

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

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

**CASE MANAGEMENT ORDER NO. 86
(Supplemental trial selection plan)**

MATTHEW F. KENNELLY, District Judge:

The parties have been unable to come to agreement on a methodology for selection of additional cases to be worked up for trial in three waves, to be trial-ready as of 8/1/2018, 1/1/2019, and 7/1/2019, or on the number of cases to be put into the trial pools. Unfortunately, this will necessitate more work for everyone.

From the Court's perspective, it makes more sense to increase the number of cases placed into the first pool than to adjudicate the parties' disputes about the process for selecting cases. The Court has taken into account the need to advance the MDL toward a conclusion, case management concerns, fairness to both sides, proportionality, representativeness as well as the need to provide relevant information to the parties enabling them to resolve more cases beyond those selected, the likelihood that some selected cases will drop out of the pool as has happened in the past, the status of settlement discussions, and so on. The Court makes the following determinations:

- For wave one (cases to be trial-ready by 8/1/2018), there will be 12 cases selected for the pool: 8 AbbVie cases, 2 Auxilium cases, and 2 Lilly cases. Each side will select half of the cases (i.e., plaintiffs and defendants will each select

4/1/1). The cases are to be selected by 12/21/2017. No advance meet-and-confer is required. The parties should attempt to select single-use cases, but if a case that is selected turns out to be a multiple-use case, the Court reserves the right to keep it in the pool. The draft case management order to be submitted to the Court is to provide that the final selection of which cases will be tried as well as their sequence will be made by the Court after considering submissions by the parties describing the cases and why they should or should not be tried and in what sequence. The parties are to confer and attempt to agree on when those submissions and the Court's selection will be made. The Court makes no commitment on exactly when the *Frost* case will be set, though its intention is to set the case for trial during 2018.

- The Court rejects defendants' proposal to absolutely preclude supplementation of a plaintiff's fact sheet after a plaintiff's deposition. It is better to leave disputes over such matters to the ordinary process of dealing with discovery-related disputes, including (where a supplementation is considered inappropriate) motions to preclude evidence or for other sanctions.
- It is unclear to the Court whether, and to what extent, plaintiffs object to defendants' proposed paragraph 1.5 regarding supplementation of expert reports. The Court is inclined to believe that the Rules of Civil Procedure and existing case management orders are sufficient in this regard, but it is open to consideration of defendants' view that some further limitations are appropriate—though not necessarily those, or all of those, proposed by defendants. The parties are to negotiate further on this point and attempt to reach agreement. If

not, they are to submit competing proposals as alternatives in a *single* proposed case management order (not separate proposed orders) by the deadline set below.

- The Court is unpersuaded by defendants' argument in favor of paragraph 1.6 of their proposal, regarding collection and production of medical records.

Specifically, the proposal to put the primary obligation on plaintiffs is likely to lead to disputes and litigation and less than likely to lead to complete production of the records defendants believe they need. The Court also is unpersuaded by defendants' proposal regarding cost-sharing; the cost of obtaining records is appropriately placed on the party seeking the records. That said, given the shortened time frame for the "wave one" cases, there should be a joint, cooperative approach to obtaining relevant medical records for those cases. The parties are to negotiate and attempt to agree on one. If they cannot reach agreement, they are to submit competing proposals as alternatives in a *single* proposed case management order (not separate proposed orders) by the deadline set below.

- The Court adopts plaintiffs' suggestion, at p. 16 of the joint status report (dkt. no. 2292, the paragraph starting with the word "Interestingly"), regarding the mechanism for securing timely production of treating physicians for depositions.
- The pool for wave two is to include 24 cases, and the pool for wave three is to include 46 cases. The parties should attempt to select single-use cases, but if a case that is selected turns out to be a multiple-use case, the Court reserves the right to keep it in the pool. Each side is to select half the cases to be placed into

each pool. Sixty percent of each of these two pools pool is to consist of AbbVie cases. The remaining proportions are to be worked out by the parties. The parties are to confer and agree on a date(s) on which the cases for these pools will be selected. The draft case management order to be submitted to the Court is to provide that the final selection of which cases will be tried as well as their sequence will be made by the Court after considering submissions by the parties describing the cases and why they should or should not be tried and in what sequence.

- Answers should be filed or, if already filed, supplemented, within 21 days of selection of a case for a bellwether trial pool. Any further amendments to complaints or answers will require a stipulation or a motion to the Court. There also needs to be a deadline for seeking leave to amend pleadings (complaints and answers, including affirmative defenses), that *predates* the completion of fact discovery, to enable follow-up discovery regarding unanticipated points.
- Defendants' proposal for the timing of defendant fact sheets is approved.
- The parties are directed to confer, make appropriate compromises, and reach agreement on any remaining disputed language.

A *single* draft proposed case management order is to be submitted by 4:00 p.m. Chicago time on Monday, December 11, 2017. If there are disagreements on the particular matters noted above, the parties' competing proposals are to be set forth as either-or alternatives in the draft proposed order.

Date: December 10, 2017, 8:30 p.m.


MATTHEW F. KENNELLY
United States District Judge