[*Submitting Counsel on Signature Page*]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: JUUL LABS, INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL ACTIONS

Case No. 19-md-02913-WHO

SUPPLEMENTAL JOINT CASE MANAGEMENT CONFERENCE STATEMENT REGARDING CASE SCHEDULES AND PERSONAL INJURY BELLWETHER SELECTION PROCEDURES

On August 19, 2020, and pursuant to Civil Local Rule 16-10(d) and the Court's July 17, 2020 Minute Order (ECF No. 808), counsel for Defendants Juul Labs, Inc. ("JLI"), Altria,[1] Director Defendants,[2] E-Liquid Defendants,[3] Retailer Defendants,[4] and Distributor Defendants[5] (collectively "Defendants"), and Plaintiffs' Co-Lead Counsel ("Plaintiffs") (collectively referred

[1] "Altria" refers to Altria Group, Inc., and the Altria-affiliated entities named in Plaintiffs' Consolidated Class Action Complaint and Consolidated Master Complaint (collectively, "Complaints"), *see* ECF Nos. 387, 388.

[2] "Director Defendants" refers to Messrs. James Monsees, Adam Bowen, Nicholas Pritzker, Hoyoung Huh, and Riaz Valani.

[3] "E-Liquid Defendants" refers to Mother Murphy's Labs, Inc., Alternative Ingredients, Inc., Tobacco Technology, Inc., and Eliquitech, Inc.

[4] "Retailer Defendants" refers to Chevron Corporation, Circle K Stores, Inc., Speedway LLC, 7-Eleven, Inc., Walmart, and Walgreen Co.

[5] "Distributor Defendants" refers to McLane Company, Inc., Eby-Brown Company, LLC, and Core-Mark Holding Company, Inc.

to herein as the "Parties") filed their Joint Case Management Statement in advance of the Further Case Management Conference scheduled for August 21, 2020. (ECF No. 904). The Parties now respectfully submit a Supplemental Joint Case Management Statement focusing specifically on the issues of case scheduling and personal injury bellwether selection procedures.

I. CASE MANAGEMENT MATTERS

A. Proposed Case Schedule

The parties set forth their competing schedules in Exhibit A (Plaintiffs) and B (Defendants).

Plaintiffs' Position

At the outset of this litigation, the Court indicated to the parties that their approach should reflect "the fierce urgency of now" and the pressing public health concerns animating this case. 12/9/19 Hr'g Tr. at 6:22. To that end, the Court conveyed an expectation that bellwether trials would commence in 2021 and it would not wait for the FDA to act. To date, the Court has endorsed a leadership structure and discovery plan that advances the personal injury, class and government entity cases on the same schedule. Recognizing that discovery is largely common to all types of cases, Plaintiffs are developing each type of case alongside the others, sharing resources, and methodically spreading tasks. The goal of this approach is efficiency.

Plaintiffs agree with the Court's observations that this case presents significant public health issues, and Plaintiffs have accordingly proposed a schedule that balances these concerns with the practical realities of adjudicating a complex multi-district litigation in the midst of a pandemic. Plaintiffs' proposed schedule provides comprehensive deadlines for simultaneously advancing all three types of cases toward a trial by the end of 2021, and a clear path to resolution. While it is unclear at this time which case tranche (or tranches)—class, government entity, or personal injury—will be tried first, there is no reason to determine a specific sequence now. Instead the Court should set a schedule that facilitates all cases continuing to move in tandem, subject to litigation events to come that may ultimately inform the sequence in which the cases are tried.

Plaintiffs' approach is consistent with this Court's creation and organization of this MDL, which consists of distinct but overlapping case types brought by distinct but overlapping types of plaintiffs. Recognizing that discovery is largely common to all types of cases, Plaintiffs amongst themselves are cooperatively developing and prosecuting this case, sharing resources, and spreading tasks. This approach has already facilitated the efficient prosecution and development of common themes across the cases. And it is precisely what JLI advocated when it petitioned the JPML for coordination of all cases into one MDL in front of this Court. *See, e.g.*, JLI's Response ISO Consolidation, MDL 2913 (ECF No. 44) at 5 (Aug. 27, 2019) ("separating the class and individual actions into two MDLs…would substantially undermine the efficiencies that Section 1407(a) is meant to promote.").

It is undisputed that the Parties have made tremendous progress to date. Heeding the Court's directives, the parties have moved the proceedings forward "in a speedy, collaborative and efficient way," (11/8/19 Hr'g Tr. at 12:3–7), constructing a case management infrastructure that is already facilitating case development and prompt dispute resolution. Discovery continues apace and both sides have briefed the motions to dismiss for the September hearing date. Progress is being made and technical challenges overcome to meet the expectations of the Court and to serve the ends of justice. Setting "bellwether trials as soon as practicable" remains "the best way to enhance settlement and to move [this] matter to resolution." 12/9/19 Hr'g Tr. at 6:23-7:1.

Naturally, the pandemic will require reasonable accommodations. But, as demonstrated by the progress of the past six months, the parties are up to this task and have already taken significant steps in this direction. Most recently, the parties reached agreement on a remote deposition protocol, which will allow discovery to proceed without delay and will, in fact, reduce the time otherwise required for depositions by eliminating travel and scheduling logistics. *See e.g.* ECF. No. 888. A trial date in 2021 will incentivize the parties to find other efficient solutions to the challenges inherent to complex litigation; pushing out all of the Parties' deadlines will not. At some point, the Parties may need to extend their deadlines due to any number of variables. But that possibility should not frustrate the goal of setting reasonable trial dates now.

Under Defendants' proposed schedule, dispositive motions will not be resolved until nearly two years from now. While Defendants do not provide a clear reason why the Court should adopt their relaxed timeline, they appear to start with the (false) premise that all problems will be remedied by taking more time. As noted, this case seeks to address an ongoing, worsening public health crisis. Time is not on our side. With recent studies showing that e-cigarette use increases the risk of severe coronavirus complications, the pandemic has only made the dangers of e-cigarettes a more urgent concern. And there is no telling how long this pandemic may last. Delaying this litigation in the hopes that the coronavirus will disappear later is not a real plan, it is a recipe for continuous delay. The Court should maintain the incentives that have driven progress to date.

Bigger picture, Defendants' proposed schedule is both inefficient and omits critical milestones in the litigation. Defendants propose no trial date at all for the class case and their schedule does not even include a date for a class certification motion. Yet, they propose to take more than 100 class representative depositions in the next two months—without any date on the horizon to actually use that discovery for any meaningful purpose, and having first served written discovery on the current class representatives (and numerous absent class members) less than two months ago. Defendants also take this "hurry-up-and-wait" approach in the personal injury and government entity cases, proposing complete expert workup in 10 bellwether trial cases in 12 weeks, followed by motion practice on just two cases, and then pretrial workup in only one case at a time. Under Defendants' proposal, discovery would close nearly a year before trial at the earliest, and in most cases, up to two years or more. This delay will lead to inevitable supplemental depositions and expert reports, which will multiply the time and costs to try these cases—with no end in sight. This would obliterate all the efficiencies and cooperative effort that Plaintiffs have implemented to drive this case forward. *See* Manual for Complex Litigation (Fourth) § 11.422 ("The discovery cutoff should not be so far in advance of the anticipated trial date that the product of discovery becomes stale and the parties' preparation outdated.").

Guidance from the Court, rather than further meeting and conferring, will be most productive at this stage. Defendants have had ample opportunity to raise the "gating" or

"sequencing" issues they now contend prevent them from charting out the schedule, but have not done so. Clarity on the case schedule now will advance the proceedings, and Defendants' request for more time at the eleventh hour is not well-taken.

Defendants' Objections Are Meritless

Defendants raise three primary objections to Plaintiffs' proposed schedule. None have merit. ***First***, Defendants argue that advancing the personal injury, class and government entity cases on the same schedule is impractical because each type of case is currently in a different stage of development. This position ignores the substantial overlap in all three types of cases. Again, the discovery in these cases is largely common, and Plaintiffs will be better positioned to develop each type of case alongside the others, by sharing resources. Plaintiffs will all, for example, share common experts to opine on issues like the development, chemistry, and marketing of JUUL products. This approach is vastly more efficient than a balkanized approach, and maintains the benefits of a coordinated action and joint leadership.

The fact that the government entity plaintiffs were delayed by the virus at the outset does not mean they cannot catch up, and certainly does not justify putting their cases on the backburner. Defendants strain to analogize to the *Opioid* litigation schedule but fail to acknowledge that this case is much narrower in scope—there are far fewer defendants, and this litigation involves only one product that did not come on the market until 2015. Stretching this case eight months *longer* than *Opioids* makes little sense. Moreover, siloing the Plaintiffs' cases, as Defendants suggest, has already been rejected by this Court. *See* ECF. No. 226 (explaining that the Court was "not inclined to formally track the case"). It also provides no clear path to resolution. Indeed, the divorced schedules seem designed to culminate in a discovery quagmire. For example, are Defendants going to make their general liability witnesses available to government entity plaintiffs after the personal injury or class depositions? If so, these duplicative depositions will potentially inject new evidence into the other cases on an ongoing basis. If not, the attorneys working on all three types of cases will need to be prepared to take key depositions at the same time. Absent multiplication of efforts, no case type can move much faster than the slowest. In this way, Defendants' proposal puts this entire proceeding on the slow-train they

incorrectly assert is necessary for the government entity cases. By contrast, a coordinated schedule will allow Plaintiffs to develop multiple trial-ready bellwether cases, which can replace those that are resolved or dismissed along the way. This approach avoids delay at every stage, ensures a meaningful trial or trials in the near term, and provides a clear path to global resolution.

Second, Defendants argue that Plaintiffs' proposal of a simultaneous exchange of expert reports is unworkable because it compresses the schedule, does not allow them to complete depositions of Plaintiffs' experts before disclosing their experts, and is not "typical" practice. But expert depositions need not be completed before rebuttal reports are served. In fact, it is common for expert depositions to take place through the end of expert discovery. Hence, plaintiffs' schedule provides nearly three months for generic expert depositions and two months for case-specific expert depositions in the government entity and first two PI bellwether cases. Moreover, the notion that Rule 26 somehow prohibits a simultaneous exchange of expert reports is simply untrue. *Pfohl Bros. Landfill Site Steering Comm. v. Pfohl Enters.*, 187 F.R.D. 462 (W.D.N.Y. 1999) (explaining "the Revisers Note to amended Rule 26, suggests that the party having the burden of proof should typically provide expert disclosure first. But that it is not required as the default clause of the rule itself directs simultaneous disclosure"). As multiple federal courts have recognized, simultaneous exchanges are both efficient and fair. *See e.g. In Re: Pool Products Distribution Market Antitrust Litigation*, 2:12-md-02328-SSV (E.D. La. 2014), ECF No. 550; *c.f. Sanchez v. Stryker Corp.*, 2012 WL 13006186, at *3 (C.D. Cal. Mar. 28, 2012) (noting the virtue of simultaneous exchange as eliminating an unfair advantage).

Third, Defendants argue that substantial completion of fact discovery by March 3, 2021 is unrealistic. But that deadline provides the Parties with nearly twelve-months of discovery on the core liability case, a standard timeline in complex cases. *See In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, 387 F. Supp. 3d 323, 329 (S.D.N.Y. 2019) (ordering close of fact discovery on general causation eight-months after consolidation); *In re Bard IVC Filters Prods. Liab. Litig.*, 2018 WL 4279834, at *4-5 (D. Ariz. Sep. 7, 2018) (describing a full discovery process that took under eighteen months). Moreover, as Defendants are aware, discovery in this matter has been substantially advanced by the immediate production of documents sought in

ongoing regulatory and State Attorney General proceedings. And Defendants' own delay in serving discovery on Plaintiffs should of course not serve as a basis for delaying the progress of the case as a whole. For example, Defendants complain that the government entity fact sheets have not yet been finalized, but it was *Plaintiffs* who finally proposed county, school district, and defendant fact sheets on July 7, 2020 after Defendants neglected to act. Then, Defendants waited almost a month, until August 2, 2020, to respond to the proposed county and school district fact sheets and still have not provided revisions to the defendant fact sheet. While it is undisputed that the Parties have made substantial progress to date, Defendants cannot have it both ways: touting the Parties' cooperative progress while asking for a distended schedule to accommodate dragging discovery delays largely of their own making. Plaintiffs are confident they can work up their cases for trial on the proposed schedule. Defendants' speculative skepticism should not stand in the way of this goal.

Defendants' Position

1. Introduction

Defendants raise three overarching points for the Court's consideration as it reviews the Parties' proposals regarding case scheduling and bellwether selection procedures.

First, despite good faith efforts to resolve or narrow disputes, there remain substantial disagreements among the Parties as to core substantive, sequencing, and timing issues. Defendants believe that an informal conference with Judge Corley will provide salient guidance, facilitate agreements on at least some issues, and ripen any remaining disputes for the Court's adjudication. Defendants respectfully request that the Court direct the parties to participate in such a conference. Alternatively, to the extent the Court takes up these issues at the August 21, 2020 CMC, Defendants suggest that Court guidance, rather than rulings, on some or all of the issues may help the Parties further bridge the gaps in their proposals. The Parties could then submit joint or competing letter briefs on any remaining disputes within the next seven days.

Second, since the outset of this MDL, the Parties have worked diligently to meet the Court's expectation that the case "move forward in a speedy and collaborative and efficient way." (11/8/19 Hr'g Tr. at 12:3–7.) With the guidance of the Court and Judge Corley, the Parties have

developed procedures to facilitate prompt case development and eventual resolution, including through the entry of significant orders regarding joint coordination, deposition protocols, privileges and protections, and ESI procedures, among others. The Parties have also agreed to modify procedures in the wake of Covid-19, including adopting an alternative service of process and remote deposition protocols. But there is more to be done before any case will be close to trial ready.

While the Parties have heeded the Court's admonition "to get this case to resolution as fast as it can get there" (7/17/20 Hr'g Tr. at 6:19–23), the significant case milestones cannot be realistically accomplished in 15 months, as Plaintiffs suggest. This is a massive litigation as a matter of substance and numbers, including hundreds of different legal claims, thousands of Plaintiffs, and scores of parties on both sides—including more than a dozen defendants who were not parties until a few months ago, and still other parties who may be joined or impleaded as the case progresses. And, despite their best efforts, Defendants still lack crucial information about Plaintiffs in all three tracks. For example, many personal injury Plaintiffs have requested (and JLI has agreed to) extensions because of difficulties related to Covid-19. The class representatives have shown reluctance to respond to virtually any discovery, and the government entity Plaintiffs have yet to produce any documents and are still negotiating Plaintiff Fact Sheets. And, no Plaintiff in any case has provided Rule 26 initial disclosures.

Moreover, the complex litigation landscape is not set in a vacuum; it occurs on the heels of the FDA's acceptance of JLI's PMTA for comprehensive review.[6] The FDA is now determining whether—and if so, on what terms—JUUL products may be marketed in the United States. Finally, all of this is playing out against the backdrop of a Covid-19 pandemic that has strained parties on both sides of the aisle as well.

Third, the quest for expediency should not risk compromising fundamental principles of fairness, nor should it result in artificially compressed or impractical schedules that will not hasten resolution, but instead will almost certainly be revised at later dates. "[T]he multidistrict process contemplates involvement of representative counsel in formulating ***workable*** plans." *In*

[6] On July 29, 2020, JLI submitted its PMTAs to the FDA.

re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1232 (9th Cir. 2006) (emphasis added).[7] A "workable plan" in this MDL should be informed by the practical realities of this litigation, the progress that has been made, and the work that still must be done.

2. The Court Should Defer Setting Schedules For The Government Entity And Class Action Tracks.

Defendants believe it is premature to set a full case schedule for any track with the exception of the personal injury track.

First, there are significant issues the Court should decide before setting a full trial schedule for either the class or government entity cases. The Court has yet to hear argument on motions to dismiss, and the shape of the litigation will be informed by the Court's decision on the foundational issues raised in the Parties' briefs. For example, with respect to the government entity cases, the Parties agreed that the deadline for even amending the complaints should be deferred until "after the resolution of those motions," and thus stipulated that such amendments would not be due until "60 days after the Court issues its rulings on the pending motions." (7/15/2020 Jt. CMC Statement (ECF No. 803) at 6; *see also* 7/17/2020 Minute Order (ECF No. 808) (adopting same).) And the class certification issues are likewise significant and need not be decided at this juncture. The Parties would benefit from deferring decisions on the appropriate sequencing of class certification and summary judgment, among others things, until after the Court has ruled on the motions to dismiss, or at least until the Parties have had further opportunities to address the issues. For example, resolution of the motions to dismiss will very likely influence the nature and scope of the class that Plaintiffs propose to certify.

Second, the government entity and class tracks are simply not as far along as the personal injury cases. Although Plaintiffs suggest these tracks can "catch up" such that they can be on par with the personal injury cases, their proposal is not realistic, as described in more detail below.

[7] *See also In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011) ("the basic ground rules … may not be tossed out the window in an MDL case."): *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 841 (6th Cir. 2020) ("The rule of law applies in multidistrict litigation under 28 U.S.C. § 1407 just as it does in any individual case.").

3. The Court Should Adopt Defendants' Proposed Schedules.

To the extent the Court decides to consider and rule upon proposed schedules for any track at the CMC, Defendants respectfully request the Court adopt Defendants' proposed schedules for personal injury, class certification, and government entity tracks, attached hereto as Exhibit B. Defendants' proposals are carefully crafted (based on the available knowledge to date) to accord with the work that needs to be done to get these cases trial-ready in an efficient but realistic and fair manner. Plaintiffs' proposal, conversely, is not practical and should be rejected for at least the following reasons.

The Three Tracks Should Not Be Squeezed Into The Same Schedule. Plaintiffs' proposed schedule attempts to collapse all three tracks to set up interchangeably trial-ready bellwethers in each track on December 1, 2021. As noted above, this proposal ignores the reality that the three tracks are in markedly different states of advancement—in many cases due to factors within Plaintiffs' control or influence.

For instance, the Parties have received 367 PFS fact sheets to date (as compared to 830 filed personal injury cases), pursuant to a PFS Order that was entered on March 27, 2020. (ECF No. 406.) Defendants have moved to dismiss more than 40 Plaintiffs based on overdue or deficient fact sheets. Another 20% of Plaintiffs have requested extensions to submit their PFSs. And the vast majority of Plaintiffs have not provided any medical, education, and other records. Past experience shows that it will take months to gather these probative records.

The government entity claims remain at an even more nascent stage. The Parties are still negotiating Plaintiff Fact Sheets, and neither Plaintiffs nor Defendants have even proposed, let alone agreed to, a trial bellwether selection process. Plaintiffs have to date taken the position that these facts sheets should be the only discovery taken from the Plaintiffs until the bellwether candidates have been selected because school districts are overwhelmed with the press of business and Covid-19 to participate in discovery for the foreseeable future. In fact, with the exception of the seven current motion-to-dismiss bellwether complaints, the amended complaints for the remaining government entity Plaintiffs are not even due to be filed until 60 days after the Court rules on the pending motions to dismiss. (ECF No. 803.) And developing a government

entity public nuisance case takes extensive time—even in a pre-Covid-19 world. In the *Opioids* MDL, for example, the counties were selected as bellwethers on April 2018, and the trial was eventually set for October 2019—18 months later. In contrast, Plaintiffs' proposal would have government entity bellwethers selected by December 18, 2020 (a date which in itself is unrealistic), and then the first case trial ready less than 12 months later, on December 1, 2021.

The proposed government entity schedule is even further divorced from reality in light of the Covid-19 pandemic. As the government entity Plaintiffs explained in the April 13, 2020 Joint CMC, "the demands being placed on the government entity Plaintiffs by the Covid-19 pandemic" are significant, with "[c]ounty health departments" being "almost completely focused on containing the pandemic," and "school districts are largely shut down while still trying to provide important services to their students." (ECF No. 442 at 12.) Thus, the government entity Plaintiffs told the Court in all candor that they could not "forecast their ability to participate in a trial next year," as they explained why it was "not feasible to identify trial bellwethers at this time." (*Id.*) Sadly, those public health circumstances have not improved since April, so Plaintiffs' current optimism in support of their desired trial dates must be considered alongside their unwillingness and stated inability to provide even basic discovery. In addition, the recent addition of tribal entities may further complicate any government entity bellwether selection process and schedule.

And the class claims likewise remain at the very beginning of an even longer procedural road. JLI served the named class representatives with 20 requests for production and 20 interrogatories. 104 of the 108 named Plaintiffs have refused to respond to a single written discovery request. Moreover (as discussed below), a class case faces inherent milestones that do not exist for personal injury or government entity cases. Plaintiffs' synchronized trial readiness proposal, for example, does not account for class discovery, expert work, and a certification hearing—let alone reasonable notification and opt out periods, or what will almost certainly be Rule 23(f) appeals should any class or subclass be certified.

While this Court should coordinate among different tracks of cases, it should also make distinct scheduling and other accommodations as appropriate. *See In re Vioxx Prods. Liab. Litig.*,

360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005) ("transferee court can employ any number of pretrial techniques—such as establishing separate discovery and/or motion tracks—to efficiently manage this litigation"). The Court should not force all three tracks through a one-size-fits-all schedule to a single trial date. The Court should instead adopt Defendants' proposed schedule that provides flexibility to develop each distinct track at its own cadence and according to its substantive and procedural requirements. It is manifest that a single plaintiff personal injury case is more straightforward than trying a class action or government entity case, and there is no reasonable basis to proceed under any unrealistic assumption to the contrary. *See, e.g.*, *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 841–44 (6th Cir. 2020) (describing different "Track[s]" of cases in MDL); *In re Korean Air Lines*, 642 F.3d at 690 (cases within MDL "placed on coordinated but separate tracks for pretrial purposes").

Plaintiffs' Proposal Is Not Workable. Plaintiffs' proposal is driven by selecting trial dates at the end of 2021 and working backwards, rather than by the *actual status of this case today* and the real world facts about *how much needs to be done* before even the first personal injury case can be tried.

First, the Covid-19 epidemic and the massive discovery sought of JLI mean discovery of JLI is still in its earlier stages, and even more nascent for the other Parties. Even as to JLI (for whom discovery and document production is arguably the furthest along), the parameters of document production are still being developed. JLI has recently agreed to add an additional 45 custodians, and the Parties are still in search term negotiations. And fact discovery of Plaintiffs is still just getting under way. To this day, not a single personal injury, class representative, or government entity Plaintiff has provided Rule 26 disclosures. Although the Court entered its Case Management Order on personal injury Plaintiff Fact Sheets in March 2020, Defendants lack medical records and educational records for almost all of the personal injury Plaintiffs. The Newly Named Defendants and Plaintiffs have been negotiating a Supplemental Plaintiff Fact Sheet for months, but that Supplemental Plaintiff Fact Sheet was only recently ordered, and thus no personal injury Plaintiff has submitted a Supplemental PFS. With respect to the class actions, 104 of the 108 class representatives recently objected to and refused to substantively respond to

written discovery, and—with the exception of named plaintiffs in *Colgate* who produced documents before the MDL was created—none of the class representatives has produced a single document. And the government entity Plaintiffs and Defendants are negotiating Plaintiff Fact Sheets for those cases. It seems incredible that the government entity Plaintiffs will be able to engage in the rapid-fire discovery turn around envisioned by their own proposed schedule.

On these facts regarding ***this case***, the "substantial completion of fact discovery" by March 3, 2021 is unrealistic. Plaintiffs cite no case in which fact discovery of the scope which remains to be completed here has been completed in such a short time, much less under the extraordinary constraints that still flow from Covid-19.

Second, Plaintiffs' schedule for expert discovery does not work. Under that schedule, initial simultaneous expert reports would be exchanged on April 12, 2021; the "rebuttal reports" would be exchanged four weeks later, on May 12, 2021. The suggestion that the Parties could digest the opinions of, depose, and issue their own reports in response to numerous experts in myriad complex statistical, scientific, and economic issues (among others) is simply not practical, and Defendants have been unable to identify any MDL (or other complex litigation) that adopted anything approaching this timetable. Similarly, while the proposed personal injury bellwether cases selected for trial work up would be subject to "supplemental case specific discovery," there is not meaningful time in the schedule for that. Plaintiffs' proposal has this supplemental discovery closing on May 7, 2021, but case-specific expert reports would be due before then, on May 1, 2021.

Plaintiffs' schedule also provides for simultaneous exchanges of expert reports, without regard to who has the burden of proof. As Rule 26's advisory committee notes recognize, "in most cases ***the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties*** are required to make their disclosures with respect to that issue." Fed. R. Civ. P. 26(a)(2) advisory committee's note to 1993 amendment (emphasis added); *see also Manual for Complex Litig.* § 11.48. Indeed that is the practice (almost without exception) in MDLs, including MDLs before this Court. *See* Stipulated Scheduling Order, *In re Lidoderm*

Antirust Litig., MDL No. 2521 (N.D. Cal. Jan. 15, 2015) (ECF No. 134) at 1 (providing that "party with the burden of proof on the issue serves its expert report on that issue" first).[8]

Third, the class case schedule is facially implausible. Defendants believe it is premature and ask the Court to defer addressing the sequencing of certification and summary judgment. However, for illustrative purposes, the Defendants have considered the timing of Plaintiffs' proposal. Plaintiffs propose *simultaneous* class expert reports, provide no timeline for Defendants' experts at all (except as limited to "rebuttal"), and then set a whirlwind class briefing schedule. The schedule does not identify a class certification hearing date, but even assuming that the Court hears and decides certification by May 14, 2021 (which is wholly unrealistic for many reasons), there simply would not be enough time to have a class trial set for December 1, 2021.

Among other things, Plaintiffs' schedule fails to take account of the notice required under Rule 23(b)(3). Where a class is certified under Rule 23(b)(3) "the court *must* direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). While there is no set timeframe for notice, the class-certification-to-trial schedule in a recent class action tried before this Court, *Farar v. Bayer AG*, No. 3:14-cv-04601, is instructive. In *Farar*, the class was certified on November 15, 2017 (ECF No. 166) and the parties jointly submitted a notice plan on April 2, 2018 (ECF No. 190). After notice was complete, and after addressing issues including bifurcation of liability and damages, trial began on February 15, 2019—15 months after the Court's certification decision. Similarly, in *Krommenhock v. Post Foods LLC*, No. 3:16-cv-04958, this Court certified a class on March 9, 2020 (ECF No. 228) and has set trial to begin 13 months later on April 12, 2021 (ECF No. 249).

[8] *See also, e.g.*, Stipulated Order Establishing Case Mgmt. Schedule, *In re Abilify Prods. Liab. Litig.*, MDL No. 2732, at 2 (N.D. Fla. March 23, 2017) (ECF. No. 273) (scheduling plaintiffs' expert reports before defendants'); Order No. 25, *In re GM Ignition Switch Litig.*, MDL No. 2543, at 15 (S.D.N.Y. Nov. 19, 2014) (ECF. No. 442) (same).

B. Personal Injury Cases Bellwether Proposal

Per agreements set forth in the July CMC statement and the Court's Minute Order (ECF No. 808), any action filed in or transferred to this Court by October 15, 2020 will be included in the bellwether selection pool. The initial bellwether discovery pool will be selected (pursuant to procedures to be determined by agreement and/or by order of the Court) from the bellwether selection pool on or before December 15, 2020. Plaintiffs will make good faith efforts to timely submit completed PFSs and authorizations for those Plaintiffs in the bellwether selection pool, and JLI and Altria reserve all rights to move to dismiss complaints with incomplete PFSs and/or authorizations pursuant to the procedures set forth in Case Management Order No. 8. The parties have met and conferred regarding protocols for selecting bellwether cases for discovery and trial but were unable to reach agreement. The parties' respective proposals are below:

Plaintiffs' Position

I. PLAINTIFFS' BELLWETHER PROPOSAL AND BASIS

Plaintiffs propose that by December 15, 2020, a total of 24 personal injury cases will be selected for the initial bellwether discovery pool (or nominee pool) using a hybrid method, with Plaintiffs selecting eight cases, Defendants selecting eight cases, and the Court selecting an additional eight cases. Plaintiffs' proposed schedule is consistent with the agreement set forth in the July 17, 2021 CMC statement.[9] Further details of Plaintiffs' proposal follow:

Core discovery of the nominee pool: Under Plaintiffs' proposal, core discovery of the bellwether discovery pool may begin immediately upon selection and will conclude on or before March 30, 2021. Core discovery for each discovery pool case will consist of no more than three case-specific fact witnesses: (1) the plaintiff, (2) a fact witness with knowledge as to plaintiff's JUUL use and/or JUUL-related injury that the parties will meet and confer to determine the

[9] "Plaintiffs, JLI, and Altria agree that any action filed in or transferred to this Court by October 15, 2020 will be included in the bellwether selection pool. The initial bellwether discovery pool will be selected (pursuant to procedures to be determined by agreement and/or by order of the court) from the bellwether selection pool on or before December 15, 2020. Plaintiffs will make good faith efforts to timely submit completed PFSs and authorizations for those Plaintiffs in the bellwether selection pool, and JLI and Altria reserve all rights to move to dismiss complaints with incomplete PFSs and/or authorizations pursuant to the procedures set forth in Case Management Order No. 8."

appropriate witness, and (3) a treating medical provider who was principally responsible for the diagnosis and treatment of plaintiff's injury if the plaintiff received medical treatment for the injury alleged. Additional time is embedded in Plaintiffs' proposed schedule for additional depositions for the four cases that are selected for trial settings as set forth below.

Trial cases should be selected by the Court with input from the parties: Plaintiffs propose that on April 7, 2021, each party shall simultaneously submit *under seal* to the Court a letter not to exceed 12 pages identifying four of the 24 cases from the nominee pool that they contend are representative bellwether trial cases, the basis for their selections, and if appropriate, why the other cases are not representative or suitable bellwether trial candidates.

The Court will then select a total of four cases to be set for bellwether trials, prioritizing for trial the order of the cases. Fact discovery in those four cases will close on May 7, 2021. For the first two of those cases (as selected by the Court) case-specific expert discovery will close on May 15, 2021, and the remaining two cases will have an expert discovery schedule to be agreed upon following a meet and confer of the parties.

Plaintiffs' proposal for Court input will facilitate the selection of a representative sample of bellwether trials, in contrast to defendants' proposal, which contemplates totally random selections followed by a strike process designed to exclude bellwether trial-worthy representative cases. Plaintiffs' proposal also avoids the need for excessive depositions in thirty cases, when the initial three depositions, the core discovery, should be sufficient to assess the case's bellwether value.[10]

Plaintiffs believe the selection submissions should be under seal, since they will address the particular medical, psychological, cognitive, behavioral conditions and other personal facts about two dozen teens and young adults. Such information need not be aired on the internet for the twenty cases that would not be tried as bellwethers.

Defendant should be required to Waive *Lexecon*: As part of the bellwether process, the Defendants should be deemed to have waived any *Lexecon* rights to the extent they exist in any

[10] Plaintiffs just learned today that Defendant is apparently proposing five depositions for each of the thirty cases they suggest, meaning an additional sixty depositions of teen friends, teachers, coaches, parents and doctors mostly for cases that will not be selected.

given case. Without that, Defendants could prevent the Court from even being able to try a bellwether case.

II. PLAINTIFFS' PROPOSAL WILL PROMOTE RESOLUTION BY GIVING THE COURT DISCRETION TO IDENTIFY REPRESENTATIVE CASES.

A. MDL Precedent and Guidance Supports Plaintiffs' Proposal

"A bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation; therefore, it is imperative to know what types of cases comprise the MDL." Eldon E. Fallon *et. al.*, Bellwether Trials in Multidistrict Litigation, 82 Tul. L. Rev. 2323, 2344 (2008). Accordingly, purely random selection as a method for selecting bellwether trials is frequently disfavored. *See, e.g.*, *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, No. 09-MD-02100, 2010 WL 4024778, at *2 (S.D. Ill. Oct. 13, 2010) ("Most modern plans seem to disfavor random selection in order to have better control over the representative characteristics of the cases selected… The Court finds that the process that will provide the best sampling of cases will be one that allows both sides of this litigation to have a role in selecting cases."). Courts have come to favor a selection process that allows counsel to "play a role in selecting the cases." *See, e.g.*, *In re General Motors LLC Ignition Switch Litig.*, 14-md-02543, Order No. 25 (S.D.N.Y. Nov. 19, 2014) (ECF No. 422). As Judge Furman explained:

> Under the random-selection option, the trial-selection pool is filled with a prearranged number of cases selected randomly from the total universe of cases in the MDL or from various logical subsets of that group. This method is easy to perform, but it can be problematic. *If cases are selected at random, there is no guarantee that the cases selected to fill the trial-selection pool will adequately represent the major variables*.

Id. at 9 (quoting Judge Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. at 2348) (emphasis added).

The recent bellwether selection order in the Talc MDL is highly instructive. Chief Judge Wolfson applied a selection protocol similar to that proposed by Plaintiffs here, and explained that "each side shall select 10 cases and the Court shall randomly select 10 cases to compose the Discovery Pool… Further discovery will be allowed once the pool of 30 is narrowed to the trial

cases." The core discovery applied there is likewise similar in allowing for three depositions: "The plaintiff in each case will be deposed; if a death case, then the spouse or significant other… [u]p to two healthcare providers may be deposed in this phase with each side selecting one healthcare provider. *In Re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation,* MDL Docket No. 2738 Case 3:16-md-02738-FLW-LHG ECF No. 14108 Filed 07/23/20.

The FJC Pocket Guide to Bellwether Trials in MDL Proceedings *A Guide for Transferee Judges,* 27 (2019) describes various methods of selection, and notes: "Any of these strategies may be combined or modified to produce a hybrid approach. *For example, the court could allow both parties to select some cases and reserve others for the court to select or for random selection."* (Emphasis added).

B. The Court should adopt Plaintiffs' hybrid method of bellwether trial case selection.

Defendants advocate a byzantine selection process derived from total random selection for the pool of what they propose to be sixty cases that then gets reduced to thirty cases by peremptory strikes by both sides. After discovery of the thirty cases, Defendants then advocate "Peremptory Strikes, Particularly For Final Trial Candidate Selections," thus divesting the court of any discretion in selection of bellwether cases. Plaintiffs instead propose a more balanced and measured approach where each side and the Court each select a third of the cases for the nominee pool of candidates. *See, e.g.*, *Talcum Powder,* No. 2738, Case 3:16-md-02738-FLW-LHG Doc. 14108 Filed 07/23/20.

C. The Court should have discretion to select the cases it will try.

Plaintiffs' proposed process gives the Court a meaningful role in evaluating the parties' positions on the types of injuries alleged, assessing how the selections correlate to the statistical data from the Fact Sheets identifying the types of cases in suit, and whether the Court deems the case representative or an outlier, among other important factors beyond the ken of a roulette wheel. Further, a role in case selection also enables the Court to consider any state law issues that

could impact the utility of a bellwether case. For example, if a case is randomly selected with a personal injury that is anomalous, but one side seeks to advance that case, the Court should be able to weigh in to determine if it is productive to have to conduct *Daubert* briefing, if not hearings, and potentially trial for an injury that would not be instructive for resolution purposes. Based upon the data derived from the fact sheets filed to date, there are 130 unique identified personal injuries. While certainly some of them involve the same organ system and could be overlapping or related, some are unique. These important decisions should not be left up to chance and inevitable gamesmanship, and the Court should instead have the decision-making power in bellwether selections.

D. Plaintiffs' nominee pool of 24 and trial pool of four is more appropriate than the 30/60 pools and trial pool of 10 proposed by the Defendants.

Defendants propose to start with an enormous pool of 60, then winnow that pool to 30, and then incredibly, a pool of ten cases for expert discovery. Plaintiffs' proposal of a maximum of 24 cases (with eight cases each selected by Plaintiffs, Defendants and the Court) is far more balanced and proportional. The relative number of cases in this MDL further supports Plaintiffs' proposal. Even in the *Talc MDL* discussed above, there was a bellwether pool of thirty cases among the 18,500 complaints on file. In contrast, fewer than one thousand cases are on file in this MDL.

E. All Defendants should waive *Lexecon*, but JLI and the California resident Management Defendants *must* waive *Lexecon*.

JLI and the Management Defendants cannot credibly argue that they may refuse to waive *Lexecon.* This MDL is venued and situated in these Defendants' own jurisdiction. Notwithstanding the direct filing order, Plaintiffs could obtain personal jurisdiction over JLI and the Management Defendants by filing their cases in the Northern District of California, which should end the inquiry.

In *In Re: Cook Medical, Inc., IVC Filters Marketing, Sales Practices and Product Liability Litigation*, for example, the plaintiffs who had filed their cases in the Southern District of Indiana against Cook Medical, Inc. (an Indiana-based corporation) argued they could refuse waiver of *Lexecon.* The court rejected the plaintiffs' arguments, holding that venue in the

Southern District of Indiana was proper under 28 U.S.C. § 1391 and "the court has complete authority over cases originally filed in this court, just as it would over any other case originally filed in this district. This complete authority includes the authority to try such cases." *In Re: Cook Medical, Inc., IVC Filters Marketing, Sales Practices And Product Liability Litigation*, Case No. 1:14-ml-02570-RLY-TAB, 6/13/2019 Minute Order (Doc. No. 11131). While it was plaintiffs in the *Cook* MDL seeking to refuse waiver of *Lexecon*, the same principles apply here. The Court clearly held it has the authority to try cases filed in his district, and the justification for this rests on the fact that the Court has jurisdiction over the in-state defendant.

Additionally, Defendants' desire to randomly select bellwether cases, while at the same time refusing to waive *Lexecon*, significantly limits the pool of potential bellwether trials this Court could preside over. None of the individual plaintiffs will be California residents due to lack of diversity and hence subject matter jurisdiction. If the Court were to accept Defendants' position, cases eligible for the bellwether pool could not be tried before this Court unless they were filed in the Northern District of California or another district in the Ninth Circuit, or otherwise compliant with Case Management Order No. 3. The alternative would be for the Court to seek intercircuit assignment pursuant to 28 U.S.C § 292 to preside over a trial outside the Northern District of California. *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, 5 (Federal Judicial Center, 2011), That makes no sense, particularly when JLI and four of the five Management Defendants are at home in the Northern District of California.

By refusing to waive *Lexecon* for any case, Defendant is attempting to hold the entire bellwether process hostage by forcing Plaintiffs to waste valuable time and resources conducting pretrial workup on thirty cases that Defendants do not intend to let this Court hear. This is highly inefficient. As the MDL Judge, Your Honor will have more familiarity with the complex issues presented by these cases – it thus wastes judicial resources to essentially mandate that this Court cannot hear any of the bellwether cases.

Defendants' Position:

1. **Overview Of Defendants' Proposal**[11]

- October 19, 2020 Random Selection of 60 Cases. On October 19, 2020, the Court will randomly select 60 cases from all cases that were directly filed in or transferred to the MDL on or before October 15, 2020.

- December 1, 2020 Required PFS Completion Date. On or before December 1, 2020, absent good cause, the 60 randomly selected Plaintiffs must have submitted complete Plaintiff Fact Sheets (including records releases and Supplement Plaintiff Fact Sheets), as required in CMO No. 8 (ECF No. 406) and its forthcoming amendment. Only Plaintiffs with completed PFSs will be eligible for bellwether trial candidates. Defendants hope that most of the Plaintiffs will already have completed PFSs (as previously defined) before this time, and request that the Court and Lead Counsel encourage counsel for the remaining Plaintiffs in this group to prioritize completion of those PFSs in the first instance, and set meaningful consequences for failure to submit fulsome PFS responses, including dismissal with prejudice.

- December 15, 2020 Strike Process to Establish A 30 Case "Discovery Pool". On December 15, 2020, Plaintiffs and Defendants may exercise peremptory strikes in equal numbers as necessary to arrive at a discovery pool of 30 cases. (*E.g.*, if all 60 Plaintiffs above had completed PFSs by December 1, then each side would get 15 strikes. If only 50 Plaintiffs above had completed PFSs by December 1, then each side would get 10 strikes.)

- July 1, 2021 Fact Discovery Completion. By July 1, 2021, fact discovery will close for both Plaintiffs and Defendants. It is critical that sufficient time elapse between setting the Discovery Pool and the close of fact discovery to allow the Parties to, among other things: (1) collect medical, education, and other records from third parties, (2) depose Plaintiffs and a sufficient number of other Plaintiff-related fact witnesses, and (3) substantially complete Defendants' document productions before their current or former employees are deposed.

- July 15, 2021 Strike Process To Establish 10 Case "Trial Pool". On July 15, 2021, the Parties may exercise a sufficient number of strikes to result in a 10-case "Trial Pool." The Trial Pool will then be the focus of expert work and further case refinement.

- August 1, 2021 Motion to Dismiss Discovery Pool Plaintiffs. On or before August 1, 2021, any Defendant may move to dismiss any Plaintiff within the Discovery Pool for failure to state a claim or for any other pleading defect that is specific to that Plaintiff. Any such Motion to Dismiss shall be briefed according to the schedule provided in the Rules of this Court and the Federal Rules of Civil Procedure.

- August 10–November 30, 2021 Expert Disclosures And Discovery. On August 10, 2021, Plaintiffs will disclose their experts, and discovery of Plaintiffs' experts will be complete by September 30, 2021. On October 15, 2021, Defendants will disclose their experts, and discovery of Plaintiffs' experts will be complete by November 30, 2021.

- December 10, 2021 Random Selection of Bellwether Trial Order. On December 10, 2021, the Court will use random selection to set the order of bellwether trials. The first two trial cases will then proceed to summary judgment and *Daubert* motions. Working up dispositive motions for two trials will provide a cushion, should the first trial be disposed of on summary judgment, voluntary dismissal, or settlement before trial.

[11] Other deadlines that Defendants propose in connection with this schedule, such as deadlines for the amendment of pleadings and service of written discovery, are contained in Exhibit B to this Statement.

- January 14, 2022–April 10, 2022. The Parties will brief and propose the Court hear oral argument on summary judgment and *Daubert* motions with respect to the first two bellwether trial cases.
- June 15, 2022 First Bellwether Trial. The Court (or another court of appropriate jurisdiction) will hold the first bellwether trial.

2. **The Court Should Adopt Defendants' Proposal.**

"'Bellwether' cases, or test cases focused upon individual claims, have been an important case-management tool in many MDL proceedings involving numerous individual claims." *Guidelines & Best Practices for Large & Mass-Tort MDLs*, Bolch Jud. Instit., Duke Law School, (2d ed. Sept. 2018) ("*Duke MDL Guidelines*") at 18; *see also* Melissa J. Whitney, Fed. Jud. Ctr., *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges* (May 15, 2019) ("*FJC: Bellwether Trials*") at 3 (goal of bellwether trials is "producing reliable information about other cases centralized in that MDL proceeding"). While there are a variety of methods for selecting bellwethers, there is near uniform agreement that, "[i]f bellwether cases are representative of the broader range of cases in the MDL proceeding, they can provide the parties and court with information on the strengths and weaknesses of various claims and defenses and the settlement value of cases." *FJC: Bellwether Trials* at 3–4. Defendants' proposal will serve these goals.

The Court Should Employ Random Selection Procedures. A random selection process will promote representativeness and fairness. "If individual trials . . . are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases." *Manual for Complex Litig.* § 22.315 (4th ed. 2004). Random selection is "the standard method for helping ensure that a sample is representative of the population." *FJC: Bellwether Trials* at 25; *see also Manual For Complex Litig.* § 22.315 (4th ed. 2004) ("To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases."); *Duke MDL Guidelines* at 23 ("The most popular methods" include "random selection from the entire case pool.")

Indeed, random selection is one of the primary methods of bellwether selection in recent MDLs. *See, e.g.*, Pretrial Order No. 23, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*,

MDL No. 2885 (N.D. Fla. Jan. 21, 2020) (ECF No. 922) (ordering bellwether discovery pool selection starting with a random sample of "1% of the population," as well as additional random selection processes later); *In re Johnson & Johnson Talcum Powder Prods Mkt'g, Sales Prac. & Prods. Liab. Litig.*, MDL No. 2738 (D. N.J. May 15, 2020) (ECF No. 13317) (randomly selecting 1,000 cases from cases pending as of May 1, 2020); *In re Abilify Prods. Liab. Litig.*, MDL No. 2734 (N.D. Fla. August 10, 2018) (ECF No. 953) ("[T]he Court has randomly selected the following 40 cases from the pool of eligible bellwether plaintiffs to proceed with the next step in the discovery process.").[12]

Plaintiffs propose that the Court allow the Parties to pick most of the bellwether cases. Plaintiffs' proposal, however, discourages representativeness and fairness—as many authorities recognize. "Simply permitting the plaintiffs and defendants to each choose some number of cases for the bellwether pool may . . . skew the information that is produced, leading to a pool that contains only extreme cases for each side." *FJC: Bellwether Trials*; *see also In re Chevron U.S.A., Inc.*, 109 P.3d at 1019 (noting that trial of cases selected by each side "is not a bellwether trial. It is simply a trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in this litigation.").[13] The Court should adopt random selection rather than party selection because it may "prevent[] gamesmanship by the parties during case selection and may prevent certain attorneys from filing questionable cases." *FJC: Bellwether Trials* at 25.

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[12] *See also In re Prempro Prods. Liab. Litig.*, MDL No. 4:03-cv-1507-WRW (E.D. Ark. June 20, 2005) (judge would "randomly draw from a hat (literally) fifteen cases."); *In re Chevron*, 109 F.3d 1016, 1019 (5th Cir. 1997) (noting that, in order for bellwether trials to serve their "value ascertainment function," "the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained"); Pretrial Order No. 89, *In re Baycol Prods. Liab. Litig.*, MDL No. 1431 (D. Minn. July 18, 2003) (ECF. No. 3601) (including 200 cases selected at random from all filed cases in the bellwether selection pool); *In re Norplant Contraceptive Prods. Liab. Litig.*, No. 4:03-cv-1507-WRW, 1996 WL 571536, at *1 (E.D. Tex. Aug 13, 1996) (discussing proceedings after "random selection of the twenty-five bellwether trial plaintiffs"); *In re Benicar (Olmesartan) Prods. Liab. Litig.*, No. 15-2606, 2016 WL 1370998, at *1 (D.N.J. Apr. 6, 2016) (parties to select 20 bellwether cases "from a pool of 30 cases that were randomly selected").

[13] An empirical study suggests, moreover, that cases plaintiffs choose tend to be greater outliers than those chosen by defendants, generating asymmetrical bias in the bellwether pool that skews the process against defendants. *See* Brown, Holian, Ghosh, *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663 (2014).

The Court Should Allow Sufficient Fact Discovery Of Plaintiffs. Plaintiffs propose that the **dozens** of potential Defendants in each case be limited to three fact depositions for each bellwether discovery pool case (or only two if a Plaintiff did not seek medical treatment) While Defendants agree some presumptive limits on initial depositions may be appropriate, the limit here—in terms of number and subject—is too strict. Defendants request that the limit should be up to five deponents for each bellwether discovery pool case (subject to good cause expansion), as long as any cases selected for the trial pool are subject to full supplemental fact discovery, including depositions of any additional case-specific witnesses who may testify at trial. Defendants' proposed limit of five deponents for each bellwether discovery case is consistent with recent MDLs. *See, e.g,*, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, MDL No. 2885 (N.D. Fla. June 29, 2020) (ECF No. 1204) at 2 ("Absent leave of Court, the Parties are permitted up to six case-specific depositions per side"); *In re Abilify Prods. Liab. Litig.*, MDL No. 2734 (N.D. Fla. Dec. 4, 2018) (ECF No. 1072) ("Absent leave of Court and a showing of good cause, nor more than six fact witnesses may be deposed in any individual case; the plaintiff, one family member or friend, two treating physicians, prescribers, or other health care providers, and two sales representatives" as well as "any other fact witness the other side indicates it will be called as a witness at trial"); Order No. 25, *In re GM Ignition Switch Litig.*, MDL No. 2543, at 15 (S.D.N.Y. Nov. 19, 2014) (ECF No. 442) (no numeric limits on case-specific fact depositions).

The Court Should Complement Random Selection With Peremptory Strikes, Particularly For Final Trial Candidate Selections. Defendants appreciate that "some commentators have expressed the view that random selection will rarely result in the selection of representative cases." *Duke MDL Guidelines* at 23. Thus, Defendants propose party input to reduce outliers through a strike process. Defendants believe the strike process will play a valuable role in both setting the discovery pool and in ultimately setting the smaller trial pool—with the latter being the most important. *See FJC: Bellwether Trials* at 28 (suggesting courts allow "each side to recommend a set number of cases for the pool, but allow the other side strikes or vetoes over a certain number of selections"); *Duke MDL Guidelines* at 23 (noting that "the

most popular methods [of bellwether case selection] are: (1) random selection of cases from the entire case pool; and (2) selection of cases by the parties (usually with strikes).").

A strike process will provide both sides with the opportunity to identify and strike outlier cases and facilitate a bellwether discovery and trial pool that is representative. Through a strike process, each side will be able to eliminate the other side's perceived outlier and/or "best cases," leaving cases in the middle that are more representative. Party selection, on the other hand, will likely lead to both sides' selection of their perceived "best" cases, as opposed to cases that will result in trials that will provide the most meaning to the Parties and the Court in terms of the strengths, weaknesses, and value of the litigation pool. Recognizing the merits of strikes, MDLs have employed a variety of strike processes at both the discovery and trial stages of the litigation. *See, e.g.*, Order, *In re Abilify Prods. Liab. Litig.*, MDL No. 2734 (N.D. Fla. Aug. 10, 2019) (ECF No. 953) (court randomly selected 40 cases, and each side exercised 5 strikes to create a discovery pool of 30 cases and later exercised 5 additional strikes to create a second discovery pool of 20 cases); CMO No. 12, *In re Gadolinium-Based Contrast Agents*, No. 1:08-GD-50000, at 1 (N.D. Ohio May 12, 2009) (ECF No. 360) (using strikes to create final group of trial candidates); PTO No. 13, *In re Bausch & Lomb Contact Lens Solution*, MDL No. 1785 (D.S.C. Jan. 31, 2008) (ECF No. 86) (permitting parties to make strikes, followed by random selection of a case for trial); *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 791 (E.D. La. 2007) ("Initially, the PSC and DSC were each permitted to designate for trial five bellwether cases involving myocardial infarctions in which case-specific discovery was complete. Each side was given two veto strikes"); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, MDL No. 2666, 2019 WL 4394812, at *2 (D. Minn. July 31, 2019) (each party exercised one strike to reduce eight bellwether cases to "six cases in the final Bellwether Trial Pool").[14]

[14] *See also In re Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig.*, MDL No. 1726, 2007 WL 846642, at *3 (D. Minn. Mar. 6, 2007) (court "will randomly select plaintiffs in each category to be potential subject cases for bellwether trial," after which the field will narrow to three bellwethers in each category "chosen by the parties through use of alternating peremptory strikes"); *In re Gen. Motors LLC Ignition Switch Litig.*, MDL No. 2543, 2016 WL 1441804, at *3 (S.D.N.Y. Apr. 12, 2016) ("two strikes by each party on the other's list" of final trial candidates); *In re Mirapex Prods. Liab. Litig.*, MDL No. 1836, at 6 (D. Minn. Aug. 23, 2007) (ECF No. 26) (parties would make alternative strikes until a single case remained for trial).

The Court Should Randomly Select The Order Of Trials. Plaintiffs request that the Parties submit under seal[15] competing proposals for the order of trials. Defendants believe the better approach is for the Court to select the order of trials randomly after each side has exercised its strikes. A randomized process will make sure neither side skews the results and ensures both sides are treated equally, as has been adopted in other MDLs. *See, e.g.*, CMO No. 9, *In re Fosamax Prods. Liab. Litig.*, MDL No. 1789 (S.D.N.Y. Jan. 31, 2007) (ECF No. 74) (court "will randomly select the order in which each of the three cases will be tried"); PTO No. 13, *In re Bausch & Lomb Contact Lens Solution*, MDL No. 1785 (D.S.C. Jan. 31, 2008) (ECF No. 86) (permitting parties to make strikes, followed by random selection of a case for trial).

The Court Should Adopt Defendants' Proposed Trial Date. Under Defendants' proposal, the first case would be trial ready 34 months after the creation of this MDL and 28 months after most Defendants, including JLI Directors and Founders, were first named as defendants in any case. This schedule compares favorably with recent MDLs, including ones dealing with serious medical and public health issues. *See, e.g.*, Track One-B Case Mgmt. Order, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Nov. 19, 2019) (ECF No. 2940) (setting first trial date for 34 months after initiation of MDL); Order After Hr'g, *In re Roundup Prods. Liab. Litig.*, MDL No. 2741 (N.D. Cal. Sept. 24, 2018) (ECF No. 1882) (first trial started on March 28, 2019, nearly 30 months after MDL formation); CMO No. 18, *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, MDL No. 2740 (E.D. La. Mar. 22, 2019) (ECF No. 6551) (setting first trial date for 35 months after initiation of MDL).

Defendants Are Entitled To Exercise Their *Lexecon* Rights. Plaintiffs request that Defendants be "deemed" to have waived their *Lexecon* rights. But under *Lexecon*, an MDL court may not force a defendant (or a plaintiff) to waive his or her rights to have the case remanded to a court of appropriate jurisdiction and venue at the conclusion of pretrial proceedings. *Lexecon, Inc. v. Milberg Weiss Bersgad Hynes & Lerach*, 523 U.S. 26, 43 (1998). Defendants agree that selecting bellwether cases for pleadings motions and coordinated discovery proceedings,

[15] Defendants do not object to the submission of materials under seal, provided they meet the standards for sealing under Local Rules.

including expert discovery and motions practice related to discovery for pretrial purposes, may promote efficiency. Defendants, however, believe that transferring cases for trial in the district where they were filed, or would have been filed without the Direct Filing Order, will not impede that goal and may in some cases be more efficient or preferable for other reasons. In particular, many of the Defendants (and the overwhelming majority of Plaintiffs) are not, and have never been, California citizens. Accordingly, no Defendant has agreed to waive *Lexecon* rights in this case, and instead Defendants expressly preserve their rights, which may include having certain pre-trial motions decided by the trial court of remand.

Dated: August 20, 2020

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EXHIBIT A

Plaintiffs' Proposed Case Schedule

In re Juul Labs, Inc., Marketing, Sales Practices and Prods. Liability Litig,
Case No. 19-md-02913-WHO
MDL No. 2913

Event	Date
Personal Injury (PI) Only: Close of PI bellwether pool (complaints must be on file)	October 15, 2020
Government Entity (GE) Only: Deadline for submitting agreed upon or competing proposals for methodology for selecting GE bellwethers	October 15, 2020
Government Entity (GE) Only: Close of GE bellwether pool (complaints must be on file and PFS must be completed for all potential GE bellwether candidates)	November 16, 2020
Deadline for PI outstanding PFS Deadline for Plaintiffs and Defense to select their PI nominees Deadline to submit agreed or competing GE bellwether pools	December 15, 2020
Court to determine composition of GE and PI bellwether pool	December 18, 2020
Personal Injury Only: Deadline to meet and confer on deferred pleading challenges	January 7, 2021
Class Cases Only: • Exchange of Class Certification Expert Reports • Motion for Class Certification	January 13, 2021
Personal Injury Only: Deadline for bellwether plaintiffs to amend complaints	January 21, 2021
Personal Injury Only: Deadline for Defendants to file deferred pleading challenges	February 5, 2021
Personal Injury Only: Deadline to oppose deferred pleading challenges	March 1, 2021

Event	Date
Personal Injury Only: Deadline to reply to deferred pleading challenges	March 15, 2021
Class Cases Only: • Opposition to Motion for Class Certification; • Defendants File *Daubert* Motions for Class Plaintiffs' Class Certification Experts	March 17, 2021
Substantial Completion of Fact Discovery	**March 30, 2021**
Personal Injury Only: Hearing on deferred pleading challenges	April 1, 2021
Exchange of Generic Expert Reports	April 12, 2021
Class Cases Only: • Reply in Support of Motion for Class Certification; • Class Plaintiffs File *Daubert* Motions for Defendants' Class Certification Experts; • Class Plaintiffs File Oppositions to Defendants' *Daubert* Motions	April 14, 2021
Personal Injury Only: Deadline to select the first trial cases from the bellwether pool	April 7, 2021
Personal Injury Only: Deadline for supplemental case specific discovery in the First Two Trial Cases	May 7, 2021
Class Cases Only: Defendants file Oppositions to Class Plaintiffs' *Daubert* Motions	April 28, 2021
Exchange of Case-Specific Expert Reports in GE Bellwether Cases	May 1, 2021
Exchange of Rebuttal Generic Expert Reports	May 12, 2021
Exchange of Case-Specific Expert Reports in First Two PI Trial Cases	May 15, 2021
Exchange of Case-Specific Rebuttal Reports in GE and First Two PI BWs	June 15, 2021

Event	Date
Close of Expert Discovery (Generic and Case Specific Bellwether GE and First Two PI Trial Cases)	**July 15, 2021**
MSJ and *Daubert* Motions	July 23, 2021
MSJ and *Daubert* Oppositions	August 23, 2021
MSJ and *Daubert* Replies	September 7, 2021
Oral Argument: MSJ and *Daubert* Motions	September 30, 2021
Exchange of Civil Local Rule 16-10(b)(7), (8), (9), and (10) Materials	October 15, 2021
Pretrial Conference Statement, Jury Instructions, Exhibit List and Objections, Deposition Designations and Objections, and Motions in *Limine*	November 1, 2021
Pretrial Conference (Class, GE and First Two PI Trial Cases)	November 15, 2021
First Bellwether	**December 1, 2021**
Second Bellwether	January 12, 2022
Third Bellwether	February 23, 2022
Fourth Bellwether	April 6, 2022
Fifth Bellwether	May 18, 2022

EXHIBIT B

***In re Juul Labs, Inc., Marketing, Sales Practices, & Prods. Liability Litig.*, MDL No. 2913**
Defendants' Proposed Case Schedule

Personal Injury Track

Event	Date
• Cases must be filed in or transferred to the MDL to be eligible for bellwether selection.	10/15/2020
• The Court will randomly select 60 eligible cases.	10/19/2020
• The 60 randomly selected plaintiffs must have submitted complete Plaintiff Fact Sheets (including records releases and Supplemental Plaintiff Fact Sheets), as required in CMO No. 8 (ECF No. 406) and its forthcoming amendment.*	12/01/2020
• **30 cases in Bellwether Discovery Pool**: Each side exercises equal number of strikes necessary to get 30 remaining cases.	12/15/2020
• Deadline to serve additional written discovery on Discovery Pool; Deadline to amend pleadings/add parties, claims or defenses in the Discovery Pool cases, except upon good cause.	1/15/2021
• Fact discovery of Plaintiffs and Defendants complete.	7/1/2021
• **10 cases in Bellwether Trial Pool**: Each side exercises 10 strikes to arrive a bellwether trial pool of 10 cases.	7/15/2021
• Deadline to file motions on deferred pleading challenges (motion to dismiss).	8/02/2021
• Plaintiffs' expert disclosures.	8/10/2021
• Discovery of Plaintiffs' experts complete.	9/30/2021
• Defendants' expert disclosures.	10/15/2021
• Discovery of Defendants' experts complete.	11/30/2021
• Order of trials determined by random selection.	12/10/2021
• Summary Judgment and *Daubert* motions for first 2 Bellwether Trials to be filed.	1/14/2022

* Only plaintiffs with completed PFSs (as previously defined) will be eligible for bellwether trial candidates. Defendants hope that most of the plaintiffs will already have completed PFSs before this time, and request that the Court and Lead Counsel encourage counsel for the remaining plaintiffs in this group to prioritize completion of those PFSs in the first instance, and set meaningful consequences for failure to submit fulsome PFS responses, including dismissal with prejudice

***In re Juul Labs, Inc., Marketing, Sales Practices, & Prods. Liability Litig.*, MDL No. 2913**
Defendants' Proposed Case Schedule

Event	Date
• Oppositions to Summary Judgment and *Daubert* motions for first 2 Bellwether Trials to be filed.	2/21/2022
• Reply briefs in support of Summary Judgement and *Daubert* motions for 2 Bellwether Trials to be filed.	3/10/2022
• Hearing on Summary Judgment and *Daubert* motions for first 2 Bellwether Trials.	4/11/2022
• Exchange Local Rule 16-10(b)(7), (8), (9), and (10) Materials for First Bellwether Trial.[†]	5/2/2022
• Pretrial Conference Statement, Jury Instructions, Exhibit List and Objections, Deposition Designations and Objections, and Motions in *Limine* for First Bellwether Trial.	5/16/2022
• Pretrial Conference for first Bellwether Trial.	6/1/2022
• First Bellwether Trial (if required under *Lexecon*, remand case to appropriate jurisdiction or venue for trial).	6/15/2022

[†] Some of the pretrial dates/procedures may be adjusted depending on the jurisdiction of the first trials.

***In re Juul Labs, Inc., Marketing, Sales Practices, & Prods. Liability Litig.*, MDL No. 2913**
Defendants' Proposed Case Schedule

Class Action Track

Event	Date
• Each of the class representatives must respond to first set of written discovery; and to the extent not previously completed, each class representative, shall complete the production of information and documents required to be produced under Rule 26(a)(1)(A).	9/15/2020
• Each of the proposed class representatives must be produced for deposition on or before this date.	10/30/2020
• Parties to submit joint or competing proposals of which state subclasses (if any) in addition to California should be selected as class bellwethers.	12/15/2020
• The Court determines which state subclasses (if any) in addition to California, will be the Class Bellwethers.	12/29/2020
• Fact discovery related to Bellwether Classes (including any putative nationwide class) complete.	7/1/2021
• Deadline to file motions on deferred pleading challenges (motion to dismiss).	8/10/2021
• Plaintiffs' expert disclosures.	8/10/2021
• Discovery of Plaintiffs' experts complete.	9/30/2021
• Defendants' expert disclosures.	10/15/2021
• Discovery of Defendants' experts complete.	11/30/2021
• Summary Judgment and *Daubert* motions.	1/15/2021
• Oppositions to Summary Judgment and *Daubert* motions.	2/20/2021
• Reply briefs in support of Summary Judgment and *Daubert* motions.	3/10/2021
• Hearing on Summary Judgment and *Daubert* motions.	4/25/2022
• [Date and order of trials; class notice, and opt out dates to be set after (1) Court certifies class or classes (if any) and (2) Rule 23(f) appeals have been resolved]	

***In re Juul Labs, Inc., Marketing, Sales Practices, & Prods. Liability Litig.*, MDL No. 2913**
Defendants' Proposed Case Schedule

Government Entity Track

Event	Date
• Parties to submit agreed upon or competing proposals for methodology for selecting bellwethers.	10/15/2020
***[The following assumes similar bellwether selection procedure as Defendants proposed in the personal injury cases]	
• PFSs due of the eligible cases [number to be determined], including record releases (if not already done) Any of the eligible plaintiffs who have not submitted PFSs by this date may be dismissed with prejudice.	2/01/2021
• **Bellwether Discovery Pool:** Each side exercises equal number of strikes necessary to get the remaining cases for a Bellwether Discovery Pool [number to be determined].	2/15/2021
• Deadline to serve additional written discovery on Bellwether Discovery Pool; Deadline to amend pleadings/add parties, claims or defenses in the Bellwether Discovery Pool cases, except upon a showing of good cause.	3/15/2021
• Fact discovery of Plaintiffs and Defendants complete.	10/1/2021
• **Bellwether Trial Pool**: Each side exercises strikes to create Bellwether Trial Pool [number to be determined].	10/15/2021
• Deadline to file motions on deferred pleading challenges.	12/10/2021
• Plaintiffs' expert disclosures.	12/10/2021
• Discovery of Plaintiffs' experts complete.	1/30/2022
• Defendants' expert disclosures.	2/15/2022
• Discovery of Defendants' experts complete.	3/30/2022
• Order of trials determined by random selection.	4/10/2022
• Summary Judgment and *Daubert* motions for first 2 Bellwether Trials.	6/15/2022
• Oppositions to Summary Judgment and *Daubert* motions for first 2 Bellwether Trials.	7/20/2022
• Reply briefs in support of Summary Judgement and *Daubert* motions for 2 Bellwether Trials.	8/10/2022

***In re Juul Labs, Inc., Marketing, Sales Practices, & Prods. Liability Litig.*, MDL No. 2913**
Defendants' Proposed Case Schedule

Event	Date
• Hearing on Summary Judgment and *Daubert* motions for first 2 Bellwether Trials.	9/10/2022
• Exchange Local Rule 16-10(b)(7), (8), (9), and (10) Materials for First Bellwether Trial[‡]	10/1/2022
• Pretrial Conference Statement, Jury Instructions, Exhibit List and Objections, Deposition Designations and Objections, and Motions in *Limine* for First Bellwether Trial	10/15/2022
• Pretrial Conference for first Bellwether Trial	11/1/2022
• First Bellwether Trial (if required under *Lexecon*, remand case to appropriate jurisdiction or venue for trial)	11/15/2022

[‡] Some of the pretrial dates/procedures may be adjusted depending on the jurisdiction of the first trials.