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

IN RE: HAIR RELAXER MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	Case No. 23 C 818 MDL No. 3060
This document relates to: ALL ACTIONS	Judge Mary M. Rowland

PLAINTIFFS' SUBMISSION OPPOSING BIFURCATION OF GENERAL CAUSATION DISCOVERY

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I. INTRODUCTION

Plaintiffs respectfully oppose Defendants' request to bifurcate and stay all discovery unrelated to general causation ("general causation bifurcation"). General causation bifurcation is contrary to standard practice in this District and in multi-district litigation across the country. As courts, including this Court, have repeatedly determined, formal discovery bifurcation—especially of general causation discovery—is highly inefficient, increases delay and costs, impedes resolution, generates inevitable disputes, and prejudices plaintiffs. *See, e.g.*, *In re Testosterone Replacement Therapy Prods. Liab. Litig.* ("*TRT*"), No. 1:14-cv-01748, MDL No. 2545 (N.D. Ill. Oct. 24, 2014), ECF No. 441 (rejecting general causation bifurcation in mass tort MDL) (attached as Exhibit A); *see also New England Carpenters Health & Welfare Fund v. Abbott Lab'ys*, No. 12 C 1662, 2013 WL 690613, at *2-3 (N.D. Ill. Feb. 20, 2013) (Rowland, J.) (denying motion to stay discovery pending motion to dismiss or bifurcate class certification discovery); *In re Groupon, Inc. Sec. Litig.*, No. 12 C 2450, 2014 WL 12746902, at *2 (N.D. Ill. Feb. 24, 2014) (Rowland, J.) (denying motion to bifurcate class certification discovery); *Maysonet v. Guevara*, No. 18-CV-2342, 2020 WL 3100840, at *3 (N.D. Ill. June 11, 2020) (Rowland, J.) (denying motion to bifurcate *Monell* discovery).

Although Defendants characterize their proposal as "targeted discovery" (ECF No. 12 at 3), their suggested approach would severely prejudice Plaintiffs and burden the Court. At best, the parties will engage in substantial disputes and predictable motion practice regarding the demarcation line between general causation discovery and remaining discovery. At worst, Defendants' approach will ensure a discovery process that is exponentially longer and more expensive, all while delaying the possibility of resolution to women (or their survivors) who are suffering from serious cancers or have died. Importantly, Defendants also fail to show good cause for their proposed partial stay of discovery. *See New England Carpenters*, 2013 WL 690613, at

*3 (defendant bears burden to show cause for discovery stay). Defendants' only purported basis for staying normal discovery here is their hope that they will win summary judgment on general causation—an assumption they assert before any discovery or motion practice has occurred, and despite the fact that Plaintiffs' allegations are based on multiple scientific studies that Defendants' hair relaxer products cause cancer. Plaintiffs' claims are therefore not so "utterly frivolous" to justify the high costs of Defendants' proposed deviation from standard discovery practice. *See id.* at *2.

Accordingly, and as set forth more fully below, Plaintiffs respectfully request that the Court deny Defendants' request to bifurcate and stay all discovery unrelated to general causation.

II. FACTUAL BACKGROUND

As alleged in Plaintiffs' Master Long Form Complaint (ECF No. 106, "Compl."), two recent studies found that women who had used hair relaxers were at least twice as likely to develop uterine or ovarian cancer. First, in October 2021, a study funded by the National Institutes of Health and the National Institute on Minority Health Sciences found that persons who used hair relaxers four or more times per year were more than twice as likely to develop ovarian cancer. Compl. ¶¶ 89-90. Applying hair relaxers multiple times each year is common, as "maintaining the relaxed hairstyle requires on-going application of hair relaxer to the new growth" every four to eight weeks, often called "re-touches." *Id.* ¶ 63. Other studies have also found a positive correlation between hair relaxer use and ovarian cancer. *Id.* at ¶ 96.

Second, in October 2022, the National Institutes of Health released a study finding that the risk of developing uterine cancers was approximately doubled for women who had used hair relaxers compared with women who did not use hair relaxers. *Id.* at ¶¶ 85-88.

Both ovarian and uterine cancer have hormonally driven etiologies, such that the hormone-disrupting chemicals in Defendants' hair relaxers and the resulting shifts in hormonal balance increase the risk of developing of ovarian and/or uterine cancer. *Id.* at ¶¶ 84, 92.

Plaintiffs allege that their cancers and other injuries were caused by a variety of Defendants' products, often in combination, including but not limited to Dark & Lovely (L'Oréal and SoftSheen), Optimum (L'Oréal and SoftSheen), Mizani (L'Oréal), Crème of Nature (Revlon), Revlon Realistic (Revlon), Motions (Strength of Nature), Just for Me (Strength of Nature), Soft & Beautiful (Strength of Nature), TCB (Strength of Nature), TCB Naturals (Strength of Nature), Profectiv Mega Growth (Strength of Nature), African Pride (Strength of Nature), Dream Kids (Strength of Nature), Dr. Miracle's (Strength of Nature), African Pride (Strength of Nature and Godrej SON Holdings), ORS Olive Oil (Dabur and Namaste), Hawaiian Silky (JF Labs), Cantu (PDC Brands), Design Essentials (McBride), Affirm (Avlon), Africa's Best (House of Cheatham) Pink Conditioning No-Lye Relaxer (Luster), Smooth Touch No-Lye Relaxer (Luster), and Silk Elements (Sally Beauty). *Id.* at ¶ 2.

III. LEGAL STANDARD

The "party seeking to limit discovery has the burden of showing 'good cause' for such an order." *New England Carpenters*, 2013 WL 690613, at *3. Good cause requires "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Id.* (quoting 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2035, at 157–58 (3d ed. 2010)).

When considering requests to limit or stay discovery, courts consider factors including whether the request is likely to speed or delay resolution, increase or decrease litigation burdens on the parties and the court, or disadvantage the non-moving party. *See E.E.O.C. v. Fair Oaks Dairy Farms, LLC*, No. 2:11 CV 265, 2012 WL 3138108, at *2 (N.D. Ind. Aug. 1, 2012) (denying

motion to stay discovery pending motion to dismiss) (quoting *Abbott Laboratories v. Matrix Laboratories, Inc.*, No. 09-CV-1586, 2009 WL 3719214, *2 (N.D. Ill. Nov. 5, 2009)). When considering whether to bifurcate discovery, in addition to the factors above, courts also consider whether the discovery issues to be separated are easily disentangled. *In re Groupon*, 2014 WL 12746902, at *2 (denying motion to bifurcate class certification and merits discovery).

Underlying all these factors is Federal Rule of Civil Procedure 1: "the Court['s] authority to stay discovery . . . must be exercised so as to secure the just, speedy and inexpensive determination of every action." *New England Carpenters*, 2013 WL 690613, at *2 (internal quotation marks omitted).

IV. ARGUMENT

A. Bifurcation Deviates from the Federal Rules and Standard MDL Practice.

"Bifurcated discovery is not the norm." *Dean v. Pfizer, Inc.*, No. 419CV00204JMSDML, 2020 WL 12032895, at *2 (S.D. Ind. Dec. 9, 2020) (rejecting defendant's proposal to bifurcate general causation discovery). In MDLs, courts regularly employ unified discovery plans and reject bifurcation—including in this District. *See, e.g.*, Oct. 24, 2014 Minute Order at 1, *TRT*, ECF No. 441 ("The Court declines to bifurcate discovery as proposed by defendants") (attached as Exhibit A); CMO No. 14 at 1, *id.*, ECF No. 467 ("The Court is unpersuaded that the revised proposal by . . . defendants to bifurcate expert discovery and summary judgment (as between general causation and other matters) represents a fair, efficient, and reasonable way to manage the pretrial proceedings in this case.") (attached as Exhibit B); CMO No. 15 at 1, *In re Proton-Pump Inhibitor Prods. Liab. Litig.*, No. 2:17-md-2789, MDL No. 2789 (D.N.J. May 18, 2018), ECF No. 209 ("The Court denied Defendants' motion for the Court to consider general causation and preemption before conducting case-specific fact discovery in individual cases.") (attached as Exhibit C); CMO No. 1, *Goodstein v. Astrazeneca Pharmaceuticals LP*, No. 16-cv-5143 (D.N.J. May 25, 2017),

ECF No. 6 (in same *Proton-Pump* litigation, scheduling full discovery and bellwether process rather than adopting defendants' bifurcation proposal) (attached as Exhibit D); Scheduling Order No. 1 at 2-9, 13, *In re Ethicon, Inc. Power Morcellator Prods. Liab. Litig.*, No. 2:15-md-02652, MDL No. 2652 (D. Kan. Dec. 24, 2015), ECF No. 80 (rejecting bifurcated schedule, permitting discovery within the full scope of Rule 26(b)(1), and ordering all common fact discovery and all case-specific discovery to begin and be completed within about 13 months) (attachment as Exhibit E); Am. Case Mgmt. Order No. 24 at 2, *In re Yasmin and YAZ (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig.* ("*YAZ*"), No. 3:09-md-2100, MDL No. 2100 (S.D. Ill. Oct. 13, 2010), ECF No. 1329 (ordering "aggressive schedule" for full case-specific discovery bellwether trials) (attached as Exhibit F).

Defendants' proposal to bifurcate discovery deviates not only from standard MDL practice but also from the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1) (permitting discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."). Instead, Defendants ask this Court to impose a stark limit on discovery until Plaintiffs clear a hurdle not present in the Federal Rules. Under Defendants' proposal, the scope of Rule 26(b)(1) would be preempted in favor of only "targeted discovery relevant to general causation"—a vague concept that would be hotly debated. ECF No. 12 at 3. "If, and only if, Plaintiffs prevail on general causation," would "other discovery proceed." *Id.*

Because such a stay of all "other discovery" deviates from the Federal Rules and standard procedure, Defendants bear the "burden of showing 'good cause'" based on "specific demonstration of fact." *New England Carpenters*, 2013 WL 690613, at *3. Given the risks of delay, disputes, and prejudice described below, Defendants cannot do so.

B. Bifurcation is Inappropriate and "Incredibly Inefficient."

The only Court in this District to consider bifurcation of general causation discovery in a mass tort MDL (like this) rejected it as "incredibly inefficient." Transcript of Oct. 24, 2014 Hearing at 43:24-44:5, *TRT*, (Kennelly, J.) (as quoted in ECF No. 464 at 10, attached as Exhibit G). This is for good reason. Bifurcated and stayed discovery would impose delay and invite redundancy in every phase, thus impeding potential resolution of the case and increasing costs for the parties and the Court.

1. Bifurcation Severely Delays the Collection of Critical Evidence and Potential Resolution.

By carving up the evidence and briefing artificially, it might reasonably be another two years before the remaining discovery on other topics *could begin*, let alone selection and preparation of bellwether trials. As Judge Kennelly observed in *TRT*, "if the defense ends up not prevailing on the summary judgment, all of a sudden this looks like an incredibly inefficient way of doing things, because we have gone two years down the road, or whatever it is." *TRT*, ECF No. 464 at 10. The parties here might just be starting (second rounds of) document collection in 2025, with (second rounds of) fact depositions and then expert discovery continuing into 2026. Even under outstanding MDL case management, the first bellwether trial could be four or more years away if the parties need to go through two complete rounds of pre-trial litigation.

Most importantly, such a delay in critical discovery and bellwether proceedings would put any hope of speedy resolution out of reach. This is precisely the reason stays on discovery are disfavored in this District: "because they bring resolution of the dispute to a standstill." *New England Carpenters*, 2013 WL 690613, at *2. The discovery that Defendants seek to stay—potentially including evidence on Defendants' knowledge, marketing, and more—will fundamentally inform when (or whether) the parties are able to evaluate this MDL for resolution

consistent with the very purpose of MDL consolidation. *See* ECF No. 1 at 2 (J.P.M.L. Order consolidating MDL to "allow this litigation to be managed most efficiently").

By contrast, unified discovery facilitates settlement. Discovery into Defendants' alleged marketing misrepresentations, particularly after they were aware of the health and safety issues of these products, is both relevant to general causation and is likely to be critical to understanding the scope of exposure here. And most of all it is early, unified bellwether discovery and related export work—on both general and case-specific issues—that develops the information that drives global resolution. *See, e.g.*, *In re Nat'l Prescription Opiate Litig*., No. 1:17-md-2804, MDL No. 2804, 2019 WL 3843082, at *1 (N.D. Ohio Aug. 15, 2019) (recognizing bellwether process as essential for "information gathering that would facilitate valuation of cases to assist in global settlement"); *In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig*., 835 F.3d 1195, 1208 (10th Cir. 2016) (noting, in appeal from MDL No. 2048, "the whole purpose of bellwether litigation . . . is to enable other litigants to learn from the experience and reassess their tactics and strategy (and, hopefully, settle)") (citing Eldon E. Fallon, Jeremy T. Grabill and Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litig.*, 82 Tul. L. Rev. 2323 (2008)). Often a unified bellwether discovery process leads to settlement without the need for any trial at all. *See, e.g.*, *YAZ*, ECF Nos. 2377 (Minute Order, Apr. 19, 2012), 2739 (Order #60, Mar. 15, 2013) (orders staying bellwether process and later recognizing settlement) (attached as Exhibits H-I); *Invokana (Canagliflozin) Prods. Liab. Litig*., No. 3:16-md-2750, MDL No. 2750 (D.N.J.), ECF Nos. 266 (Text Order, May 22, 2018), 276 (Order, Nov. 19, 2018) (orders staying bellwether process and later recognizing settlement) (attached as Exhibits J-K); *In re Juul Labs, Inc. Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 3:19-md-2913, MDL No. 2913 (N.D. Cal.) ECF Nos. 3363 (Order, July

28, 2022), 3690 (Minutes, Dec. 6, 2022) (extending bellwether process into 2023 and then recognizing settlement in 2022) (attached as Exhibits L-M).

As this Court has previously summarized: "Where the Court finds that a stay of discovery is unlikely to significantly expedite the litigation, and may actually slow it down, it will decline to interfere." *New England Carpenters*, 2013 WL 690613, at *2 (citing cases). Here, Defendants' proposal would throttle the litigation, and should be rejected.

2. Bifurcation Increases Costs and Repetition.

Along with delay, Defendants' proposal would bring increased costs for the parties and the Court. Rather than "obviate the risk of duplicative discovery" as the J.P.M.L. envisioned, ECF No. 1 at 2, bifurcation risks repeating every contested stage of discovery. The parties could battle through two rounds of negotiating ESI search terms and custodians, document collections, privilege disputes, and depositions—first those related only to general causation, and then those related to other topics. Many of the same witnesses deposed on general causation would likely have to be re-deposed for other matters, such as Defendants' notice, knowledge, and marketing practices. *Cf. Maysonet*, 2020 WL 3100840, at *3 ("much of the evidence required to litigate the individual claims will be relevant to the *Monell* claim and *vice a versa*, such that bifurcation could result in two rounds of depositions and document production"); *New England Carpenters*, 2013 WL 690613, at *4 (denying motion to bifurcate class certification and merits discovery when those "issues will likely overlap" based on an "initial review of the complaint").

None of this would be beneficial for the parties or the Court. *See Pfizer*, 2020 WL 12032895, at *3 ("Bifurcated discovery . . . seldom results in efficient case management."); *Gonzalez v. Texaco, Inc.*, No. C 06-02820 WHA, 2007 WL 661914, at *2 (N.D. Cal. Feb. 28, 2007) (denying defendants' request for phased general causation discovery in toxic tort case

because "setting an earlier deadline, even on one issue, will likely result in *increased* costs for all involved") (emphasis in original).

To the extent Defendants rely on the cost of full discovery they might face in this litigation to justify staying most discovery now, this Court has recognized that reference to such costs is not compelling without a "clear showing of its burden or cost with any anticipated discovery," and is premature when "the parties have not even discussed the discovery Plaintiff intends to request." *New England Carpenters*, 2013 WL 690613, at *3.

C. Bifurcation Burdens the Court with "Inevitable Disputes" on Scope.

Many courts, including this one, have recognized that bifurcating discovery leads to "inevitable disputes about the scope" of permitted discovery. *Maysonet*, 2020 WL 3100840, at *3 n.3. "There is no neat line dividing information relevant to general causation and to specific causation . . . undoubtedly leading to myriad disputes whether certain information, search terms, interrogatories, or deposition questions are sufficiently relevant to one and not the other." *Pfizer*, 2020 WL 12032895, at *3; *see also In re Metformin Mktg. & Sales Pracs. Litig.*, No. 2:20-cv-2324, 2023 WL 2324769, at *1 & n.3 (D.N.J. Mar. 2, 2023) (in consolidated toxic tort cases, rejecting priority phasing of general causation discovery in part because it "would overly complicate discovery and invite case management problems, such as disputes concerning the appropriate scope of discovery for each stage"); *Gonzales*, 2007 WL 661914, at *1 (rejecting bifurcation because it "would lead to increased costs based on an increased potential for discovery disputes").

When considering bifurcation in other contexts, this Court has recognized that hair-splitting generates disputes, observing that "several courts have noted that bifurcation can actually increase the costs of litigation because of disputes over what constitutes merits and what constitutes class discovery." *In re Groupon*, 2014 WL 12746902, at *4 (citing cases); *see also*

Maysonet, 2020 WL 3100840, at *3 n.3 ("the Court does not wish to referee the inevitable disputes about the scope of *Monell* versus non-*Monell* discovery").

The same concerns apply here: "liability" evidence will be inextricably enmeshed with "causation" evidence. Critical documents and analyses relating to causation are often located in custodial files or emails of personnel in Defendants' budgeting, corporate planning, marketing and other departments. This is not surprising, as product development and testing are deeply intertwined with marketing and business planning. It will thus be highly inefficient and impractical to attempt to circumscribe document productions and depositions of such personnel to "causation" alone—predictably generating unwanted disputes for the Court and unnecessary costs for the parties. And, even if Defendants temporarily succeed in delaying complete discovery due to such arbitrary line-drawing, discovery of the same personnel will be required again if (as Plaintiffs expect) a triable issue of fact exists on general causation.

Notably, Defendants' proposal would generate these endless boundary-drawing disputes regardless of which party ultimately wins on general causation. Either way, under Defendants' proposal, the *Court* loses.

D. Bifurcation Is Prejudicial to Plaintiffs.

The murky boundaries of general causation discovery will also prejudice Plaintiffs with regard to proving general causation. As described above, evidence relevant to general causation is expected to appear in varied and decentralized places, such as in marketing and sales materials revealing Defendants' notice of harm, supporting both causation *and* liability. But if discovery is bifurcated, Plaintiffs expect Defendants to argue that discovery about marketing, sales, and other business-related areas is not relevant to general causation, and resist related productions and depositions. Bifurcation puts Defendants in the role of discovery gatekeepers, making unreviewable decisions about which of their responsive documents relate to general causation and

which relate to other relevant issues—and therefore need not be produced in the initial phase of discovery. If even some relevant evidence is perceived by Defendants to fall on the wrong side of the arbitrary discovery boundary, Defendants might never produce it and Plaintiffs' ability to demonstrate general causation from myriad sources and types of evidence will be undermined solely by the timing of production and not due to a lack of discoverable evidence.

Moreover, Plaintiffs would have to take general causation depositions without key contextual documents from areas excluded from discovery. And while Plaintiffs will have access to only a limited subset of Defendants' documents, Defendants will have access to all of them, creating an uneven playing field.

There is no corresponding prejudice to Defendants to proceed under the normal discovery rules. Defendants will be able to challenge discovery requests as usual, and can move for summary judgment on general causation at the appropriate time.

E. Bifurcation Assumes a Premature and Unsupported Merits Conclusion.

Given the delays, disputes, and prejudice created by deviating from a unified discovery process, bifurcation could be justified only by heavy countervailing benefits. But any efficiency benefits that could be gained by bifurcation here are entirely "predicated on the assumption that" Defendants' future motion for summary judgment on general causation "has a high likelihood of success." *New England Carpenters*, 2013 WL 690613, at *2. At this stage that is "mere speculation."[1] *Id.*; *accord Gonzales*, 2007 WL 661914, at *2. Defendants' proposal "ask[s] this Court to make a preliminary finding on the likelihood of success on the merits" before Defendants have filed answers or any motions and before there has been any discovery, which would

[1] Defendants' assumption here that they will prevail on a summary judgment motion far in the future is even more unreasonably speculative than in *New England Carpenters*, where defendants requested a stay pending resolution of a motion to dismiss that was already before this Court. 2013 WL 690613, at *2.

"circumvent[] the usual procedures." *New England Carpenters*, 2013 WL 690613, at *2. Such a merits determination would be inconsistent with the pleadings and unsupported by any evidence before the Court.

This Court has recognized that stays of discovery at the outset of a case are inappropriate except in narrow circumstances, not present here: "Although it is conceivable that a stay might be appropriate where the complaint was utterly frivolous, or filed merely in order to conduct a 'fishing expedition' or for settlement value, this is not such a case." *Id.* at *2; *see also Pfizer*, 2020 WL 12032895, at *2 (rejecting bifurcation in part because plaintiff's "general causation theory is not so weak that the court concludes that she should first prove she can get to trial on a general causation theory before being allowed to take any other discovery").

Judge Kennelly rejected bifurcation in the *TRT* MDL for this very reason: "[P]art of my concern with this [bifurcation] motion . . . it's a little bit of a mini summary judgment motion. . . . [Y]ou're asking me to make sort of a preliminary indication, [that] yes, this is kind of a weak case and so I should do it this way. I have some sort of visceral discomfort about that just from life experience as a judge." Transcript of Oct. 24, 2014 Hearing at 43:15-22, *TRT* (as quoted in ECF No. 464 at 10 n.9, attached as Ex. G). For the same reasons here, this Court should reject Defendants' invitation to prejudge the merits before the pleadings have even been resolved.

F. Defendants' Cited Authority for Bifurcation Does Not Support Their Position Here.

In their prior submission, Defendants argued that four other MDLs (*Zantac*, two regarding *Viagra*, and *Acetaminophen ASD-ADHD*) have applied the same proposed causation bifurcation approach Defendants advocate here. ECF No. 12 at 3. Plaintiffs disagree.

Contrary to Defendants' claim, in *Zantac*, there was no bifurcation as Defendants here propose, as all discovery proceeded simultaneously. *See In re Zantac (Ranitidine) Prods. Liab.*

Litig., No. 20-MD-2924, MDL No. 2924, 2022 WL 17480906 (S.D. Fla. Dec. 6, 2022). As that court later explained:

> It was important to the Plaintiffs that they be able to take *all* discovery—discovery on the merits and discovery on general causation—as soon as possible and without bifurcation. Non-bifurcated discovery was important to the Plaintiffs because should the Plaintiffs prevail on general causation *Daubert* challenges, they would be prepared to immediately shift their focus to bellwether trials and specific causation.

In re Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-2924, MDL No. 2924, 2023 WL 2734775, at *2 (S.D. Fla., Mar. 31, 2023).[2]

Unlike this case, the parties *jointly proposed* bifurcation in the two *Viagra* MDLs. *See* Pretrial Order No. 6, *In re Viagra (Sildenafil citate) Prods. Liab. Litig.* ("*Viagra Cal.*"), No. 3:16-md-2691, MDL No. 2691 (N.D. Cal. Sept. 26, 2016), ECF No. 102 (adopting parties' joint proposed pretrial order) (attached as Exhibit N); Scheduling Order Relating to Phase I of Discovery, *In re Viagra Prods. Liab. Litig.* ("*Viagra Minn.*"), No. 06-md-1724, MDL No. 1724 (D. Minn. June 30, 2006), ECF No. 38 (same) (attached as Exhibit O). By contrast, Plaintiffs here strongly oppose bifurcation for the reasons set forth in Sections IV(A)-(E), above. Moreover, despite the parties' agreement on process and proposed joint scheduling in the *Viagra* MDLs, the bifurcated discovery still took longer than the parties had proposed to their respective courts, reflecting the inefficiencies inherent in the line drawing and risks of such substantial delays before commencing stayed discovery. *See Viagra Cal.*, ECF No. 102 at 12 (parties proposed and court ordered bifurcated document production by February 2017 and *Daubert* briefing by June 2018, but—as the examples cited below show—discovery fights delayed briefing until October 2019,

[2] If anything, *Zantac* demonstrates that proceeding with *all* discovery does not need to delay the resolution of any general causation questions, and that a defendant can adequately defend itself on general causation after all discovery has been produced.

more than a year late) (attached as Exhibit N); *id.*, ECF No. 536 (Jt. Ltr. Br. Regarding Docs. Withheld as Non-Responsive, July 20, 2017) at 1-2 (attached as Exhibit P); *id.*, ECF No. 817 (Third Amended Pretrial Order No. 6, Dec. 11, 2018) at 1 (attached as Exhibit Q); *see also Viagra Minn.*, ECF Nos. 38 (Scheduling Order, June 30, 2006), 587 (Defs.' Reply Br. re *Daubert* issue, July 13, 2009), 607 (*Daubert* Order, Aug. 19, 2009) (parties intended to complete bifurcated discovery and related *Daubert* briefing within a year, by May 2007, but did not finish until summer 2009, over two years late) (attached as Exhibits O, R-S).

While the court in *Acetaminophen ASD-ADHD* did prioritize general causation discovery, this outlier (and out of Circuit) decision provides no roadmap here, as the court there provided no justification for its decision which could be applied here nor has the litigation progressed sufficiently to indicate the extent to which it has slowed or facilitated the progress of the case. *See* Order, *In re Acetaminophen ASD-ADHD Prods. Liab. Litig.* ("*Acetaminophen ASD-ADHD*"), No. 1:22-mc-3043, MDL No. 3043 (S.D.N.Y. Dec. 7, 2022), ECF No. 27 (attached as Exhibit T).

Finally, the only MDL to consider bifurcation in this Circuit was this Court in *TRT*, *supra*, where Judge Kennelly rejected the concept. *See TRT*, at ECF No. 441 (attached as Exhibit A).[3] None of the authority cited by Defendants justify a different approach than approved in *TRT* or overcome the risks of substantial delay, added costs, likely disputes, and prejudice explained above.

[3] To the extent Defendants cherry-picked inapposite cases where the plaintiffs ultimately failed to prove general causation, those cases show only that sometimes defendants prevail when they are sued. They do not support a sweeping rule preventing Plaintiffs here, in a different case with different facts and Defendants, from discovering their own case now.

V. CONCLUSION

For the above reasons, Plaintiffs respectfully request that the Court deny Defendants' request to bifurcate and stay all discovery unrelated to general causation.

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Respectfully submitted,

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