

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

**IN RE: RECALLED ABBOTT INFANT
FORMULA PRODUCTS LIABILITY
LITIGATION**

**This Document Relates To:
All Cases**

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)
) Case No. 22 C 4148
) MDL No. 3037
)
) Hon. Judge Matthew F. Kennelly
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**CASE MANAGEMENT ORDER NO. 13
(Bellwether Case Selection and Scheduling Order)**

I. SCOPE OF ORDER

1. In furtherance of the effective and efficient case management of complex litigation between Plaintiffs in MDL No. 3037 (“Plaintiffs”) and Defendant Abbott Laboratories (“Defendant”), this Case Management Order (“CMO”) will govern the guidelines and procedures for selecting a first wave of 10 Personal Injury cases (the “Initial Bellwether Discovery Cases”) for which individual case-specific discovery will be conducted, and then for selecting a smaller subset of those cases thereafter to be designated to be tried as bellwether cases in this MDL Proceeding. This CMO also sets certain deadlines for the MDL, generally, and Initial Bellwether Discovery Cases, specifically.

2. This Order may be modified or amended for good cause shown by agreement of the Parties or with leave from the Court.

**II. DETERMINATION OF CASES ELIGIBLE FOR INITIAL BELLWETHER
DISCOVERY CASES**

3. Subject to the requirements set forth in Paragraph 7 below, any personal injury case filed in or associated with *In Re Recalled Abbott Infant Formula Products Liability Litigation*, 1:22-cv-04148 (N.D. Ill.) (MDL No. 3037), by July 24, 2023 and with a substantially complete

Plaintiff Fact Sheet (“PFS”) (including completed medical authorizations) within 14 days of entry of this Order shall be eligible to be selected by the parties as an Initial Bellwether Discovery Case as described further below.

4. Within 21 days of entry of this Order, the parties shall confer regarding the cases eligible for selection as Initial Bellwether Discovery Cases. Specifically, the parties shall confer regarding (i) the PFS status of each personal injury case (including whether the PFS is substantially complete (including completed medical authorizations), and (ii) the diagnosis category for each case for purposes of potential selection under Section 5(a) below.

III. SELECTION OF INITIAL BELLWETHER DISCOVERY CASES

5. From among the cases eligible to be selected as Initial Bellwether Discovery Cases, cases shall be selected through the following process:

- a. Simultaneous Party Selections – Five Cases. On or before 60 days after entry of this order, at Noon CST, the parties shall exchange their respective selections of five Initial Bellwether Discovery Cases each from among the eligible cases – at least one of which must allege a *Cronobacter* diagnosis, one of which must allege a meningitis diagnosis (non-*Cronobacter*), and at least two of which must allege *Salmonella* diagnoses (but which do not include meningitis diagnoses). The fifth case may allege any type of diagnosis (or no specific diagnosis at all).
- b. In selecting their respective Initial Bellwether Discovery Cases, the parties shall select cases that they have a good faith belief are representative of the body of then-filed cases as a whole, and that should be subject to discovery and then taken to trial.
- c. In the event that the parties select one overlapping case as an Initial Bellwether Discovery Case, nine cases will move into initial discovery. In the event that the

parties select more than one overlapping case as Initial Bellwether Discovery Cases, the parties will meet and confer to select a mutually agreed upon replacement cases, so the total number of Initial Bellwether Discovery Cases is no less than nine.

6. Following selection, the parties shall jointly submit a proposed order to the Court identifying the cases selected by the parties as Initial Bellwether Discovery Cases and discovery in those cases shall commence promptly after selection consistent with the schedule set forth below.

7. Within 30 days of entry of this Order, Plaintiffs shall provide written *Lexecon* waivers for all *Cronobacter* and Meningitis cases originally filed outside the U.S. District Court for the Northern District of Illinois. Any such case for which a waiver is not provided by such date shall not be eligible as an Initial Bellwether Discovery Case subject to a meet and confer regarding any requests for an extension of time. For all non-*Cronobacter* and non-Meningitis cases (as determined by the parties meet and confer within 14 days of this order), Plaintiffs shall provide a *Lexecon* waiver for any case originally filed outside the U.S. District Court for the Northern District of Illinois within 10 days of such case's selection as an Initial Bellwether Discovery Case. If the Plaintiff in any such cases refuses to provide a waiver, the party choosing such case shall be entitled to replace it with a case alleging the same diagnosis within 7 days.

8. Within 14 days after the parties' selection of the Initial Bellwether Discovery Cases, Plaintiffs may amend their initial complaints. Where an amendment is served for a case initially selected by Abbott, Abbott may replace the case with an alternate selection within 7 days of amendment provided the amendment provides a good faith basis for replacing the selection.

9. Defendant will serve answers to the operative Complaint in each of the Initial Bellwether Discovery Cases within 45 days after the case's selection as an Initial Bellwether Discovery Case or within 45 days after amendment, if the relevant complaint is amended. The parties agree that Answers are only required in the 10 Initial Bellwether Discovery Cases and not in any other personal injury case pending within the MDL, unless later ordered by the Court.

IV. PHASE I DISCOVERY: FACT DISCOVERY IN INITIAL BELLWETHER DISCOVERY CASES

10. Bellwether discovery shall be divided into two phases. The first phase ("Phase I") will consist of fact discovery intended to facilitate selection of bellwethers cases for trial. After Phase I discovery concludes, the parties will submit representativeness briefing and the Court will select the Bellwether Trial Cases. The second phase ("Phase II") will consist of limited additional fact discovery and expert discovery for those cases selected as Bellwether Trial Cases.

11. During Phase I discovery, Defendant may issue written and/or document discovery requests for Initial Bellwether Discovery Cases, limited to not more than 10 Interrogatories, 15 Requests for Production, and 20 Requests for Admission in each case (absent a showing of good cause that additional interrogatories or requests are warranted in a particular case). Such discovery requests shall not be duplicative of information and documents requested and obtained through the Plaintiff Fact Sheet process (Case Management Order No. 3). Plaintiffs may also issue case-specific written and/or document discovery requests to Defendant for Initial Bellwether Discovery Cases. Such requests shall be case-specific and not duplicative of requests served by the Plaintiffs' Steering Committee during the course of this MDL and will be governed by the Federal Rules of Civil Procedure. Moreover, to the extent the parties reach agreement on a proposal regarding case-specific discovery in the form of a Defendant Fact Sheet for filed cases similar to the PFS, Plaintiffs shall be limited to not more than 10 interrogatories, 15 requests for

production, and 20 requests for admission for a given case (absent a showing of good cause that additional interrogatories or requests are warranted in a particular case). These shall be served such that responses are due by the end of the Phase I discovery period.

12. Plaintiff/Parent/Caregiver Depositions. During Phase I, the parties may take no more than three case-specific depositions of Plaintiffs and/or parents (or caregivers), which are presumptively limited to 5 hours (exclusive of any re-direct examination by Plaintiff's counsel). Defendant, who shall pick the deponents and shall be entitled to go first in all such depositions, shall be entitled to seek additional time for good cause shown, but in no event more than the time allotted by the Federal Rules of Civil Procedure.

13. Medical Provider Depositions. For each case that a party selects as an Initial Bellwether Discovery Case, such party shall be entitled to identify a treating medical provider to depose and shall conduct their examination prior to the opposing party's examination. After such party identifies the initial provider to be deposed, the opposing party shall have the opportunity to identify a second treating medical provider for deposition if they deem it necessary and shall be entitled to conduct their examination first in any such deposition. The parties shall meet and confer in the event either party identifies additional medical providers to be deposed prior to selection of trial cases.

14. Contact with any treating healthcare provider shall be governed by the law of the state in which the healthcare provider currently practices.

15. Phase I discovery shall be completed within 150 days of selection of the Initial Bellwether Discovery Cases.

V. SELECTION OF TRIAL BELLWETHER CASES

16. Within 14 days of the completion of Phase I discovery, each side (Plaintiffs collectively and Defendant) shall simultaneously submit to the Court a brief not to exceed 20 double-spaced pages identifying up to five cases from the Initial Bellwether Discovery Cases 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. In their briefing, the parties will also address the appropriate number of cases (up to five) to be further developed and tried as bellwether trial cases. No replies will be permitted.

17. Following receipt of the parties' submissions, the Court will select a total of up to five cases to be set for bellwether trials and will set the order of the cases for trial (the "Trial Selection Order").

VI. PHASE II DISCOVERY: TRIAL-RELATED DISCOVERY AND EXPERT DISCOVERY IN TRIAL BELLWETHER CASES

18. Within 14 days of the Trial Selection Order, the parties shall designate additional case-specific fact witnesses who may be called as witnesses in the bellwether trials. Depositions of those witnesses may commence immediately upon such designations, and all such depositions must be completed within 75 days of Trial Selection. The parties agree to meet and confer in an effort to reach agreement regarding the logistical details of such depositions.

19. Expert discovery for the bellwether trial cases must be completed within 150 days of the Trial Selection Order. Specific deadlines related to expert discovery are set forth in the schedule below.

20. The parties intend that the limitations on expert discovery set forth in Rule 26 of the Federal Rules of Civil Procedure, including the provision of Rule 26(b)(4)(A)-(D) limiting

discovery with respect to draft reports, communications with experts, and depositions of consulting experts, shall apply to all cases.

VII. SCHEDULE FOR TRIAL BELLWETHER CASES

24. In accordance with the schedule set forth above (and including other dates not specified above), the following schedule shall apply:

Proposed Case Schedule	
Meet and Confer regarding pool for potential Initial Bellwether Discovery Cases	August 28, 2023
Plaintiffs to provide <i>Lexecon</i> waivers for all Cronobacter and Meningitis cases originally filed outside the U.S. District Court for the Northern District of Illinois	September 13, 2023
Simultaneous Selection of Initial Bellwether Discovery Cases	October 13, 2023
Plaintiffs to provide <i>Lexecon</i> waivers for all cases selected as Initial Bellwether Discovery Cases for which waivers have not been previously provided	October 23, 2023
Plaintiffs to file any amended complaints for cases selected as Initial Bellwether Discovery Case	October 27, 2023
Defendant to file answers for Initial Bellwether Discovery Cases	November 27, 2023 or 45 days after amended complaint is filed
Phase I Discovery For Initial Bellwether Discovery Cases	
Phase I Discovery Begins	October 13, 2023
Phase I Discovery Complete	March 11, 2024

General Discovery Deadlines	
Rule 26(g) Certification	March 11, 2024
Close of General Fact Discovery	April 25, 2024
Selection of Trial Bellwether Cases	
Representativeness Submissions to Court	March 25, 2024
Court Selects Trial Bellwether Cases and Sets Order of Trials (“Trial Selection Order”)	TBD
Phase II Discovery For Trial Bellwether Cases	
Phase II Discovery Begins	Immediately following Trial Selection Order
Parties Exchange Lists of Potential Case-Specific Witnesses (e.g., Plaintiffs, Caretakers, Medical Providers)	14 days after Trial Selection Order
Complete depositions of Potential Trial Witnesses Not Previously Deposed	75 days after Trial Selection Order
Exchange of Generic Expert Reports	75 days after Trial Selection Order
Exchange of Rebuttal Generic Expert Reports	21 days after Exchange of Generic Expert Reports
Exchange of Case-Specific Expert Reports	90 days after Trial Selection Order
Exchange of Rebuttal Case-Specific Expert Reports	21 days after Case-Specific Expert Reports
Close of Expert Discovery	150 days after Trial Selection Order

Dispositive Motions	
Motions for Summary Judgment	21 days after Close of Expert Discovery
<i>Daubert</i> Motions	28 days after Close of Expert Discovery
Oppositions to Motions for Summary Judgment	30 days after filing of any Motion for Summary Judgment
Oppositions to <i>Daubert</i> Motions	30 days after filing of any <i>Daubert</i> Motion
Replies to Motions for Summary Judgment, if any	10 days after filing of relevant Opposition to Motion for Summary Judgment
Replies to <i>Daubert</i> Motions	10 days after filing of relevant Opposition to <i>Daubert</i> Motion
Trials	
Bellwether Trial Case No. 1 Trial Begins	To Be Set By Court
Bellwether Trial Case No. 2 Trial Begins	To Be Set By Court
Bellwether Trial Case No. 3 Trial Begins	To Be Set By Court
Bellwether Trial Case No. 4 Trial Begins	To Be Set By Court
Bellwether Trial Case No. 5 Trial Begins	To Be Set By Court

IT IS SO ORDERED.

Dated: August 13, 2023


 The Honorable Matthew F. Kennelly
 U.S. District Court Judge