarations discussed below are completed (on a more accelerated basis for a very small sub-set of 300 cases) to be fully worked up and trial ready on a rolling quarterly basis starting in the fourth quarter of 2018.

With respect to requiring additional information from Plaintiffs, Defendants jointly propose that, within the first quarter of 2018, individual Plaintiffs must complete a Supplemental Declaration. (*Infra* § I.) The Declaration will require key information similar to that ordered for 100 randomly selected mixed bellwether cases (currently due on November 27, 2017). Critically, the proposed Declaration must be signed by counsel, which will help ensure that reasonable diligence is performed regarding the basic viability of their cases, and thereby ensure "further appropriate winnowing" of the cases. By eliminating unsupportable cases from the litigation, moreover, the Declaration also will help ensure that the cases selected as bellwethers meet a minimum threshold of viability.

With respect to accelerating the trial schedule, the Court's objective is clear. Because each Defendant is at a different stage of trial-readiness, Defendants submit individual plans. (*Infra* § II.) But all Defendants propose schedules that will result in more cases becoming "trial ready" sooner. Defendants then jointly oppose Plaintiffs' proposal that the parties (1) partially work up an astronomical number of cases through "core discovery," which is unrealistic and does not accomplish the Court's goal of more trial ready cases, and (2) try multi-Plaintiff cases, which is clearly prejudicial to Defendants and unnecessary given Defendants' proposals to ensure an "expanded and accelerated" trial schedule. (*Infra* § III.)

I. Defendants' Joint Proposal on an Enhanced Plaintiff Fact Sheet

Defendants jointly propose that the Court require Plaintiffs to complete the Declaration attached as Exhibit O. Consistent with the Court's directions, the Declaration requires Plaintiffs to provide "information and documentation regarding the particular TRT product(s) used, when, and how frequently, as well as information and documentation regarding the date and nature of any injury the plaintiff claims to have suffered as a result of TRT usage." (Dkt. #2244 at 3.)

The Declaration provides a clear, precise format for collecting essential information. As compared to the PFS (which will be maintained as it is broader in scope), the Declaration is more focused and easier to track for compliance and therefore will facilitate achieving the Court's goal for a "shortened and simplified" process for "sanctioning non-compliance" (as well as bellwether case selections). Unlike the PFS, moreover, the Declaration will be signed by Plaintiff's counsel, which can predicate corresponding sanctions and remedies that include dismissal. (*See infra* p.3.) This ensures that the Plaintiffs are properly incentivized to perform reasonable diligence and fully comply with the Declaration requirements and thereby mitigate against the Court and parties unnecessarily expending time and resources addressing "show cause" for non-compliance

(discussed below) and/or working on bellwether cases only to belatedly discover that they should have been weeded out much earlier.[19] A case should not even be considered as a potential bellwether until *after* a compliant Declaration has been submitted. (*See infra* § II.)

Defendants acknowledge that the Declarations will take time and effort to complete. However, the Defendants agree that the Court should expect and establish a "reasonably prompt deadline" for the submission of this additional information. (Dkt. #2244 at 3.) This is particularly true since the task of completing the Declarations will be spread across all of the 194 law firms that have filed cases in this litigation. When viewed within that context, it is clear that no single Plaintiffs' firm is unreasonably burdened by being ordered to timely comply for the number of cases it chose to file. (*See infra* § II.) Accordingly, Defendants propose the following schedule:

- For all pending cases: **Declarations will be due by April 16, 2018**.[20] This provides Plaintiffs represented by 194 law firms over 120 days to complete the Declarations in all cases.

- For newly filed cases: **Declarations will be due 60 days after Plaintiffs' PFS due dates** (which are 80 days after the case is docketed in the MDL). Plaintiffs should be strongly encouraged to provide this information simultaneously with their PFS. But the additional time reflects that some of the requested information may take longer to obtain (although Defendants submit that this work should be completed before the complaint is filed in the first instance).

The Court also directs "that the process of ensuring compliance and sanctioning non-compliance should be shortened and simplified." (Dkt. #2244 at 3.) Defendants appreciate the importance of this, as hundreds of deficient PFS have been served in this litigation, and the

[19] The Declaration is similar to one that Defendants proposed for Mixed Use Cases on July 13, 2017 (Dkt. #2079). Although the Court did not adopt the Declaration, it did in CMO 75 require Plaintiffs to supplement their PFSs with information similar to what Defendants sought in the Declaration. The deadline for this information is not until November 27th, yet the impact of the requirement is already becoming apparent. Of the 100 cases randomly-selected on October 11th, 7 cases have been dismissed either in their entirety or against Defendants who were improperly named.

[20] *See infra* §II.A for AbbVie's proposal for acceleration of a limited number of Declarations for purposes of selecting bellwether cases during the first two quarters of 2018.

current process to address deficiencies (deficiency letters, responses, and then motion practice) is too burdensome and elongated. Accordingly, Defendants propose the following process, based on the dates above:

- Defendants submit noncompliant cases to Court: Beginning **June 1, 2018** and on a **rolling basis** through **November 1, 2018**, Defendants will submit to the Court a chart identifying any noncompliant cases and the relevant deficiency. That chart will be attached to an Order to Show Cause.

- Hearing and sanctions: After the submission of purportedly noncompliant cases, the Court will set a **hearing date** requiring individual counsel representing the purportedly noncompliant Plaintiffs to appear in person to show cause why such cases should not be sanctioned. Depending on the nature of the deficiency and at the Court's discretion, sanctions for confirmed noncompliance could include at a minimum, a monetary fine (i.e. $1,000 per case) *and* dismissals.[21]

II. Defendants' Proposals on Trial Schedule

As referenced above, because each Defendant is at a different stage of discovery and trial-readiness, Defendants submit the following individual trial plans.

A. AbbVie Defendants:

AbbVie proposes an aggressive acceleration of trial preparation and trials over the course of 2018 and 2019. The first step is completion of the Supplemental Declaration process, which is critical to ensuring that the parties prepare for trial only those cases which have survived an "appropriate winnowing" process and accordingly are more likely to be viable. (*See supra* § I.) Next, AbbVie proposes that, over the next year, progressively larger groups be ***randomly*** selected for ***full trial work up*** from the compliant post-Declaration cases (including the mixed bellwether cases for which supplemental information is due on November 27), reaching a total of ***105 cases*** within less than a year from now.[22] Finally, the parties should fully prepare those

[21] This will clearly and forcefully motivate Plaintiffs' counsel to ensure minimal viability early on, which the risk of later dismissal cannot accomplish alone.

[22] The cases would involve AbbVie as the sole Defendant, regardless of whether they are single or mixed use cases.

cases so that trials can start by the fourth quarter of 2018 (subject to dismissals by Plaintiffs and/or the Court). The groups of new trial-ready cases randomly selected would increase from 5 in this quarter to in 2019 ten (10) by the first quarter, twenty (20) by the second quarter, thirty (30) by the third quarter, and forty (40) by the fourth quarter.[23]

As explained more fully below, AbbVie's proposal can be summarized as follows:

	STEP 1	STEP 2	STEP 3[24]	STEP 4	STEP 5	
BELL-WETHER GROUPS	**CASES RANDOMLY SELECTED FOR ACCELERATED DECLARATIONS**	**DECLARATIONS SUBMITTED**	**CASES RANDOMLY SELECTED FOR DECLARATION COMPLIANCE CONFIRMATION**	**DECLARATIONS COMPLIANCE CONFIRMED**	**BELLWETHER CASES RANDOMLY SELECTED**	**CASES TRIAL READY BY**
Group 1 (5 cases)	October 11, 2017 (100 cases)	November 27, 2017	N/A	December 15, 2017	December 18, 2017	4th Quarter 2018
Group 2 (10 cases)	December 1, 2017 (100 cases)	January 15, 2018	N/A	February 15, 2018	February 16, 2018	1st Quarter 2019
Group 3 (20 cases)	December 15, 2017 (200 cases)	March 15, 2018	N/A	May 3, 2018	May 4, 2018	2nd Quarter 2019
Group 4 (30 cases)	Unnecessary	April 16, 2018	April 23, 2018 (300 cases)	August 1, 2018	August 2, 2018	3rd Quarter 2019
Group 5	Unnecessary	April 16, 2018	N/A	October 29, 2018	October 30, 2018	4th Quarter

[23] The schedule will also need to consider the order of trials and the schedules of, among other things, the assigned experts.

[24] This step is only needed for Group 4 to prioritize 300 cases from all Declarations due per joint defense proposal by April 16, 2018 for AbbVie's review and confirmation in order to have a subset from which to randomly select this Trial Group 4.

(40 cases)						2019

This proposal significantly accomplishes the Court's goal, as it ensures that ***by the end of 2019, 105 cases will have been fully worked up and actually prepared for trial*** (at least to the extent such cases survive discovery and dispositive motion practice).

For further clarity, the Group 1 cases in the chart above will be selected from the existing pool of mixed bellwether cases for which Plaintiffs are already required to provide supplemental information by November 27, 2017.[25] AbbVie will review and confirm compliance by December 15, 2018 and the parties will randomly select **five cases** from among the fully compliant cases on the following business day (December 18, 2018). AbbVie is proposing only **five cases** <u>because it is also proposing those cases</u> be fully worked up on a more accelerated schedule to be **trial ready by the 4th quarter of 2018**.

In each remaining Groups, the bellwether cases would be randomly selected from cases in which Plaintiffs have submitted Declarations. This approach would follow the one used for the mixed bellwether cases, where a pool of 100 cases was randomly selected and Plaintiffs were given about 6 weeks to provide the supplemental fact sheets and documentary support. To accomplish this same result for the additional bellwether selections in the first two quarters of 2018, AbbVie proposes that a limited number of Plaintiffs be randomly selected to submit their Declarations on a schedule that is more accelerated than the one proposed in Section I above for all cases. Thus, going back to the chart:

- <u>Group 2</u>: On December 1, 2018, the parties will randomly select 100 AbbVie cases in which Declarations will be due by January 15, 2019. AbbVie will review and confirm

[25] There are 65 Mixed Use cases in the pool naming AbbVie. AbbVie was originally named in 72, 7 have already been dismissed, and 48 remain naming AbbVie as the only Defendant.

compliance by February 15, 2019, and then **ten cases** will be randomly selected from among the fully compliant cases. Those cases will be worked up to be **trial ready by the 1st quarter of 2019**.

- Group 3: On December 15, 2018, the parties will randomly select 200 AbbVie cases in which Declarations will be due by March 15, 2019. AbbVie will review and confirm compliance by May 3, 2019, and then **20 cases** will be randomly selected from among the fully compliant cases. Those cases will be worked up to be **trial ready by the second quarter of 2019**.

- Group 4: Selection for this Group will come after the deadline for submission of all Declarations (April 16, 2018) but before AbbVie will have had an opportunity to review several thousand cases for compliance. Therefore, AbbVie proposes that on April 23, 2018, the parties randomly select 300 cases from among the cases in which Declarations were submitted, which AbbVie will review those for compliance by August 1, 2019. The parties will then randomly select **30 cases** from among fully compliance cases that will be worked up to be **trial ready by the 3rd quarter of 2019**.

- Group 5: AbbVie anticipates that the Declarations will be fully reviewed before the time to select this Group of cases. So, on October 30, 2018, the parties will randomly select **40 cases** from among fully compliant cases that will be worked up to be **trial ready by the 4th quarter of 2019**.

On this schedule, at least dual trial tracks could begin at the start of 2019 and, possibly grow to additional tracks as the year progresses (considering witness availability including expert assignments), with a growing inventory of fully worked up trial ready cases.

Three additional points warrant discussion:

1. Random Selection: The random selection of the bellwether cases is essential to an efficient and effective acceleration of the trial schedule, with no opportunities for either party to "game" the system. It would dramatically streamline the process by eliminating the need for parties to spend weeks reviewing cases and lodging preferences and objections. It would eliminate the contention that the selection process favored one side. And all cases will have an equal likelihood of being selected, regardless of the particular circumstances they involve.[26]

[26] *See Manual for Complex Litigation*, Test Cases § 22.315, 2004 WL 258850, 1 ("Some judges permit the plaintiffs and defendants to choose . . . but this technique may skew the information that is produced. ***To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly*** or limit

2. Sizing the groups of cases to prepare for trial: As the parties and the Court are well-aware at this point, trial of each case in this litigation involves a complex and detailed fabric of case-specific medical history, general and case-specific science, and general and case-specific regulatory and company history. Overlaid on all of this are various state laws governing instructions, case-specific dispositive motion practice, and case-specific motions in limine. While AbbVie believes that the trial process can and should continue to become more efficient, these are far from cookie-cutter cases and must be prepared carefully. All of this points to the crucial need for careful pre-trial preparation. Anything less poses a direct threat to the trial docket because that docket only works if the cases set for trial are trial-ready and trial-worthy. In the foregoing proposal, AbbVie has sought to size the five groups to provide a more than adequate supply of cases to be tried, while still assuring that the cases can be properly prepared.

3. Transition to the accelerated docket in 2018: AbbVie sees 2018 as a year for major multitasking and just as challenging as the expanded trial schedule that should begin in 2019.

AbbVie already has at least four cases to try in 2018: (1) *Nolte* on January 8, 2018; (2) *Myers* on May 7, 2018; and (3) *Rowley* on June 4, 2018.[27] Another case from AbbVie's bellwether trial pool, *Frost*, is trial ready.[28]

Overlapping with this trial docket, AbbVie will be conducting discovery for an increasing inventory of cases to be available for trial. The number will grow from five at the beginning of

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the selection to cases that the parties agree are typical.") (emphasis added) (citing *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (observing "the sample must be a randomly selected one of sufficient size")).

[27] Further, post-trial motions in *Mitchell* and *Konrad* may necessitate re-trying those cases in 2018 as well.

[28] AbbVie requests that the *Frost* case not be double-tracked with any other case from the original AbbVie-only bellwether pool as multi-tracked trials were not contemplated when these cases were prepared and therefore, there is significant overlap of experts that will be difficult to accommodate with competing trial settings. AbbVie understands the Court's desire to multi-track cases in the future and the need to consider and provide for that eventuality going forward.

the year to 105 by October 2018. In addition to working up the cases, during this time the parties will need to increase their stables of experts to accommodate multi-tracked trials. New experts will need to undergo complete expert discovery and *Daubert* motion practice, which needs to be built into the schedule for cases beginning in late 2018.

And, as discussed above, AbbVie proposes to extend the trial docket by moving up trials of the mixed bellwether cases to the last quarter of the year.

B. Auxilium Defendants:

Per the Court's instruction, Auxilium and the PSC have negotiated, and the Court has entered CMO 79, setting up a "Plan B" for the two remaining defense picks from CMO 31 (*Cunningham* and *Schleck*) to proceed through expert discovery and motion practice with a trial in April 2018.

Auxilium has now completed its initial two bellwether trial set cases (selected under CMO 31, hereinafter "Plan A"), resulting in a *Daubert*/Summary Judgment ruling on a defense pick case (*Owens*) and a defense verdict on a plaintiff pick case (*Hotlsclaw*). As noted above, CMO 79 has established a "Plan B" for the two remaining defense picks from CMO 31 (*Cunningham* and *Schleck*) to proceed through expert discovery and motion practice with a trial in April 2018. If the Court seeks additional Testim bellwethers after that April 2018 trial, the remaining Plan B case can be selected for trial in Fall 2018 (by which time the first 4 PCCP trials will have proceeded). If additional Auxilium-only bellwether trial ready cases are required after that, Auxilium would propose that the 4 remaining originally selected Testim-only bellwether cases (from CMO 31), 3 of which were dropped due to mixed-product use, complete core discovery, expert discovery, and motion practice (hereinafter "Plan C" cases). Those Plan C cases could be trial ready by January 2019, and as a result of Plans A, B, and C would provide

the Court with 8 Auxilium-only bellwethers in addition to any Auxilium Mixed-Uses cases selected in accordance with the Mixed Use CMO, CMO 75 entered on October 13, 2017.

C. Lilly Defendants

1. Backup Bellwether Trial Proposal

Pursuant to CMOs 62 and 83, the Court has set the following Lilly bellwether cases for trial:

- *John Debroka Jr. v. Eli Lilly and Company, et al.*, United States District Court for the Northern District of Illinois - Case No. 1:15-cv-9246.
- *Tracy Garner v. Eli Lilly and Company, et al*., United States District Court for the Northern District of Illinois - Case No. 1:15-cv-2045.

The parties have met and conferred regarding a backup trial plan that would only be implemented if either *Debroka* or *Garner* is dismissed through motion practice.

Lilly proposes that one additional trial replacement be randomly selected from the three cases remaining in the Lilly bellwether discovery pool that have completed core fact discovery:

- *Marvin Musgrove v. Eli Lilly and Company, et al.*, United States District Court for the Northern District of Illinois - Case No. 1:16-cv-02767
- *John Huntington v. Eli Lilly and Company, et al.*, United States District Court for the Northern District of Illinois - Case No. 1:15-cv-04428
- *Daniel A. Malinowski v. Eli Lilly and Company, et al.*, United States District Court for the Northern District of Illinois - Case No. 1:15-cv-09637.

Lilly submits that these three cases are the farthest along in terms of case preparation with only expert discovery remaining and can be worked up for a trial date in June 2018 if either *Garner* or *Debroka* is dismissed before trial.

The PSC's proposal is similar to Lilly's but seeks to add 6 Mixed Use cases previously removed from the bellwether discovery pool as part of CMO 45 as candidates eligible for a backup trial. Lilly opposes adding these 6 cases to the backup bellwether pool for two reasons.

First, unlike in *Musgrove*, *Malinowski* and *Huntington*, core discovery had not been completed in these 6 Mixed Use cases before the Court removed them from the bellwether discovery pool.

Second, there is already an order in place governing the selection and workup of Mixed Use cases for bellwether trials – CMO 75, and as set forth below, Lilly proposes to use the six cases previously excluded under CMO 45, along with what is left of *Musgrove*, *Malinowski* and *Huntington* as the pool for any future bellwether trials.

2. Future Lilly Bellwethers

As of the filing of this Joint Status Report, there are approximately 538 cases pending against Lilly in this MDL, which comprises less than 10% of the MDL inventory. If the Court requires additional Lilly-only cases to be tried in 2018 or 2019 after *Debroka* and *Garner*, Lilly proposes to complete core fact discovery, expert discovery, and dispositive motion practice in *Musgrove*, *Malinowski*, *Huntington* and the 6 Mixed Use cases which were dropped from the bellwether discovery pool per CMO 45 on a schedule to be negotiated by the parties. Lilly submits that this is a reasonable plan going forward, given its relatively small share of the overall MDL case inventory.

D. Actavis Defendants

Pursuant to Case Management Order No. 78, Actavis Defendants propose amending Case Management Order No. 37 to provide a plan for work-up of additional Bellwether Cases that is proportionate with Actavis Defendants' inventory of MDL cases, and that will provide valuable

information regarding the viability and value of the MDL cases involving Actavis Defendants. Currently, in accordance with CMO No. 37, Actavis Defendants are continuing with core discovery on six Actavis-only, Androderm-only Bellwether Cases chosen by the parties. Pursuant to CMO No. 37, two of the six Bellwether Cases will be selected as Bellwether Trial Cases, either by agreement of the parties or by determination of the Court, and one of those cases will be selected as the August 6, 2018, trial case, and the other will be the back-up case. Both Bellwether Trial Cases will proceed through expert discovery and dispositive motion practice.

In addition to the existing schedule, Actavis Defendants' propose entry of Amended CMO No. 37 (a copy of which is attached hereto as Exhibit P). Actavis Defendants' proposed Amended CMO No. 37 provides for the complete work-up of the four remaining Bellwether Cases selected by the parties, including complete fact discovery, expert discovery, and dispositive motion practice. The schedule set forth in section VII of proposed Amended CMO No. 37 provides for the completion of the work-up of those four additional cases by November 17, 2018. Under Amended CMO No. 37, Actavis Defendants will have four additional Bellwether Cases worked-up through dispositive motions by December 2018. Actavis Defendants believe their proposal will provide sufficient information to evaluate the viability and value of the cases against Actavis Defendants.

E. Endo

Endo and the PSC are negotiating an amendment to CMO 33, which will revise the original Endo Bellwether pool, and this amendment will include and propose adding an additional case to proceed through expert discovery to ensure three viable Fortesta-only trial cases.

Endo, the last of the manufacturer-defendants in the bellwether trial schedules, is currently working up 5 Fortesta-only bellwether cases as work-ups under CMO 33, (with one case having been dropped due to mixed-product use), in order to select two "Plan A" cases, the first trial ready for September 2018. As noted above, Endo and the PSC are negotiating an amendment to CMO 33 to ensure that the remaining Plan A case and a "Plan B" case are available for future trial settings. If the Court requires additional Fortesta bellwether trial ready cases after the initial three trial ready cases, Endo proposes that the parties select an additional three Fortesta cases from the mixed-use pool where Endo is the only named defendant.

III. Defendants' Joint Opposition to Plaintiffs' Proposals

Defendants jointly oppose the PSC's proposals for the trial schedule and multi-plaintiff trials.

A. Plaintiffs' Trial Schedule Proposal

Defendants oppose the PSC's proposal that waves of hundreds of cases be worked up through core discovery only as it serves none of the Court's objectives. The PSC's proposal is the equivalent of creating a pipeline that is a mile wide but only a foot deep. There would be hundreds of cases with only a small amount of discovery in each and none that have gone through expert discovery or dispositive motion practice. In other words, the PSC proposal does nothing to advance the ball on resolving these cases. Presumably another schedule would need to be created after this *en masse* core discovery before any case could be tried. Having cases only partially worked up is what has led to potentially empty trial slots in the existing schedule.

Defendants' proposals on the other hand go the full mile. More cases are worked up and trial ready (subject to dismissals along the way by Plaintiffs or the Court). Defendants recognize that the Court is anticipating involving several judges in trying these cases and wants

assurances that should cases fall away during fact or expert discovery or at the summary judgment stage – as has happened with both the AbbVie and Auxilium pools to date – there are cases at the ready. Defendants' proposals are the only way to effectively deal with that situation.

The PSC's proposal will also lead to discovery that will end up being stale and will need to be duplicated by the time of trial.[29] A prime example of this is the *Accutane* litigation in New Jersey state court, the PSC's model for its current proposal.[30] That consolidated mass tort was created in 2005 in New Jersey. Seven years later and after nine bellwether trials (including the retrial of the first bellwether case), the court ordered three waves of fact discovery of 250 cases in each wave. The cases were selected for each wave in September, October, and November 2012. Fact depositions in each wave were to be completed by June 2013, October 2013, and February 2014, respectively. In fact, discovery in all three waves was eventually extended to January 2015 – over ***two years*** after the cases were selected. During which time no trials were being held and no trials of any of these has been held. It has now been an additional two years and these cases remain pending and dormant. Even if some of the cases proceeded to trial at the end of this process, the discovery would have been outdated.[31] Whatever cases are selected for trial, at a minimum Plaintiffs and treating physicians (and any damages witnesses) will need to be re-deposed after updated medical records collected (which can take up to 1-3 months even for supplemental collections depending on the number of prescribers and treaters involved) and then

[29] For instance, from the original AbbVie-only bellwether pool, there are 16 cases that went through core discovery only. Some of the Plaintiffs and doctors in those cases were deposed almost two years ago now and would certainly need to be re-deposed on things such as the Plaintiffs' health and treatment since then.

[30] The PSC also referred to the *Vioxx* litigation in New Jersey state court for its proposal. Again, smaller groups of cases were worked up for trial and only after 17 cases were tried in multiple jurisdictions around the country over two and a half years, did the judge in New Jersey faced with a docket of close to 20,000 cases enter an order calling for core discovery in 229 cases. While some discovery was conducted, the litigation settled shortly thereafter.

[31] The cases have been awaiting the result of appeals before further trial court work.

more fully worked up with expert discovery and motion practice. All of the about 750 cases will essentially have to start over. This model of massive fact discovery not tied to a realistic trial schedule is nothing but a waste of time and resources that could be much more effectively used fully working up cases and testing important legal issues such as causation, warning adequacy, and statute of limitations in a variety of factual scenarios – issues that will assist in resolution of this litigation.[32]

B. Plaintiffs' Proposal for Trial Consolidation

Plaintiffs' proposal to consolidate trials would be prejudicial, inefficient, and would undermine the purpose of the bellwether process.

First, although Rule 42 allows consolidation if the jury will decide a "common question of law or fact," it is not permitted if it would prejudice a party. *See* 28 U.S.C. § 2072 (procedural tool "shall not abridge, enlarge or modify any substantive right"). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir 1993) (*quoting In re: Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir.1992)).

Here, the wide variety of issues presented in each case not only renders consolidation inappropriate under Rule 42, it also would prejudice Defendants by requiring them to defend against multiple unique claims at once. *See* Duke Law Center for Judicial Studies, *Standards and Best Practices for Large and Mass Tort MDLs*, at 29 (2014) (consolidation "can tilt the

[32] The type of mass core discovery suggested by the PSC is typically seen in federal MDLs only in the context of remand. For instance, in the HRT MDL, cases were worked up in groups of 100 for purposes of remand. Very limited discovery was taken while the cases were in the MDL (usually plaintiff and one doctor) with the parties agreeing that all remaining discovery, expert discovery and motion practice occur in the remand courts. Defendants have not read CMO 78 to contemplate this type of rolling remand at this stage, especially given that common fact discovery is still ongoing with respect to some defendants.

playing field"); *see also, e.g.*, *Johnson v. Advanced Bionics, LLC*, 2011 WL 1323883, at *4-5 (W.D. Tenn. April 4, 2011) (denying consolidation of two cases involving different medical history and damage). The Manual for Complex Litigation specifically cautions that "differences in facts relevant to exposure, causation, and damages, as well as in the applicable law, often make consolidation for trial purposes . . . unfair." *See* Ann. Manual Complex Lit. § 22.32 (4th ed.). For example, consolidation would allow Plaintiffs to improperly support each other's claims. Plaintiffs have had limited (if any) success proving that TRT caused a particular Plaintiff's heart attack. Aggregating the claims of multiple Plaintiffs who all allege that their heart attacks were caused by TRT could have an improper bolstering effect.[33]

Defendants also would be prejudiced by juror confusion. *See, e.g., Michael v. Wyeth, LLC*, 2011 WL 1527581, at *3 (S.D. W. Va. Apr. 20, 2011) (denying consolidation request due to "risks of prejudice and possible confusion"). The simultaneous presentation of evidence of labeling and promotional materials from different time periods would confuse the jury. *See, e.g.*, *Bowles v. Novartis Pharm. Corp.*, 2013 WL 663040 (S.D. Ohio Feb. 25, 2013) (refusing to consolidate two cases because plaintiffs were prescribed the drug at different points in time and "much of the corporate evidence admissible in one case would be irrelevant and prejudicial in the other"). Consolidation also would improperly ask jurors to compartmentalize multiple states' laws. *In re Welding Fume Prods. Liab. Litig.*, 2006 WL 2869548, at *3 (N.D. Ohio Oct. 5, 2006) ("A requirement that the Court or a jury apply different legal standards to the different cases may present an excessive risk of prejudice and confusion, such that consolidation is not

[33] Research shows that juries have a hard time understanding evidence and are more likely to find against defendants where the claims of four or more plaintiffs are consolidated. Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. Applied Psy. 909 (2000); *see also Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (commenting that limiting instructions and other precautions were "feckless in preventing jury confusion"); *Moorehouse v. Boeing Co.*, 501 F. Supp. 390, 393 n.4 (E.D. Pa. 1980) ("In the Court's view, even the strongest jury instructions could not have dulled the impact of a parade of witnesses . . .").

appropriate."). Consolidation raises the additional risk that the jury will confuse various Plaintiffs' cases and punish Defendants with punitive damages based on evidence that only properly related to (or should have only properly been admitted in) another Plaintiff's case. *See Philip Morris v. Williams*, 549 U.S. 346, 355 (2007).

Second, consolidation would be inefficient. *See* Ann. Manual Complex Lit. § 22.32 (4th ed.) (consolidation of mass tort cases for trial often are "inefficient"). By requiring proof on multiple individuals' medical histories, usage of TRT, alleged damages, and exposure to marketing (among others), consolidated trials would be significantly more complicated. They would require testimony from multiple treating physicians, specific-causation experts, and Plaintiffs themselves, each of whom would present different facts. The jury would have to expend time and efforts trying to keep track of which witness's testimony applies to which Plaintiff, and which defense evidence applies to which Plaintiff. By necessarily involving additional witnesses and exhibits, moreover, consolidated trials would be longer, imposing greater hardship on the jurors.[34]

Last, consolidation risks providing unreliable information. *See Standards and Best Practices for Large and Mass Tort MDLs*, at 29 (consolidation in mass tort context can "undermin[e] the goal of producing representative verdicts"). The bellwether program should give parties representative verdicts that they can use to evaluate broad segments of the litigation. By consolidating several Plaintiffs' unique medical conditions, risk factors, claimed injuries, and usage histories, it would be difficult to extrapolate a verdict in a consolidated trial to any particular segment of the pool. For example, the parties would be unsure whether the jury found in favor of a Plaintiff based on evidence of warnings that should have only applied to another

[34] Even if the Court were to consolidate Plaintiffs by group (e.g. Plaintiff's home state, time period/duration of usage, or exposure to advertising), that would then require reaching deeper into the pool of each of those subgroups, leading to a trial of less representative cases. This also would leave several other subgroups untested.

Plaintiff's case. Consolidation would similarly distort the representativeness of a compensatory damages verdict, as the jury would have heard evidence, claims, and injuries regarding multiple Plaintiffs, and it would be difficult to know if such evidence and claims blurred together.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, 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