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 Cases***	Judge Mary M. Rowland

PLAINTIFFS' BELLWETHER PROTOCOL SUBMISSION

I. INTRODUCTION

The Plaintiffs' Co-Lead Counsel and Executive Committee ("Plaintiffs") respectfully submit their proposed bellwether protocol, attached as Exhibit A, pursuant to the Court's November 15, 2023 minute entry (ECF No. 295). This proposal governs the eligibility, selection, workup, and schedule of bellwether trials. Plaintiffs' proposal is consistent both with: (1) the Court's decision that and there will be no "bifurcation", aka "prioritization", or early round of general causation expert disclosures; and (2) a manageable schedule that is similar to bellwether protocols entered in similar MDLs.

While the additional time the Court afforded the parties was productive, and the parties were able to reach agreement on many aspects of a proposed bellwether protocol, there remain flve overarching issues in dispute that require a ruling from the Court. As the Court knows, it has the flexibility to manage its own docket, including bellwether trials in this MDL. The Court should do so, which is consistent with existing jurisprudence, as reflected by similar orders from this district and other federal courts in Illinois. *See, e.g.*, *In re Testosterone Replacement Therapy Prods. Liab. Litig. ("TRT")*, No. 1:14-cv-01748, MDL No. 2545 (N.D. Ill. Nov. 6, 2014), ECF No. 467 (attached as Ex. B); *In re Yasmin and Yaz (Drosprirenone) Mktg. Sales Practices, and Prod. Liab. Litig. ("Yaz")*, MDL No 2100 (S.D. Ill), ECF No. 1329 (attached as Ex. C).

First, Plaintiffs proposal sets forth a schedule and structure that is in accord with this Court's ruling following the July 6, 2023 CMC, namely that the case should proceed through general liability discovery without bifurcating or prioritizing the issues of "general causation" from other liability and case specific issues. ECF No. 146; *see also*, Ex. D, 7/6/23 Tr. at 67:24-68:15. Defendants' proposal improperly re-asserts arguments the Court previously rejected, and Defendants still insist on a scheme whereby general causation on all cases, including expert reports, are addressed in the summer of 2024, while the remaining aspects of the cases are deferred until late 2025 or early 2026. Defendants'

proposal is untenable under the framework of this case generally, and is particularly untenable given the failure of Defendants to timely respond to discovery requests. Accordingly, "prioritizing" general causation should not be part of this bellwether order.

Second, the parties are at an impasse as to certain basic bellwether eligibility requirements, including a dispute over filing versus service status as of February 1, 2024, and the types of injuries that should be included in the first wave of bellwether cases. The Plaintiffs proposal, as set forth more fully below at Section II.B.1, *infra*, would include three categories of injuries in the first bellwether pool: ovarian, endometrial and uterine cancers. The reason for this is simple: the overwhelming majority of the cases in this MDL are cancer cases, and addressing these three types of cancer cases first provides guidance on the viability and valuation of the vast majority of the docket. This approach will drive resolution. Defendants seek to include an "other injuries" category that Plaintiffs contend is ill-defined and will lead to delay as the parties battle as to which medical conditions can and should be included in this category. While Plaintiffs do not dispute that the parties and the Court will address these cases going forward, the first bellwether trials are not the appropriate forum for those issues.

Third, unfortunately there are still issues related to how the Plaintiff Fact Sheet (PFS) deficiencies are handled with respect to the bellwether process. While a procedure is in place for PFS deficiencies, the issue of the timing of those deficiencies awas deferred until the bellwether process was established and whether a threshold of "substantially complete" status of said PFS—as defined by CMO 9—is needed. As set forth more fully in Section II.B.3, *infra,* Plaintiff request that a deadline be set for Defendants to alert Plaintiffs' counsel as to alleged deficiencies that deem a PFS *not* "substantially complete" be required. This is necessary to ensure that both sides have fair notice of which cases are eligible for the bellwether pool and the substantive facts underpinning those cases.

Fourth, as discussed more fully in Section II.B.4, *infra*, the parties are at impasse as to the manner in which the final five (5) bellwether trial cases should be selected.

Fifth, as discussed more fully in Section II.B.5, *infra*, the parties are at impasse on certain timing issues. The parties still dispute when the bellwether cases should be initially selected, how long Core Discovery should last, and whether the bellwether CMO should include the dates for final trial discovery, and expert reports and discovery. Plaintiffs believe these dates should be memorialized now in the interests of efficiency for the parties.

II. ARGUMENT

A. As this Court previously held, "bifurcation" and "prioritization" are inappropriate.

Defendants' current bellwether protocol reflects a slight recasting of their "bifurcation" or "prioritization" strategy, but nevertheless, seeks the same objective and suffers from the same flaws. Defendants agree with Plaintiffs that unified discovery should proceed rather than dividing the discovery process into "general" and "case-specific" but, nevertheless, *again* suggest this Court should address "general causation" first, deviating from the "traditional" discovery process that the Court has previously stated it would follow. *See* ECF No. 146. Specifically, despite the fact that it has no place in a CMO relating to bellwether selection and procedure, Defendants *yet again* propose a premature round of "General Expert Discovery and Briefing"—requiring Plaintiffs serve "general causation expert reports" on the same day they designate their Initial Bellwether Discovery Cases. Ex D at 2.

Defendants have been unsuccessfully floating the idea of "bifurcated" or "prioritized" discovery from the very beginning of the case. Defendants first formally raised it at the April 18, 2023 case management conference. Ex E, 4/28/23 Tr. at 35-39. There was briefing on that issue. ECF No. 77, 116, 117. It was again addressed in the joint status report filed in advance of the Court's July 6, 2023 case management conference. ECF No. 125. Through that briefing, Defendants sought exactly what they now seek through their proposed bellwether CMO: early disclosure (and *Daubert* briefing) for general causation experts. *See e.g.*, ECF No. 117 (seeking "early consideration of the admissibility of expert testimony on the issue of general causation") ECF No. 125 at 5-6 ("general causation

discovery should be prioritized," including early expert reports and *Daubert* motions on general causation); Ex. F, 7/6/23 Tr. at 41-48 (seeking "early date for expert deadlines on general causation").

After hearing extensive argument on the issue during the July 6, 2023 conference (7/6/23 Tr. at 40-68), the Court explicitly rejected Defendants' proposal to "prioritize" general causation expert discovery, stating: "I am not going to adopt the defendants' position as it is just yet. I am going to allow for routine fact discovery, but I am telling the plaintiffs that they're–I don't know when we're going to get to expert discovery, but we are going to get there, obviously." *Id.* at 67:24-68:15. The Court memorialized that position in its minute entry following the July 6 conference:

> The Court heard argument and each party's view about how discovery should proceed. *The Court declines to adopt Defendants' proposal* (ECF No. 125 at 6) *requesting prioritizing "general causation" discovery.* Parties are to proceed with "traditional" fact discovery, and should meet and confer and by 7/18/23, file on the docket, and submit to the Court's proposed order box, proposed fact discovery dates and a fact discovery close date. Defendants are free to raise their proposal to prioritize general causation discovery again with the Court at the close of fact discovery.

ECF No. 146 (emphasis added). As such, the Court has already decided that general causation expert discovery will not be "prioritized" to include an early round of expert reports and *Daubert* briefing.

This Court has asked the parties for briefing on a proposed bellwether process—not another round of briefing on bifurcating or prioritizing general causation discovery. Defendants' insistence on effectively proposing the same "prioritization" under the guise of a bellwether plan should be rejected. Plaintiffs' proposal meets the goals of bellwethers, which is to drive resolution expeditiously. To the extent necessary, Plaintiffs adopt and incorporate their previous arguments extensively laid out in opposition to bifurcation and prioritization. *See* ECF 116 ("Plaintiffs' Bifurcation Submission"); *see also* Ex. F, 7/6/23 Tr. at 48-55.

Defendants' further delay in producing documents and responsive discovery has only demonstrated the absurdity of their insistence on premature general causation expert discovery. To date, some Defendants have produced alarmingly few documents. Plaintiffs' discovery requests

sought, *inter alia*, relevant scientific, clinical, and testing information relating to Defendants' products; of course, Defendants have objected at least in part to *every single one of them*. Defendants have yet to fully disclose the most basic information about their products: the ingredients and chemicals they contain (despite the Court recognizing that such information is "incredibly relevant" and ordering one Defendant, which is no differently situated than the rest, to produce ingredients in each product by December 15, *see* 11/17/23 Tr. at 67:24-70:9). That information is in Defendants' sole possession and is not contained on the products' labelling. Yet, remarkably, Defendants' proposed CMO would require Plaintiffs to address general causation for the Bellwether Plaintiffs' injuries at the same time as those cases are being selected. In short, requiring early or "prioritized" general causation reports would greatly prejudice Plaintiffs who—due to Defendants' delays in production—do not have access to the same information as Defendants.

Detouring the bellwether process to engage in an out-of-context examination of "general causation" does not advance the litigation—unless the Court reaches the conclusion that *all* claims of *all* plaintiffs (including *all* claimed injuries) against *all* Defendants fail as a matter of law. But even then, there is a customary process for that: fact discovery followed by expert discovery, and the Court then decides whether the experts' opinions are admissible at trial. In that process, the Court's rulings are based on a full record with a full opportunity for each side to advance its case. Thus, each side gets what it needs, and this is how we "get there" as the Court forecasted at the July CMC. Premature, piecemeal rulings with piecemeal appeals is not a better recipe.

B. Other Areas of dispute and why Plaintiffs' positions are preferable.

1. The parties disagree as to Eligibility Requirements In order to be a Bellwether Case.

First and foremost, the parties agree that sixteen (16) cases should be selected as Initial Bellwether Discovery cases and undergo "Core Discovery." This shall include four (4) depositions per side and additional case specific written discovery in these sixteen (16) selected cases. The parties

disagree as to what makes a case eligible for the selection as a bellwether case in two respects.

There has to be a fair deadline for deciding which cases are eligible for bellwether selection. Plaintiffs propose that cases filed *and served* by February 1, 2024, should be included as Eligible Cases. *See* Plaintiffs' Proposed CMO, Section II.1. Defendants propose all cases filed as of February 1, 2024, should be presumptively eligible. *See* Defendants' Proposed CMO, Section 2. Plaintiffs submit that filed *and served* status is preferrable because that defined universe of Eligible Cases can be known as of February 1, 2024. If not, new cases can be added to the pool of Eligible Cases through a case's service deadline, which could arguably be up until be May 1, 2024, if the last filed case deadline is February 1, 2024. Defendants argue that Plaintiffs may manipulate the process by filing to serve cases by February 1st, and thereby withhold from the bellwether pool their "worst" or "weaker" cases. Even if Plaintiffs could design and coordinate such an effort, there are already over 6,500 filed and served cases—a far greater pool than most MDLs have when they are selecting bellwether cases. Further, Defendants argument fails first because service is required by rule and governed by CMO 8.

The parties also disagree as to the scope of injuries that should be included in the Bellwether pool. Plaintiffs submit that the bellwether cases be limited to those in which the primary claimed injury is either uterine, endometrial, or ovarian cancer:

> **Plaintiffs' Proposed CMO, Section II. 3.a:**
>
> Only a plaintiff alleging the following primary injuries (the "Designated Injuries") in the SFC and/or PFS shall be eligible for selection as an initial bellwether case for discovery ("Initial Bellwether Discovery Case"): (a) uterine cancer; (b) endometrial cancer; (c) ovarian cancer.

Defendants *agree* these three cancers should make up the initial bellwether pool, but they also suggest inclusion of a fourth injury category, which they describe as "any injury alleged in the [Short Form Complaint] and/or [Plaintiff's Fact Sheet] in more than 10%" of the eligible cases:

> **Defendants' Proposed CMO, Section 3:**
>
> Only a plaintiff alleging the following injuries (the "Designated Injuries") in the SFC and/or Plaintiff Fact Sheet ("PFS") shall be eligible for selection as an initial bellwether case for

> discovery ("Initial Bellwether Discovery Case"): (a) uterine cancer; (b) endometrial cancer; (c) ovarian cancer; and/or (d) any injury alleged in the SFC and/or PFS in more than 10% of the Eligible Cases. Regarding (d) of this Section 3, to promote efficiency, and subject to the Court's approval, the parties may adjust the percentage of Eligible Cases upward or downward by agreement, or agree to place one or more categories of Designated Injuries on a separate bellwether track, or they may jointly suggest that the Court take other appropriate action.

Inclusion of these other injuries would not be an efficient use of the parties' or the Court's resources to address "outlier" injuries at this stage of the MDL. It is not uncommon for MDLs to include miscellaneous injury claims that fall outside the list of "signature" injuries that are the primary focus of the litigation, and the parties and the Court certainly need to come up with a process for addressing those claims. Plaintiffs submit that the parties and the Court focus initially on the primary injuries alleged in these cases and work together to address those claimed injuries at a later time in the bellwether process or use other case management tools to address them.

The focus of a bellwether process is to resolve the litigation. Plaintiffs already know, from an analysis of 6,212 filed Short Form Complaints, that the vast majority of the cases include allegations of the three cancer claims. Indeed, our initial data confirms that of the 6,212 short form complaints assessed, 5,767 cases (almost ninety-three percent 93%) include a diagnosis of uterine, endometrial or ovarian cancer. The remaining 445 cases include some other injury that does *not* appear to be one of the three agreed to cancers.

There is no legitimate or compelling reason to include the obscure injuries in a bellwether plan *now,* or if these injuries reach some artificial percentage, as Defendants propose. Indeed, at present, it appears all of these non-primary cancer injuries are approximately 7% of what has been alleged in the Short Form Complaints. While this percentage may change through Plaintiff Fact Sheets, and filings and service between now and February 1, 2024—the cutoff date for Eligibility—it should not be a drastic change. Instead, a more detailed and robust analysis of what injuries remain after the representative cases are chosen should be undertaken at a later date; which the Plaintiffs propose be in advance of the November 2024 Case Management Conference. Should "other injury" claims be

necessary to address, those cases must first be more precisely identified. The parties can meet and confer about developing a bellwether process for a next round of relevant injures if they remain and/or are prevalent enough to warrant a bellwether track or some other case management tool.[1]

2. The parties disagree on the bifurcation of general causation.

As discussed in detail above, Plaintiffs fundamentally disagree with Defendants' proposal that the Court interrupt the bellwether process to address what Defendants refer to as "general causation" in a stand-alone, out of context process. Plaintiffs propose that expert discovery for general causation and case-specific matters take place at the end of Core Discovery.

Plaintiffs' Proposed CMO, Section V:

1. By no later than **March 21, 2025**, the Plaintiffs shall provide Defendants with expert reports pursuant to Fed. R. Civ. P. 26(a)(2).
2. By no later than **April 21, 2025**, Defendants shall provide Plaintiffs with expert reports pursuant to Fed. R. Civ. P. 26(a)(2).
3. By no later than **May 12, 2025**, Plaintiffs to disclose rebuttal expert reports, if any.
4. Each expert witness disclosure shall include at least two (2) available dates when each expert is being tendered for deposition.
5. Depositions of expert witnesses are to be completed by **July 18, 2025**.

Defendants propose that expert discovery on general causation be exchanged at the same time the bellwether cases are selected.

Defendants' Proposed CMO, Section 4:

> On August 22, 2024, the plaintiffs shall serve defendants with general causation expert reports regarding the Designated Injuries. Reports submitted at this time shall not address regulatory, company conduct or other liability claims or defenses, and shall not involve damages or the facts of any individual case.

The timeline proposed by Defendants is untenable. Defendants propose that Plaintiffs submit "general causation expert reports regarding the Designated Injuries" by August of this year – less than

[1] This very scenario has been addressed in other MDLs, including the *Yaz* MDL (agreement to focus bellwether efforts on the three main injuries (i.e., pulmonary embolism and deep vein thrombosis (together comprising 40-41% of the docket), and gallbladder disease (comprising 43% of the docket)), and to exclude arterial events (i.e., stroke and heart attack) to later bellwether track as they only made up 9-10% of filed cases).

eight months from now. However, it has taken Defendants *more than eight months* just to respond to 14 interrogatories. Even if the Court were to examine "general causation" using a process similar to what the Defendants propose, Plaintiffs should not be forced to address that issue until the Defendants have complied with their discovery obligations. Just as one example, it would be extremely compelling if Defendants were to attack the opinions of one or more of Plaintiffs' experts who testify to a causal connection between a Defendant's product and one or more injuries, and Plaintiffs were able to demonstrate that Defendants expressed the same concern in confidential, internal documents. Plaintiffs should have the benefit of fulsome discovery about what each Defendant knew about the safety of its products (which it is required by law to establish) before having to litigate causation.

3. The parties disagree with respect to a prerequisite regarding PFS completion before bellwether cases can be selected.

Plaintiffs propose one of two options: either (1) the parties simply select cases on July 15, 2024 based upon the Plaintiffs Facts Sheets that have been served on the deadlines set forth in CMO 9, which would include all cases filed as the entry of CMO 9, or (2) to the extent that defendants maintain their, to date, unwavering position that some percentage of PFS must be deemed "substantially complete," as defined by CMO 9, a protocol related to PFS deficiencies be implemented to govern the definition of "substantially complete" PFSs for cases to be included in the bellwether trial pool.

Plaintiffs' Proposed CMO, Section II.2:

PFS Status. Plaintiffs are required to timely serve a Substantially Complete Plaintiff Fact Sheet ("PFS") in accordance with the requirements of CMO 9.

a) Defendants will have 21 days from service of a Plaintiff's PFS to notify that Plaintiff of any claimed deficiency(ies) that makes said PFS not Substantially Complete as defined by CMO 9, Section I.3.

b) Upon receipt of a deficiency notice alleging a PFS is not Substantially Complete, Plaintiffs will have 21 days to respond to and/or cure the alleged deficiency(ies).

c) If Defendants do not timely identify a deficiency that would make a PFS not "substantially complete," that PFS shall be deemed "substantially complete" for purposes of the bellwether protocol.

Defendants' bellwether protocol proposal seeks to link the bellwether selection process to

compliance with the Court's Order regarding Plaintiff Fact Sheets, and seeks some arbitrary percentage of "substantially complete" PFS's. The PSC has concerns about how "substantial compliance" will be determined (and when), and seeks to avoid litigation within litigation of defining "substantially complete." For this reason. Plaintiffs' proposal requires a deadline by which Defendants must identify whether a given the PFS is or is not "substantially complete". Defendants have refused.

Defendants' Proposed CMO, Section 5.a:

> Assuming that, as of July 1, 2024, 75% of the PFSs (for cases filed before February 1, 2024) are substantially complete, as defined by Case Management Order No. 9 (PFS implementation), on August 22, 2024, the plaintiffs and defendants shall each designate eight (8) cases (including at least one case from each of the Designated Injuries), which cases shall comprise the "Initial Bellwether Discovery Cases."

In the meet and confer process, Defendants have suggested the basis of requiring a percentage of cases be deemed "substantially complete" before bellwether case selection is that Plaintiffs' counsel will not timely comply with their PFS obligations and therefore "rig the pool of eligible cases" by holding back weaker cases from the PFS process. In essence, certain Defendants are claiming Plaintiffs' lawyers will collude to violate CMO 9 (i.e. a Court Order) requiring PFS compliance and willfully serve deficient Fact Sheets. Yet, aside from the fact that that assertion is false, Plaintiffs have seen defendants in other MDLs use the PFS process to raise hyper-technical deficiency assertions in an effort to delay the litigation. Nevertheless, the eligible pool of filed and served cases exceeds 6,500 cases. To suggest that plaintiff lawyers will collude to violate a court order and then make that same argument when there are over 6,500 cases pending is non-sensical. At a minimum, however, this is a non-issue if Plaintiffs' proposal is accepted.

In the proposed bellwether plan, Defendants require that substantially complete PFSs must be served in 75% of all cases filed on or before February 1, 2024 *in order to even be eligible* for the bellwether pool. Who gets to decide what is "substantially complete" and does the Court really want to be deciding presumably thousands of those disputes? Presumably, this arbitrary percentage would

be a moving target. In addition, only after this onerous and undefined process was completed by more 75% of 6,500 women could the bellwether selection of just a few of them begin.

In an effort to address the concerns of both parties, Plaintiffs suggested and proposed the following procedure: (1) Plaintiffs are required to timely complete and serve their PFS as provided in CMO 9; (2) Defendants shall have 21 days from service of a Plaintiff's PFS to notify that Plaintiff of any claimed deficiency(ies) that deems the PFS *not* "substantially complete"; and (3) that Plaintiff then has 21 days from receipt of a notice of deficiency to cure the alleged deficiency that deems the PFS *not* "substantially complete." Defendants rejected the proposal. If Defendants do not timely identify a deficiency with a PFS, that PFS shall be deemed "substantially complete" for purposes of the bellwether protocol. It belies reason that Defendants seek a threshold for "substantially complete" PFS's but cannot deem a PFS "substantially complete" within 21 days.

In virtually every MDL the bellwether selection process occurs before the vast majority of the cases are ultimately filed. However, this litigation is unusual in that there was a large influx of cases filed early in the MDL process due solely in relation to Defendant, Revlon, and the extraordinary circumstances created by the deadlines set forth in the Revlon Bankruptcy. Thus, the time-consuming task that Defendants propose, even if completed, would not move the parties any closer to selecting representative cases, would only substantially delay the progress of this MDL, and does not make sense in light of the cases filed to date.

It is not credible to suggest, as Defendants have, that representative Plaintiffs cannot be identified from among the several thousand cases already on file.

> Most of the actions name multiple sets of defendants, and nearly all name the L'Oréal defendants. In addition, most plaintiffs allege exposure to multiple different product lines. According to movants, this is because women who use hair relaxers typically use different product lines over the course of their lives; hence, any future related actions are likely to involve multiple defendants and product lines as well.

ECF No. 1 at 2. Plaintiffs' protocol facilitates the best outcome for representativeness here.

4. The parties disagree with respect to the process of selecting the final cases to proceed as Bellwether Trial Cases.

While the parties agree that the final pool of Bellwether Trial Cases should be made up of five cases of the 16 Initial Bellwether Discovery Cases, the parties dispute how those five (5) cases should be winnowed down and selected. Plaintiffs propose that the parties attempt to agree on the Bellwether Trial Cases and if they are unable to, that the parties submit simultaneous briefing to guide the court in making the final selection. Defendants suggest that each side pick one case and try to agree on the other three, to be followed by briefing if there is disagreement. The relevant sections are below:

Plaintiffs' Proposed CMO, Section IV.

1. Prior to the completion of Core Discovery for the sixteen (16) Initial Bellwether Discovery Cases, Plaintiffs' Co-Lead Counsel and Defendants collectively shall winnow the list of cases down to five (5) representative finalists which will be known as the "Bellwether Trial Cases." The parties are encouraged to select the representative Bellwether Trial Cases by agreement. If the parties agree on which cases will be the Bellwether Trial Cases, they are to file a joint report on **November 15, 2024** explaining why the cases they have selected are appropriate Bellwether Trial Cases.
2. If the parties are unable to agree on which cases to select for trial, they shall submit simultaneous briefing to the Court supporting their respective choice of cases on **November 15, 2024**, not to exceed 20 pages, advocating which five (5) cases should be selected by the Court for additional discovery as Bellwether Trial Cases and trial. Should the Court have to decide which cases will be the five (5) Bellwether Trial Cases, the Court will endeavor to issue its ruling by **December 3, 2024**. The Parties and the Court will work together to ensure that at least one case is selected from each of the Designated Injuries categories. The Court shall have discretion to balance, or otherwise adjust, the trial pool of cases.

Defendants' Proposed CMO, Section 6.a.:

Within thirty (30) days of the Court's order on the Rule 702 (*Daubert*) motions filed under Section 4, *supra*, for any of the Designated Injuries for which the general causation experts remain, five (5) representative cases shall be selected to serve as the potential trial cases ("the Bellwether Trial Cases"). The plaintiffs shall select one (1) case for trial, the defendants shall select one (1) case for trial, and the parties shall jointly select three (3) cases for trial. If the parties are unable to agree on the last three cases, they shall submit simultaneous briefing to the Court on this issue. The Parties and the Court will work together to insure that at least one case is selected from each of the Designated Injuries categories. The Court shall have discretion to balance, or otherwise adjust, the trial pool of cases.

If the bellwether process is to accomplish its goals, it is imperative that any case selected for

trial be "representative" of the cases in the MDL. The selection of an "outlier" does facilitate a representative selection. Consequently, Plaintiffs suggest that the Court dispense with the unilateral selection process by the parties, and instead adopt a procedure where the parties are encouraged to attempt to agree on five bellwether cases, and for any cases where agreement cannot be reached, the parties submit simultaneous briefing explaining why their selections are more appropriate for bellwether trial selection – and the Court will then select them.

The overarching aim of Plaintiffs' proposed bellwether protocol is to assist the Court in establishing a protocol that will allow the parties to efficiently proceed through the bellwether process—a process which is intended to get representative cases identified and worked up for trial in order to provide the parties with meaningful information of the relative merits of the cases included in the MDL. Defendants' protocol misses the mark on these points and is likely to lead to the selection of outlier cases.

5. The parties disagree with respect to various issues surrounding the overall timing of the bellwether process.

While the parties were able to make progress during their meet and confer conferences, there are still disputes remaining regarding when the cases should be selected, how long Core Discovery should last, and whether the proposed CMO should include the dates for final trial discovery in the five final Bellwether Trial Cases and expert reports and discovery.

First, Plaintiffs propose that the Initial Bellwether Discovery Cases are selected on July 15, 2024, with Core Discovery proceeding for four (4) months until November 15, 2024.

Plaintiffs' Proposed CMO, Section III.:

1. On **July 15, 2024**, plaintiffs and defendants shall each designate eight (8) cases (including at least one case from each of the Designated Injuries), and this shall comprise the Initial Bellwether Discovery Cases

…

3. Fact discovery in the Initial Bellwether Discovery Cases, including but not limited to additional written discovery and depositions, will commence on **July 15, 2024**, and be completed by **November 15, 2024**. Each bellwether case will be limited to a total of

> four (4) fact depositions per side for this phase of the bellwether process unless a good cause showing is made that more depositions are warranted. All case specific discovery conducted in the sixteen (16) Initial Bellwether Discovery Cases shall be referred to as "Core Discovery."

Defendants propose that the Initial Bellwether Discovery Cases be selected on August 22, 2024, with Core Discovery proceeding for eight months until April 15, 2025.

Defendants' Proposed CMO, Section 5.:

a) Assuming that, as of July 1, 2024, 75% of the PFSs (for cases filed before February 1, 2024) are substantially complete, as defined by Case Management Order No. 9 (PFS implementation), on August 22, 2024, the plaintiffs and defendants shall each designate eight (8) cases (including at least one case from each of the Designated Injuries), which cases shall comprise the "Initial Bellwether Discovery Cases."

…

c) Fact discovery in the Initial Bellwether Discovery Cases, including, but not limited to, additional written discovery and depositions of the plaintiffs in those cases, their family members, and their treating healthcare providers, will commence on August 22, 2024 and will be completed by April 15, 2025.

Plaintiffs believe that Defendants' timeline is too protracted. Core Discovery, which will include *up to* eight depositions per cases (but likely less) and written discovery, can be accomplished within four months.[2]

While the parties are not in fierce disagreement, the Plaintiffs' proposal sets forth the schedule for expert witness reports, expert discovery, and dispositive motion practice, as well as the first trials. Defendants' proposal ignores this. Plaintiffs' proposed CMO includes a schedule following the selection of the Bellwether Trial Cases, through expert discovery, dispositive and *Daubert* motions and proposed trial dates. *See* Plaintiffs' Proposed CMO, Sections V-VII.

[2] There have been many other bellwether case management orders that have had more cases selected for inclusion as Initial Bellwether Discovery Cases and *afforded less time* in which to complete Core Discovery. *See e.g. TRT*, CMO 14 (selecting 16 cases as Initial Bellwether Cases and setting the deadline for core discovery at 2 ½ months); *Yaz*, CMO 24 (selecting 24 cases as Initial Bellwether Cases and setting the deadline for core discovery at 4 ½ months); *In re: E.I. du Pont de Nemours and Company C-8 Pers. Inj. Litig*. (MDL 2433), CMO 6 (selecting 20 cases as Initial Bellwether Cases and setting the deadline for core discovery at 4 months); *In re: Elmiron (Pentosan Polysulfate Sodium) Prod. Liab. Litig*. (MDL 2973), CMO 17 (selecting 20 cases as Initial Bellwether Cases and setting the deadline for core discovery at 4 months)).

III. Other Case Management Tools to Aid the Bellwether and Case Management Process.

Plaintiffs' proposed the use of other case management tools to aid in the bellwether process.

(1) Multi-Plaintiff Trials

Another issue worth considering, though not ripe for decision at this time, is whether the Court should order that more than one plaintiff's claims be consolidated or joined for trial under Fed. R. Civ. P. 42(a). Multi-plaintiff trials are frequently used in MDL proceedings, and increasingly so in recent MDLs.[3] In fact, MDL cases are especially appropriate for consolidation/joinder under Rule 42 because the Judicial Panel on Multidistrict Litigation ("JPML") has already determined that the cases involve common questions of law or fact in deciding whether to centralize. *See* Fed. R. Civ. P. 42.

(2) Bellwether Process for Settlement Evaluation

Plaintiffs respectfully submit that the Court should also consider a process for cases to be selected as "Settlement Evaluation Cases" on a track parallel to the bellwether cases. The Settlement Evaluation Cases would likely involve more limited "core discovery" (*i.e.*, just the Plaintiff Fact Sheet and limited medical records) to evaluate cases for potential valuation/settlement value purposes. While all parties may agree that a bellwether process will substantially aid the litigation process, many times the final jury verdict results are disputed as invalid or unrepresentative by the losing party. This can be mitigated by allowing the parties to consider a sampling of valuation-ready cases based on various injuries and types of damages at issue. The discovery, analysis, and mediation of these cases would be informal but could serve as a data point to compliment the bellwether process and guide the parties.

[3] *See, e.g., Eghnayem v. Boston Scientific Corp.*, 873 F.3d 1304, 1313-16 (11th Cir. 2017) (affirming four plaintiff trial following remand from MDL 2326); *Campbell v. Boston Scientific Corp.*, 882 F.3d 70, 72 (4th Cir. 2018) (same); *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2021 WL 2783898, at *1 (N.D. Fla. July 2, 2021) (consolidating three cases for trial in MDL 2885); *In re 3M Combat Arms Earplug Products Liab. Litig.*, 2021 WL 773018, at *2 (N.D. Fla. Jan. 5, 2021) ("separate trials in these three cases would be largely repetitive and thus would implicate the great many burdens, delays, and expenses that consolidation is designed to mitigate"); *Harris v. Biomet Orthopedics, LLC*, 2019 WL 6117358 (D. Md. Nov. 18, 2019) (consolidating four cases remanded from MDL 2391).

Dated: January 16, 2024.

Respectfully Submitted,

/s/ Edward A. Wallace

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EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

In Re: HAIR RELAXER MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

MDL NO. 3060

THIS DOCUMENT RELATES TO
ALL CASES

[PROPOSED] CASE MANAGEMENT ORDER NO. __
(Bellwether Selection Schedule and Procedure)

I. SCOPE OF ORDER

This order applies to: (a) all actions transferred to *In Re Hair Relaxer Marketing Sales Practices and Products Liability Litigation* by the Judicial Panel on Multidistrict Litigation ("JPML") pursuant to its order of February 6, 2023; (b) all related actions originally filed in or removed to this Court; and (c) any "tag-along" actions transferred to this Court by the JPML pursuant to Rules 6.2 and 7.1 of the Rules of Procedure of the JPML subsequent to the filing of the final transfer order by the Clerk of this Court.

II. ELIGIBLE CASES

1. **Filing Status.** All cases in which a Short Form Complaint ("SFC") have been filed and served on or before **February 1, 2024** will be presumptively eligible to be included in the bellwether trial pool, subject to the qualifications as set forth below ("Eligible Cases").

2. **PFS Status.** Plaintiffs are required to timely serve a Substantially Complete Plaintiff Fact Sheet ("PFS") in accordance with the requirements of CMO 9.

a) Defendants will have 21 days from service of a Plaintiff's PFS to notify that Plaintiff of any claimed deficiency(ies) that makes said PFS not Substantially Complete as defined by CMO 9, Section I.3.

b) Upon receipt of a deficiency notice alleging a PFS is not Substantially Complete, Plaintiffs will have 21 days to respond to and/or cure the alleged deficiency(ies).

c) If Defendants do not timely identify a deficiency that would make a PFS not "substantially complete," that PFS shall be deemed "substantially complete" for purposes of the bellwether protocol.

3. **Designated Injuries.**

a) Only a plaintiff alleging the following primary injuries (the "Designated Injuries") in the SFC and/or PFS shall be eligible for selection as an initial bellwether case for discovery ("Initial Bellwether Discovery Case"): (a) uterine cancer; (b) endometrial cancer; (c) ovarian cancer.

b) In Eligible Cases where a plaintiff has not alleged a Designated Injury as a primary injury as defined in paragraph II.3.a., any other primary injury alleged by more than 10% of the Eligible Cases by **July 15, 2024** will be subject to a later negotiated bellwether protocol or the parties may suggest that the Court take other appropriate action, including other case management orders to address injuries claimed in remaining cases in this MDL in advance of the November 2024 case management conference.

III. SELECTION OF INITIAL BELLWETHER DISCOVERY CASES

1. On **July 15, 2024**, plaintiffs and defendants shall each designate eight (8) cases (including at least one case from each of the Designated Injuries), and this shall comprise the Initial Bellwether Discovery Cases.

2. Pursuant to Case Management Order No. 8 (Service of and Responses to SFCs), each defendant shall serve its Answer and Affirmative Defenses to each of the Initial Bellwether Discovery Cases in which it is named within 45 days of selection of such cases.

3. Fact discovery in the Initial Bellwether Discovery Cases, including but not limited to additional written discovery and depositions, will commence on **July 15, 2024**, and be completed by **November 15, 2024**. Each bellwether case will be limited to a total of four (4) fact depositions per side for this phase of the bellwether process unless a good cause showing is made that more depositions are warranted. All case specific discovery conducted in the sixteen (16) Initial Bellwether Discovery Cases shall be referred to as "Core Discovery."

4. If, prior to **November 15, 2024**, any of the designated Initial Bellwether Discovery Cases are voluntarily dismissed by Plaintiff, Defendants shall be permitted to designate a replacement case of the same injury type as the dismissed case. If, prior to **November 15, 2024**, any of the designated Initial Bellwether Discovery Cases are resolved via settlement, Plaintiffs shall be permitted to designate a replacement case of the same injury type as the settled case. The Parties shall work in good faith to complete fact discovery permitted in this section for the replacement case(s) prior to the selection deadline of the Bellwether Trial Cases set forth in section IV, *infra*.

IV. SELECTION OF BELLWETHER TRIAL CASES

1. Prior to the completion of Core Discovery for the sixteen (16) Initial Bellwether Discovery Cases, Plaintiffs' Co-Lead Counsel and Defendants collectively shall winnow the list of cases down to five (5) representative finalists which will be known as the "Bellwether Trial Cases." The parties are encouraged to select the representative Bellwether Trial Cases by agreement. If the parties agree on which cases will be the Bellwether Trial Cases, they are to file a joint report on **November 15, 2024** explaining why the cases they have selected are appropriate Bellwether Trial Cases.

2. If the parties are unable to agree on which cases to select for trial, they shall submit simultaneous briefing to the Court supporting their respective choice of cases on **November 15, 2024**, not to exceed 20 pages, advocating which five (5) cases should be selected by the Court for additional discovery as Bellwether Trial Cases and trial. Should the Court have to decide which cases will be the five (5) Bellwether Trial Cases, the Court will endeavor to issue its ruling by **December 3, 2024**. The Parties and the Court will work together to ensure that at least one case is selected from each of the Designated Injuries categories. The Court shall have discretion to balance, or otherwise adjust, the trial pool of cases.

3. Following the final section of the five (5) Bellwether Trial Cases by the Court on or about **December 3, 2024**, further discovery may be conducted in each of the cases as needed to completely prepare the cases for trial. Such discovery will commence as soon as the cases are selected as final and shall be completed by **February 3, 2025**.

4. Within sixty days of the conclusion of this further discovery, the parties will submit briefing to the Court to assist in the Court's determination of the sequence of the trial case(s), including briefing on whether joint or multi-plaintiff bellwether trials may be appropriate for the selected Bellwether Trial Cases.

V. EXPERT DISCOVERY

1. By no later than **March 21, 2025**, the Plaintiffs shall provide Defendants with expert reports pursuant to Fed. R. Civ. P. 26(a)(2).

2. By no later than **April 21, 2025**, Defendants shall provide Plaintiffs with expert reports pursuant to Fed. R. Civ. P. 26(a)(2).

3. By no later than **May 12, 2025**, Plaintiffs to disclose rebuttal expert reports, if any.

4. Each expert witness disclosure shall include at least two (2) available dates when each expert is being tendered for deposition.

5. Depositions of expert witnesses are to be completed by **July 18, 2025**.

6. 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 in this MDL.

VI. SUMMARY JUDGMENT AND *DAUBERT* MOTIONS

1. Any motion for summary judgment or for partial summary judgment shall be filed on or before **August 8, 2025**.

2. Responses to summary judgment motions shall be filed on or before **September 12, 2025**.

3. Replies in support of summary judgment motions shall be filed on or before **September 26, 2025.**

4. Any motions seeking to challenge expert testimony pursuant to *Daubert* shall be filed on or before **August 22, 2025.**

5. Responses to *Daubert* motions shall be filed on or before **September 29, 2025.**

6. Replies in support of *Daubert* motions shall be filed on or before **October 13, 2025.**

7. The Court will endeavor to rule on any summary judgment and *Daubert* motions by **November 6, 2025.**

VII. INITIAL BELLWETHER TRIAL SCHEDULE

1. Trial 1: Jury selection shall commence on **January 20, 2026**.

2. Trial 2: Jury selection shall commence on **March 30, 2026.**

3. The sequence and timing of future Bellwether Trial Cases shall be determined by the Court at a later date.

VIII. DUTY TO SUPPLEMENT

Nothing herein relieves a party of its duty to supplement its disclosures, PFSs, and any other discovery as provided under the Federal Rules of Civil Procedure, orders entered in this MDL, or other applicable law and rules.

IX. AMENDMENTS

This Order may be modified or amended for good cause shown, after appropriate notice and opportunity to be heard is provided to the affected parties, when the Court believes the interest of justice requires modification.

Ordered this ____ day of _____, 2024.

_____
Mary M. Rowland
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION

Case No. 1:14-CV-01748
MDL 2545

JUDGE MATTHEW F. KENNELLY

This document relates to: ALL ACTIONS

CASE MANAGEMENT ORDER NO. 14
CASE MANAGEMENT PLAN – Part 2
(AbbVie bellwether cases – selection and pretrial / trial schedule)

The Court has considered the parties' proposals and revised proposals for a case management plan relating to the selection and trial of AbbVie-only bellwether cases. The Court is unpersuaded that the revised proposal by the AbbVie 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. One factor in this regard, but certainly not the only one, is the fact that this MDL proceeding involves six other manufacturer defendants. The Court is unconvinced that there is a fair, efficient, and reasonable way to adopt AbbVie's proposal in a way that makes the overall MDL proceeding manageable.

The Court has, however, elongated to some extent the overall process as proposed by plaintiffs for selecting AbbVie-only bellwether cases. The Court has done so to ensure fairness to all parties and to maximize the likelihood that the bellwether selection and trial process will be both representative and productive. The Court has also established a fact discovery cutoff date for the AbbVie-only bellwether cases, subject to modification upon a showing of good cause and due diligence.

The Court enters this schedule based on the express understanding, as discussed at the

most recent case management conference, that counsel will promptly negotiate and present a proposed case management plan or plans for the non-AbbVie-only cases.

The Court orders the following:

I. PROTOCOL FOR SELECTION OF ABBVIE BELLWETHER CASES

A. On or before July 11, 2015, the parties shall submit to the Court a proposed Case Management Order ("CMO") identifying the process and parameters for selecting AbbVie-only bellwether plaintiffs for two tiers of cases: (1) Thromboembolism ("TE") clotting injury cases (*e.g.*, deep vein thrombosis ("DVT"), Pulmonary Embolism ("PE"), or other clotting cases; and (2) cardiovascular cases (*e.g.*, heart attack). The Court will endeavor to enter a CMO in this regard by July 31, 2015.

B. By October 31, 2015, the Plaintiffs and Defendants shall identify the following AbbVie-only cases:

1. Eight (8) TE injury bellwether candidates per side that shall serve as bellwether discovery plaintiffs. The process and mechanisms of designations and selections of bellwethers shall be done in accordance with a separate CMO that will be submitted to the Court on or before July 11, 2015, as set forth in paragraph I.A, above.

2. Eight (8) cardiovascular injury bellwether candidates per side that that shall serve as bellwether discovery plaintiffs. The process and mechanisms of designations and selections of bellwethers shall be done in accordance with a CMO that will be submitted to the Court on or before July 11, 2015, as set forth in paragraph I.A, above.

II. ABBVIE BELLWETHER FACT DISCOVERY SCHEDULE

A. Between November 1, 2015 and January 15, 2016, core bellwether discovery shall take place, with a maximum of four (4) depositions per side for each case. This shall be designed to provide information to enable the parties to assess the larger pool of cases and, consistent with paragraph II.B, below, to provide information to the Court to enable the Court to select which cases shall serve as the first bellwether trials consistent with paragraph II.C, below.

B. On or before February 15, 2016, in accordance with the CMO described in paragraph I.A above, the parties will develop a methodology for proposing and selecting, with the Court's involvement, which of the bellwether cases should be selected as initial trial cases. As part of that CMO, each side shall provide the Court with the specified number of bellwether cases from which the trial pool will be selected.

C. By March 1, 2016, the Court will select which bellwether cases are to serve as the first three TE trials and which are to serve as the first three cardiovascular trials and shall designate the order of these bellwether trials.

D. The bellwether cases that are initially selected and those that are ultimately the picked as the initial trials are to be representative cases.

E. Fact discovery regarding the bellwether cases is to be completed by April 15, 2016. This does not relieve a party of its duty to supplement its disclosures as provided under the Federal Rules of Civil Procedure, CMOs entered in this case, or other applicable law and rules. Any request to extend or reopen fact discovery after April 15, 2016 must be supported by a showing of good cause and due diligence.

III. ABBVIE BELLWETHER EXPERT DISCOVERY SCHEDULE

A. On or before May 2, 2016, Plaintiffs shall disclose expert witness testimony for

each of the first six (6) bellwether trial cases pursuant to Fed. R. Civ. P. 26(a)(2).

B. On or before June 6, 2016, Defendants shall disclose expert witness testimony for each of the first six (6) bellwether trial cases pursuant to Fed. R. Civ. P. 26(a)(2).

C. Any request by Plaintiffs to disclose rebuttal expert witness testimony must be made promptly following receipt of defendants' Fed. R. Civ. P. 26(a)(2) disclosures.

D. Each expert witness disclosure shall include at least two available dates when each expert is being tendered for deposition.

E. Depositions of expert witnesses are to be completed by July 11, 2016. The parties may propose a more extended schedule for case-specific expert depositions concerning bellwether trials 2 through 6.

F. 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, whether pending in state or federal court. Accordingly, in order to foster cooperation between the MDL and state court litigations, counsel for the parties shall jointly seek to enter in all state court proceedings, whether already filed or hereafter filed, an order expressly agreeing that the limitations on expert discovery set forth in Rule 26(b)(4)(A)-(D) shall apply in all such state court proceedings.

IV. SUMMARY JUDGMENT & DAUBERT MOTIONS IN ABBVIE BELLWETHER CASES

A. Any motion for summary judgment or for partial summary judgment shall be filed on or before August 1, 2016.

B. Any motions seeking to challenge expert testimony pursuant to *Daubert* shall be filed on or before August 1, 2016.

C. Responses to summary judgment motions and *Daubert* motions shall be filed on or before August 29, 2016.

D. Replies in support of summary judgment motions and *Daubert* motions shall be filed on or before September 19, 2016.

E. The Court will endeavor to rule on any summary judgment and *Daubert* motions relating to the earlier bellwether trials by October 10, 2016 and on the remaining motions at reasonable intervals after that.

V. INITIAL ABBVIE BELLWETHER TRIAL SCHEDULE

The first six AbbVie-only initial bellwether trials shall begin on the following dates:

1. MDL TE #1 (Bellwether No. 1) shall begin on October 31, 2016.
2. MDL TE #2 (Bellwether No. 2) shall begin on December 5, 2016.
3. MDL TE #3 (Bellwether No. 3) shall begin on January 9, 2017.
4. MDL Cardiovascular #1 (Bellwether No. 4) shall begin on February 13, 2017.
5. MDL Cardiovascular #2 (Bellwether No. 5) shall begin on March 20, 2017.
6. MDL Cardiovascular #3 (Bellwether No. 6) shall begin on April 24, 2017.

This trial schedule is subject to modification if, among other reasons, summary judgment is granted for defendants in some but not all of the selected bellwether trials.

IT IS SO ORDERED.

Date: November 6, 2014

United States District Judge
Matthew F. Kennelly

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

IN RE YASMIN AND YAZ (DROSPIRENONE) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	)	**3:09-md-02100-DRH-PMF** **MDL No. 2100**

This Document Relates to:

ALL CASES

AMENDED
CASE MANAGEMENT ORDER NO. 24
BELLWETHER TRIAL SELECTION PLAN

I. INTRODUCTION

1. The process of establishing a bellwether plan began with discussions at monthly conferences. At the same time, a number of meetings occurred between the parties in an effort to resolve all their differences on the issues at bar. At the last conference, it was reported that the meet and confer efforts had been exhausted for the most part. The Court directed each side to submit detailed proposals simultaneously and to reply simultaneously. The parties, however, agreed to meet and confer in a last attempt to agree. The dispute is now at issue and the Court, with very detailed submissions from each side of the issue before it as well as the arguments made by each side at the last conference embedded in its

memory, enters this order. The Court considered the submissions, including the exhibits attached thereto, and arguments of the parties, District Judge Fallon's article regarding his experience in Vioxx and Propulsid (**Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, Bellwether Trials in Multidistrict Litigation, 82 TUL. L. REV. 2323 (2008)**), and a number of orders of other district judges handling MDL cases who have considered the same issue. The Court finds that this litigation will benefit substantially from the establishment of bellwether trials. Currently, there are well in excess of 3700 filed cases in this district and the number grows by leaps and bounds every month. This amended order follows the October monthly status conference, at which the PSC aired a number of issues which it takes with the original order. Despite contradicting much of what it originally advocated, the predominate effect of the Plaintiffs' position is that they want the trial schedule pushed back four months. In keeping with the aggressive schedule and demeanor all agreed upon when this MDL was established, while keeping fairness and a just adjudication of the issues at the fore, the Court believes it has arrived at a fair adjustment to its previously established plan in order to alleviate Plaintiffs' concerns yet achieve the goals established early on. [1]

2. The order now entered governs the selection of Plaintiffs for discovery and trial as part of a bellwether trial plan for cases currently pending in

[1] Throughout this amended order the Court will employ the unusual device of underlining new language and striking through language that is to be removed, in order to make it easier for all to quickly see the difference between the old and new orders.

MDL No. 2100 involving Plaintiffs who allegedly suffered personal injury from taking YAZ®, Yasmin® and/or Ocella®. It is critical to a successful bellwether plan that an honest representative sampling of cases be achieved. Each side of this litigation, through its representative leadership, has expressed, in some form, a willingness to waive all objections to venue, including the issues involved in ***Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998)**, The Court finds such a waiver to be critical to the success of this endeavor. However, the Court also finds that such a waiver must be completely voluntary, just as the holding of bellwether trials is within the discretion of the transferee judge. Therefore, if any Plaintiff or Defendant chosen for the list of cases for the bellwether plan does not waive all venue issues so that all cases so chosen can be tried, if reached, under the plan in this district, then the bellwether plan will be withdrawn and the parties will be without this valuable resource in attempting to determine the many issues with which bellwether trials would be able to assist the parties. To clarify, if one Plaintiff out of all the Plaintiffs chosen does not waive venue objections to have her case tried in the Southern District of Illinois, her case won't simply be replaced with another, but the bellwether plan will be withdrawn by the Court. The reason is quite simple, the Plaintiffs in the course of arguing, both orally and in writing, of the importance to the success of the bellwether plan and the randomization of the selection process to keep one side or the other from having the right to veto a case's selection by virtue of playing the venue objection card. The Court was able

to confirm that position in its independent research. Now, surprisingly, after taking such a strong position, it is the plaintiff's who are threatening the Court with the "Lexecon card" not the Defendants. The Court hopes that all Plaintiffs understand the important nature of a good bellwether plan and the need to proceed with it. An aggressive trial schedule will be pursued by the Court, whether the parties participate in the selection process in order to make sure it has a true bellwether character, or whether the Court selects the cases, thereby losing the ability to select true mill run cases. Parties will then be left with gleaning what they can from the cases selected.

II. BACKGROUND

3. As heretofore established, the most critical element of this plan and the purpose it seeks to serve is for the most representative cases to be selected and for no one to lose sight of that objective. The Plaintiff's Steering Committee has a role to competently represent, at the very least administratively, all of the plaintiffs in this litigation. Defendant's leadership committee must competently represent the defendants. Together, however, they share a common interest in this phase of the litigation, which is to put together a list of cases that most accurately represent the typical case at issue in this litigation. Successful fact gathering during the bellwether process could well lead to an earlier conclusion to this litigation rather than a protracted litigation process, thereby conserving precious resources, redirecting resources, shaping expectations and

serving the ends of justice for all concerned. Little credibility will be attached to this process, and it will be a waste of everyone's time and resources, if cases are selected which do not accurately reflect the run-of-the-mill case. If the very best case is selected, the defense will not base any settlement value on it as an outlier. If a case is picked that is dismissed on summary judgment, after the Plaintiff's evidence or a jury's verdict when it is obviously a weak case, the plaintiffs side will look upon it as an outlier as well.

4. Likewise, the Court will not take a chance with random selection despite its endorsement by the Complex Litigation Manual. ***See* Manual for Complex Litigation (Fourth) § 22.315 (2004)**. Most modern plans seem to disfavor random selection in order to have better control over the representative characteristics of the cases selected. ***See* Fallon, Grabill & Wynne, *supra*, at 2349-2351** (discussing various methods for populating the pool of potential bellwether cases). ***See e.g., Id.* at n. 95** (discussing the bellwether selection process in the Guidant Defibrillators Products Liability Litigation (allowing each party to select an equal number of cases to populate the pool) and noting the court's preference for party input in selecting representative cases).[2] The Court

[2] The Court also notes that some courts that have employed random selection have expressed dissatisfaction with the results. ***See e.g.,* Nov. 10, 2009 New Jersey Seroquel Hearing Transcript at 43:2-43:3** (the district court, reflecting on the pool of cases available for bellwether trials (which had been selected at random) stated: "I can tell you that in looking at the remaining three cases, none of them would be my pick for a bellwether; that would be for sure. They each have some wrinkle in them that doesn't make them the ideal bellwether, but this

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, along with a veto process in the later stages of the litigation, in case advocacy has trumped altruism and both sides have decided to ignore my efforts at objectivity.

III. SELECTION PROCESS

5. The pool of cases, with which discovery will be pursued, from which the bellwether trials will be drawn will consist of ~~fifty (50)~~ twenty-four (24) cases. This reduction in the number of cases should adequately address the Plaintiffs concerns regarding the ability to get the cases ready for trial. The Court does not accept the assertion from Plaintiffs that the only way to insure a list of cases that can be ready for trial is to let them control the list. Assuring true representative cases for a bellwether plan requires bipartisan input. ~~Twenty-five (25)~~ Twelve (12) Plaintiffs[3] will be selected by each side, the PSC and ~~Bayer~~ Defendants.

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is what we have. These are the three cases we have.") (Attached hereto as Exhibit A).

[3] For purposes of this Order, the term "Plaintiff" shall refer to an individual who took YAZ®, Yasmin® and/or Ocella® and allegedly suffered a personal injury (a "primary Plaintiff"). The claims of derivative Plaintiffs (such as spouses asserting a loss of consortium claim) shall be subject to discovery and trial pursuant to this Order if the primary Plaintiff from whom such Plaintiffs' claims derive is selected for discovery and/or trial. Further, Plaintiffs who filed complaints containing multiple primary Plaintiffs must be selected (if at all) individually. The claims of any primary Plaintiffs in multi-Plaintiff complaints are hereby automatically

Counsel discussed at length the nature of the alleged injuries pled in the complaints on file. While stroke and heart attack cases make up nine to ten percent of the cases, the parties have agreed not to include that group in the bellwether trials, in part, because those numbers pale in comparison to the other alleged ailments. Venus thromboembolisms (VTE) (which include pulmonary embolisms and deep vein thromboses) make up forty to forty-one percent; while gallbladder injuries account for the remaining forty-three percent of the alleged harms caused by the pharmaceuticals at issue. The Plaintiffs would have the Court put off the gallbladder cases until the end of the bellwether process in a second wave. The Court disagrees with that suggestion. Therefore, when the parties select this pool, equal numbers of venous cases and gallbladder cases should be chosen

6. Other Plaintiffs will also be excluded. Those Plaintiffs whose cases were not filed ~~and served~~ as of the date of this order may not be included by either side on the list of bellwether eligible cases. ~~Any Plaintiff who names as a defendant an entity or individual other than Defendants Bayer Corporation, Bayer Healthcare LLC, Bayer Pharmaceuticals Corporation, Bayer Healthcare~~

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severed from the claims of other Plaintiffs in the same complaint upon inclusion of the primary Plaintiff in the Discovery Pool.

~~Pharmaceuticals, Inc., Berlex Laboratories, Inc., Berlex, Inc., and/or Bayer Schering Pharma AG shall not be eligible for the list of bellwether cases.~~[4]

7. On October 27, 2010, Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel shall exchange lists of ~~twenty-five~~ twelve plaintiffs names that each choose to be placed on the bellwether list for discovery and potential trial (~~13~~ 8 VTE cases and ~~12~~ 4 gall bladder cases). Moreover, on that same day each counsel shall file with the Court, unsealed, said lists. In the event, duplicate names appear on the list, replacement names shall be filled in the following manner. Utilizing the court assigned case numbers, the lowest (oldest) number shall have the duplicate designation replaced by the PSC, the next duplicate by the ~~Bayer~~ Defendants and so on in alternating turns until all duplicates have been resolved and a full list of fifty cases has been achieved. The parties shall keep a record of this replacement procedure, because it shall be carried over if necessary should any plaintiffs be dismissed for failure to complete her Plaintiff Fact Sheet (PFS) or properly sign her medical authorizations. See paragraph 8.

IV. FACT SHEETS

8. If a plaintiff is identified as eligible pursuant to paragraph 7, but has not yet provided a PFS substantially complete in all respects and/or failed to properly fill out and sign the medical authorizations accompanying the PFS, as

[4] This change is intended to allow plaintiffs who have sued any defendant that has been allowed by the case management orders to participate in bellwether trials if representative factually.

provided for by CMO No. 12, by the date of this Order, such discovery shall be due on the earlier of (1) its original due date under CMO No. 12, or (2) twenty-one (21) days after entry of this Order, provided that an Answer has been filed in her case. If an Answer has not yet been filed, one will be filed within 7 days, and the PFS and medical authorization supplied, substantially complete in all respects, within 21 days thereafter. If Plaintiffs do not comply with these deadlines, Defendants shall notify Liaison Counsel of the missing preliminary discovery. If the substantially completed PFS and medical authorizations are not provided within 14 days, the case will be dismissed without prejudice immediately upon the Court's receipt of Defendant's motion. The case will promptly be replaced on the bellwether list in accordance with the procedure set out in paragraph 7 above.

It is the intent of the Court that all efforts be made to pick representative cases regardless of the initial state of preliminary pleadings and discovery. All efforts should be made to correct any preliminary pleading or discovery deficiencies immediately upon that case being selected.

9. Bayer shall provide a Defendant Fact Sheet (DFS), if one has not already been provided, in all eligible plaintiffs cases, where PFS and authorizations have been appropriately provided, on the earlier of (1) its original due date under CMO No. 18, or (2) twenty-one (21) days after the Plaintiff's production of a PFS and authorization pursuant to paragraph 8. Failure to comply will result in the imposition of any sanction available to the Court in the exercise of its inherent power.

V. CASE-SPECIFIC CORE DISCOVERY

10. Discovery in any case included in the bellwether discovery pool shall commence following the exchange of party selections on November 1, 2010.

11. In connection with any individual plaintiff's case, the parties may take the depositions of plaintiff's prescribing physician(s), primary treating physician(s), as well as two additional depositions per side. In the event either party seeks discovery beyond these depositions in an individual plaintiff's case, agreement, in writing, between Liaison Counsel must be obtained or, if no agreement can be obtained after a good faith attempt, leave of Court must be obtained upon a showing of good cause.

12. Core case-specific discovery shall be completed no later than March 14, 2011.

VI. TRIAL SELECTION

13. The first trial is set September 12, 2011. This will be a pulmonary embolism (PE) case.

14. The second trial is set January 9, 2012. This will be a gallbladder (GB) case.

15. The third trial is set April 2, 2012. This will be an additional thromboembolic (VTE) case.

16. The selection process for each trial will be as follows. The Liaison Counsel, together with any lead counsel he wishes to have present, shall meet and confer for the purpose of accomplishing this task. ~~Eight~~ Four cases of each type designated: ~~eight~~ four PE, ~~eight~~ four GB and ~~eight~~ four VTE will be selected for the trial pool by each party submitting ~~four~~ two plaintiffs names each in each category. Thereafter, each party shall have veto privileges ~~to one of the four cases in each category submitted by the opposing party~~ as follows: Each party shall have the right to exercise two vetoes; one to be exercised in a VTE case (either in one of the PE cases in the first trial group or one of the general VTE cases in the third trial group) and one in a gallbladder case. The result will ~~be six cases in each category, three selected by each party~~ vary in its application. For example, depending on how the vetoes are exercised there could be either six or seven cases remaining in the PE trial group and the same for the VTE trial group. However, there will be six remaining in the gallbladder trial group. Those names shall be submitted to the Court without any indication which party submitted what name. Upon receiving those names the court will select one case in each category to be the first case to be tried and two cases to be backups in case the first case cannot be tried for some reason. The Court will allow the parties to determine when to make this trial selection based on the discovery process and when they feel they are best able to make an informed decision regarding this issue of bellwether selection.

VII. DISCOVERY COMPLETION

17. Once a trial pool has been selected further discovery can be conducted in each of the six cases as needed to completely prepare the cases for trial. For the PE case, to be tried in September, that discovery shall be completed by April 20, 2011.

Further deadlines shall be:

a. May 2, 2011: Deadline for Plaintiff to serve Rule 26(a) case-specific expert disclosures and reports.

b. June 2, 2011: Deadline for Defendants to serve Rule 26(a) case-specific expert disclosures and reports.

c. June 22, 2011: Deadline for Plaintiff to serve any case-specific rebuttal reports under Rule 26(a).

d. July 20, 2011: Depositions of all case-specific experts shall be completed. No depositions of any of Plaintiff's experts shall be conducted until after the Defendants' expert reports have been served in accordance with 17(b) above.

18. For the GB case, to be tried in January, discovery shall be completed by September 2, 2011.

Further deadlines shall be:

a. September 16, 2011: Deadline for Plaintiff to serve Rule 26(a) case-specific expert disclosures and reports.

b. October 18, 2011: Deadline for Defendants to serve Rule 26(a)

case-specific expert disclosures and reports.

c. November 7, 2011: Deadline for Plaintiff to serve any case-specific rebuttal reports under Rule 26(a).

d. November 16, 2011: Depositions of all case-specific experts shall be completed. No depositions of any of Plaintiff's experts shall be conducted until after the Defendants' expert reports have been served in accordance with 18(b) above.

19. For the VTE case, to be tried in April, discovery shall be completed by November 28, 2011.

Further deadlines shall be:

a. December 9, 2011: Deadline for Plaintiff to serve Rule 26(a) case-specific expert disclosures and reports.

b. January 10, 2012: Deadline for Defendants to serve Rule 26(a) case-specific expert disclosures and reports.

c. January 30, 2012: Deadline for Plaintiff to serve any case-specific rebuttal reports under Rule 26(a).

d. February 8, 2012: Depositions of all case-specific experts shall be completed. No depositions of any of Plaintiff's experts shall be conducted until after the Defendants' experts reports have been served in accordance with 19(b) above.

20. Plaintiffs suggested in their documentation that treating physicians are not subject to expert reporting under Rule 26(a)(2). The Defendants did not

take a position. The Court refers the parties to ***Meyers v. National R.R. Passenger Corp. (Amtrak)*, No. 09-3323, 2010 WL 3385182 (7th Cir. Aug. 30, 2010)**. The ***Meyers*** court held, at page *5 that "a treating physician who is offered to provide expert testimony as the cause of the plaintiff's injury, but who did not make that determination in the course of providing treatment, should be deemed to be one 'retained or specially employed to provide expert testimony in the case,' and is required to submit an expert report in accordance with Rule 26(a)(2)."

VIII. CONCLUSION

21. Having found that this litigation will benefit from the establishment of bellwether trials, the Court has set firm trial dates and means and method for selecting the cases for trials. Likewise, the Court has set discovery deadlines, which are summarized below:

- **Core case-specific discovery deadline: March 14, 2011**
- **Additional deadlines:**

	Pulmonary Embolism (PE) Case	**Gallbladder (GB) Case**	**Thromboembolic (VTE) Case**
Discovery completed	April 20, 2011	September 2, 2011	November 28, 2011
Deadline for Plaintiff to serve Rule 26(a) case-specific expert disclosures and reports	May 2, 2011	September 16, 2011	December 9, 2011
Deadline for Defendants to serve Rule 26(a) case-specific expert disclosures and reports	June 2, 2011	October 18, 2011	January 10, 2012
Deadline for Plaintiff to serve any case-specific rebuttal reports under Rule 26(a)	June 22 2011	November 7, 2011	January 30, 2012
Completion of depositions of all case-specific experts	July 20, 2011	November 16, 2011	February 8, 2012
Trial Date	September 12, 2011	January 9, 2012	April 2, 2012

SO ORDERED:

/s/ David R. Herndon

Chief Judge
United States District Court DATE: October 13, 2010

EXHIBIT D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

In Re: HAIR RELAXER MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

MDL NO. 3060

THIS DOCUMENT RELATES TO
ALL CASES

[PROPOSED] CASE MANAGEMENT ORDER NO. __
(Bellwether Selection Schedule and Procedure)

1) **Scope of Order** This order applies to: (a) all actions transferred to *In Re Hair Relaxer Marketing Sales Practices and Products Liability Litigation* by the Judicial Panel on Multidistrict Litigation ("JPML") pursuant to its order of February 6, 2023; (b) all related actions originally filed in or removed to this Court; and (c) any "tag-along" actions transferred to this Court by the JPML pursuant to Rules 6.2 and 7.1 of the Rules of Procedure of the JPML subsequent to the filing of the final transfer order by the Clerk of the Court.

2) **Eligible Cases.** All cases in which a Short Form Complaint ("SFC") has been filed before February 1, 2024 will be presumptively eligible to be included in the bellwether trial pool, subject to the qualifications as set forth below (the "Eligible Cases").

3) Designated Injuries. Only a plaintiff alleging the following injuries (the "Designated Injuries") in the SFC and/or Plaintiff Fact Sheet ("PFS") shall be eligible for selection as an initial bellwether case for discovery ("Initial Bellwether Discovery Case"): (a) uterine cancer; (b) endometrial cancer; (c) ovarian cancer; and/or (d) any injury alleged in the SFC and/or PFS in more than 10% of the Eligible Cases. Regarding (d) of this Section 3, to promote efficiency, and subject to the Court's approval, the parties may adjust the percentage of Eligible Cases upward or downward by agreement, or agree to place one or more categories of Designated

Injuries on a separate bellwether track, or they may jointly suggest that the Court take other appropriate action.

4) **General Expert Discovery and Briefing.**

a) On August 22, 2024, the plaintiffs shall serve defendants with general causation expert reports regarding the Designated Injuries. Reports submitted at this time shall not address regulatory, company conduct or other liability claims or defenses, and shall not involve damages or the facts of any individual case. 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 in this MDL.

b) Assuming the other deadlines in this Case Management Order are met, all depositions of any of plaintiffs' experts on general causation shall be completed by October 21, 2024.

c) Defendants shall provide the plaintiffs with general causation expert reports for each of the Designated Injuries by January 10, 2025.

d) Assuming the other deadlines in this Case Management Order are met, all depositions of any defendants' experts on general causation shall be completed by March 10, 2025.

e) The parties shall file any Rule 702 (*Daubert*) motions on general causation by April 8, 2025.

f) The parties shall file any opposition to Rule 702 (*Daubert*) motions on general causation by May 9, 2025.

g) The parties shall file any reply in support of any Rule 702 (*Daubert)* motions on general causation by June 6, 2025.

h) The Court shall conduct hearings, as necessary, on the Rule 702 (*Daubert)* motions following the completion of briefing.

5) Selection of Initial Bellwether Discovery Cases.

a) Assuming that, as of July 1, 2024, 75% of the PFSs (for cases filed before February 1, 2024) are substantially complete, as defined by Case Management Order No. 9 (PFS implementation), on August 22, 2024, the plaintiffs and defendants shall each designate eight (8) cases (including at least one case from each of the Designated Injuries), which cases shall comprise the "Initial Bellwether Discovery Cases."

b) Pursuant to Case Management Order No. 8 (Service of and Responses to SFCs), each defendant shall serve its answer and affirmative defenses to each of the Initial Bellwether Discovery Cases in which it is named within 45 days of selection of such cases.

c) Fact discovery in the Initial Bellwether Discovery Cases, including, but not limited to, additional written discovery and depositions of the plaintiffs in those cases, their family members, and their treating healthcare providers, will commence on August 22, 2024 and will be completed by April 15, 2025. Each Initial Bellwether Discovery Case will be limited to a total of four (4) fact depositions per side for this phase of the bellwether process unless a good cause showing is made that more depositions are warranted. Case specific discovery in the Initial Bellwether Discovery Cases shall be referred to as "Core Discovery."

d) If, prior to April 15, 2025, any of the Initial Bellwether Discovery Cases are voluntarily dismissed by a plaintiff, defendants shall be permitted to designate a replacement case of the same injury type as the dismissed case. If, prior to April 15, 2025, any of the Initial Bellwether Discovery Cases are resolved by settlement as to all defendants named in that

case, the parties shall jointly designate a replacement case of the same injury type as the settled case. If the parties are unable to agree, they shall submit simultaneous briefing to the Court on this issue. The parties shall work in good faith to complete fact discovery permitted in this section for the replacement case(s) prior to the selection deadline of the Bellwether Trial Cases set forth in Section 6, *infra*.

6) **Selection of Bellwether Trial Cases.**

a) Within thirty (30) days of the Court's order on the Rule 702 (*Daubert*) motions filed under Section 4, *supra*, for any of the Designated Injuries for which the general causation experts remain, five (5) representative cases shall be selected to serve as the potential trial cases ("the Bellwether Trial Cases"). The plaintiffs shall select one (1) case for trial, the defendants shall select one (1) case for trial, and the parties shall jointly select three (3) cases for trial. If the parties are unable to agree on the last three cases, they shall submit simultaneous briefing to the Court on this issue. The Parties and the Court will work together to insure that at least one case is selected from each of the Designated Injuries categories. The Court shall have discretion to balance, or otherwise adjust, the trial pool of cases.

b) Within ninety (90) days of designating the Bellwether Trial Cases, all remaining fact discovery, if any, must be completed.

c) Within one hundred twenty (120) days of designating the Bellwether Trial Cases, the plaintiffs will provide any and all remaining general expert reports not included in Section 4, *supra,* (*e.g.*, regulatory, company conduct and any and all claims and liability) and on specific causation, liability, and damages ("case-specific expert reports").

d) Thirty (30) days after receiving the plaintiffs' case-specific and remaining general expert reports, defendants shall provide their case-specific and remaining general expert reports.

e) Within ninety (90) days of the defendants' submission of case-specific and remaining general expert reports, the parties will complete expert depositions regarding case-specific causation, liability and damages (and any other remaining) opinions.

f) Within thirty (30) days of completing case-specific and remaining general expert discovery in the Bellwether Trial Cases, the parties will file summary judgment motions, as appropriate, and/or Rule 702 (*Daubert*) motions in any of the Bellwether Trial Cases.

7) **Trial Selection and Pre-Trial and Trial Deadlines.** The parties will meet and confer within thirty (30) days of the selection of the Bellwether Trial Cases to determine an appropriate case management order for the remaining deadlines.

8) **Duty to Supplement.** Nothing herein relieves a party of its duty to supplement its disclosures, PFSs, and any other discovery as provided under the Federal Rules of Civil Procedure, orders entered in this MDL, or other applicable law and rules.

Ordered this ____ day of _____, 2024.

_____
Mary M. Rowland
United States District Judge

EXHIBIT E

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	MDL No. 3060 Master Docket No. 23 C 818
This Document Relates to All Cases	Chicago, Illinois April 18, 2023 1:01 p.m.

TRANSCRIPT OF PROCEEDINGS - Status
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(In open court.)

THE COURT: All right. Good afternoon, everyone.

MULTIPLE COUNSEL: Good afternoon, your Honor.

THE CLERK: This court resumes in session.

23 C 818, In re Hair Relaxer Marketing, Sales Practices, and Products Liability Litigation.

THE COURT: Okay. Everyone be seated.

Okay. Thanks, everyone, for the very thorough report I got earlier in the week.

I'm surprised to see so many people here. I thought I might have more people on video. I have a couple people on video, I see. They're all on mute, so that's a good sign for me.

I want to remind people who are attending remotely that if you want to have your appearance reflected of record, if you want to show clients later maybe that you attended, you have to provide your name and firm information to your liaison counsel, either defense or plaintiff, and then that person will provide your information to the court reporter.

And that information is contained in an order that I entered earlier today. So that's for my remote folks. And that's either by phone or by video.

Okay. So where do we start? Maybe I can hear from the folks who are back. Nice to see you both.

MS. TROTTER: Good afternoon, your Honor.

MS. DEBROSSE ZIMMERMANN: Good afternoon, your Honor.

THE COURT: You've been working hard.

MS. DEBROSSE ZIMMERMANN: Most definitely.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: Your Honor, if I may address the fact that there are a lot of people present.

THE COURT: Okay. Let's get appearances on the record for the court reporter.

MS. DEBROSSE ZIMMERMANN: Yes. Diandra Debrosse Zimmermann, DiCello Levitt, for plaintiff leadership.

Thank you, your Honor.

MS. TROTTER: And Rhonda Trotter for defendant Strength of Nature.

THE COURT: You want to put your firm on or no?

MS. TROTTER: Arnold & Porter Kaye Scholer, LLP.

THE COURT: Okay. Go ahead.

MS. DEBROSSE ZIMMERMANN: Thank you, your Honor.

We actually in line with what we discussed at the last CMC and the Court's order have the leadership development committee here, as well as the three co-chairs. So we wanted to make sure that the LDC members had the opportunity to be in court today and see the proceedings.

And the LDC, one of the co-chairs is present if you'd like to meet any of them or to hear about the LDC.

THE COURT: To -- okay. To meet the members who

are -- so these are young lawyers, and we're trying to introduce them to court and bring them along.

MS. DEBROSSE ZIMMERMANN: Bring them along in the mass tort process. Yes, your Honor.

THE COURT: And teach them good habits.

MS. DEBROSSE ZIMMERMANN: Excellent habits. Yes, your Honor.

THE COURT: Excellent habits.

MS. DEBROSSE ZIMMERMANN: Excellent habits.

THE COURT: Okay. What do you think about that, Ms. Trotter?

MS. TROTTER: I think it's a noble goal, and I'm fully supportive of it, your Honor.

THE COURT: Okay. I try to do that with my law clerks too. Sometimes I end up telling them so many things not to do, and then I have to remember to say some things that they should do because I always -- "Don't ever do that."

And then they say, "Are there things I should be learning, or am I just walking out of here with a negative?"

Okay. Well, okay. So what would you like me to do? I mean, we're not going to have all of them stand up and come say hello, are we?

MS. DEBROSSE ZIMMERMANN: No, we're not.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: We're not. I think that

Co-chair LaRuby will just say a few words and they'll just stand because there are quite a few.

THE COURT: Oh, good. Okay. Great.

MS. DEBROSSE ZIMMERMANN: I'll save you that display.

THE COURT: Okay.

MS. MAY: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. MAY: My name is LaRuby May, with May Jung law firm. And along with my colleagues Melanie Muhlstock and Carmen Scott, we have the privilege of serving as the co-chair of the LDC committee, your Honor. And so this afternoon we have with us the members of the LDC. And if it's okay with your Honor, I'll have them to stand for you to see them.

THE COURT: Oh, that would be great.

MS. MAY: So can all the members of the LDC please stand.

THE COURT: Oh, my goodness. Look at our future.

(Applause.)

THE COURT: We feel in very good hands.

MS. MAY: Absolutely.

THE COURT: And that's good because I'm about to fall over. So thank goodness you're here to catch me.

MS. TROTTER: Your Honor, I just must say as I'm in my 30th year of practice --

THE COURT: Oh, yes.

MS. TROTTER: Looking here --
THE COURT: Amen to that, yes.
MS. TROTTER: -- warms my heart.
THE COURT: Yes. We've come a long way.
MS. TROTTER: We've come a long way.
THE COURT: It did not look like that 30 years ago, did it.
MS. DEBROSSE ZIMMERMANN: Or 20.
THE COURT: Or 20. Yes, indeed. Indeed. And it's not been an easy road to get there. No. Nobody was opening those doors. They were being smashed down.
So welcome. Welcome. We will as we move along, I hope, get you up to the podium.
Best advice I ever got came from a court reporter, not from a lawyer, who said to me, "Mary, you need to elbow your way to the podium," because I was always standing over there being polite. And that meant that my words were not being picked up by the microphone. And I thought, eh, good point because you need sometimes to be heard.
So feel free to elbow your way on up here. I'll be happy to hear from you.
Okay. Anything else? That's it for the day?
MS. DEBROSSE ZIMMERMANN: Well, if the defendants are ready to resolve, we're good.
THE COURT: Oh, there you go.

MS. DEBROSSE ZIMMERMANN: Always got to stick to the script.

THE COURT: That would be lovely.

MS. DEBROSSE ZIMMERMANN: Got to stick to the script.

Rhonda, would you like to begin with pleadings/ amending complaints?

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: And Michael -- my co-lead counsel, Michael London, he's also at 30 years. I want to remind the Court I'm only at 20.

MS. TROTTER: Yes, your Honor.

For a number of the items, we have different defense counsel --

THE COURT: Sure.

MS. TROTTER: -- who are taking the lead, so I'm going to have my colleague Mr. Ellis come up for this.

THE COURT: Okay. Mr. Ellis, nice to meet you.

MR. ELLIS: Thank you, your Honor.

MR. LONDON: Good afternoon, your Honor. Michael London for the plaintiffs' committee.

On this first agenda item, pleadings/amending complaints, we've met and conferred twice on the phone, maybe three times, with defense group. We're volleying back and forth redlines of a document. I must confess we owed the defense a document yesterday. They will get it today.

But in a summary fashion for the Court to understand where we are, appreciate where we are, what we're looking at or contemplating providing to the Court is a process whereby there will be a long-form or master complaint, followed by a short-form or adoption-by-reference complaint where the individual plaintiffs identify the causes of action that they will pursue and factual information about themselves, followed by a long-form answer, with the affirmative -- master affirmative defenses, followed by a short-form adoption-by-reference answer that the defendants would be asserting at some time after service of the short-form answers -- short-form complaint. Excuse me.

What the plaintiffs and PSC is hoping for is probably not a drawn-out motion-to-dismiss process once that long-form complaint is filed. They may be thinking otherwise. We are confident that we completed negligence and strict liability and what have you, warranty claims and failure to warn appropriately, and we think we've done so.

But we're working through that. And, if necessary, perhaps we'll talk to defense about preserving those claims till summary judgment. But these are -- and I think that's been done in a couple of these master pleading CMOs with counsel here, obviously, in other cases.

But we're still working through all that. I don't have a timeline -- we actually haven't talked about it -- when

we can hopefully have something to the Court either by agreement or with our narrow disputes to the Court. But I think -- Dennis, what, two to three weeks? And, obviously, I'm saying that because I owe him the current document. I think we're in good shape there.

The other component of the master pleading CMO, if you will, would be to address a consolidated class action complaint. It appears that there are seven different class action complaints on file that have made their way to this Court through the MDL transfer process.

THE COURT: Right.

MR. LONDON: And we are endeavoring with those class counsel to -- and with the defendants' proposal to turn this into one consolidated class action complaint.

I do think they will feel strongly about their motion practice there, and we are working that into the response in a meet-and-confer as to what elements they would want to move on and then, obviously, a briefing schedule certainly for the class complaints.

But, again, I have to confess that that is -- that ball is in our court, and that draft CMO will be back to defendants later today.

THE COURT: Okay. Would that be then a separate complaint, the class complaint?

MR. LONDON: The class -- the consolidated class

action complaint will be absolutely a completely separate complaint. That's correct, your Honor.

THE COURT: Okay. Okay. You're proposing -- I don't know if you know this, but I think you're proposing a May 15th date, that you need until then to confer. And you're telling me you don't know the schedule, but you -- somebody proposed May 15th.

MR. LONDON: We proposed May 15th to get a document. I don't know if they now need more time because we were supposed to get this to them before today. It was supposed to be due yesterday.

THE COURT: Okay.

MR. LONDON: I can't speak if he's objecting now.

THE COURT: Sure.

Mr. Ellis?

MR. ELLIS: Thank you, your Honor. I'm Dennis Ellis for the L'oréal entities, including L'oréal USA, Inc.; L'oréal Products, Inc.; and also SoftSheen-Carson, LLC.

Your Honor, we have met and conferred. Those conversations have been fruitful. They did send us an initial draft of a consolidated pleading order. It only dealt with the product liability parts of the case. We then redlined that and then also sent them a very similar form of a consolidated class action complaint that they could adopt and come back with this for. That's what we're waiting for is for some revisions to

whatever it is we proposed to them. So we're still waiting to get that.

I think largely what Mr. London said is correct in terms of the process that would be conceptually a long-form personal injury complaint -- it may not be called that. There was some discussion about whether or not it should be called something different -- and then there would be a short-form kind of plaintiffs' -- either, you know, short-form complaints or something like that.

One of the things that has been in issue is that we haven't seen any draft of that yet, so we don't know what it's going to entail. So we wanted to preserve our rights to move to dismiss that.

There's 116 lawsuits out there, 105 federal cases presumably that will get here. Some of those in the personal injury context do include consumer claims that are purely economic. Some of the class action claims do include presently personal injury claims. So conceptually, we have an idea about what those two consolidated complaints might look like. For example, the personal injuries would include economic claims, and conceptually the personal injury claims wouldn't be in the class action complaints.

But we don't know that that's what they're going to adopt. If they don't do that, then we do want to preserve our rights to maybe challenge some of those claims, and then we see

where we are before the Court. I don't view that as a long, dragged-out process. I think that Mr. London is correct. We see, you know, the negligence claims and things like that. There may be some issues there with, you know, whether or not they need to allege a defect and things like that.

But we're talking about it. We're just waiting to see where they are. And then ultimately we'll get to a point where we have a procedure, and I think conceptually we're in general agreement about what that procedure is. We just are trying to put, you know, the little details to it.

The one thing I would say, your Honor, is that the lack of that consolidated complaint is affecting some of the other issues that we want to talk about, that we are interested in. And we do need to get through that process. And we did say May 15th, but I believe May 15th was the day, actually, that we thought initially the consolidated complaint would be filed.

So now if we're talking about just continue to talk about the approach, then that's fine. We're continuing to do that. But ultimately it is impacting some of the other things we can agree to and some of the other things we want to propose to the Court.

THE COURT: Yeah, of course.

So all this talking, I love all the talking. But you haven't -- I thought you were talking about actually a draft

complaint. But you're actually talking about this idea.

MR. LONDON: So, your Honor, if I can answer that question. So there's a -- I think there's a bit of -- we might be speaking a little bit past each other -- not with the Court, with counsel here -- that the two complaints, one would be the master injury complaint.

The issue of calling it personal injury complaint, obviously there's wrongful death cases and it's not necessarily personal injury. But it's on the behalf of individual plaintiffs who are alleging harm, wrongful death or personal injuries.

That we have not shown to them. Our hope is to have that drafted if, in fact, that is the road we go down. And we're hoping we can go down that road.

The initial response from them -- and not to get into the details -- was extremely onerous, carving out individual plaintiff claims into the class case and basically claim splitting individual claims.

They've backed off that. And so that is why we said wait a second. We're just going to stick with the direct filing order. This is -- claim splitting is impossible. They've backed off that.

So now our team is actually drafting the master complaint, which we also have concerns about, which it was nice to hear that counsel isn't intending to move on negligence and

what have you because when we do have a master complaint, we have to -- it's incumbent upon the steering committee to assert causes of action for all 50 states. So the consumer protection claim from Alaska or from Missouri or from New York has to be asserted.

And this is, you know, one reason it's not always the best way, because now the plaintiff with the short-form adoption-by-reference --

THE COURT: Right.

MR. LONDON: -- has to adopt by reference.

The problem, one might say, well, don't put it in there. Just let those plaintiffs assert what they want.

THE COURT: But can't it just be an attachment that then the plaintiff checks off that that -- you're laughing. Is that really going to --

MR. LONDON: We proposed the checkbox. They opposed the checkbox.

THE COURT: I see. I see.

MR. ELLIS: That's not correct, actually. We opposed the checkboxes for listing 200 products and then the plaintiff just checks the boxes of the products used.

THE COURT: Right.

MR. ELLIS: In terms of the checkboxes with respect to if they want to adopt different claims that are in the long-form complaint, we did not necessarily object to that part

of it, but discussion was about the products and the checkboxes for that.

Another correction. What had happened was -- I believe counsel used the term "backed off." What had happened was that we had communicated to them that we thought that the personal injury or injury-type complaint would not include economic claims, and there was some discussion about that. That was less concerning for us than the personal injury claims being as part of the class action because if that is true and this Court was to certify a personal injury class action, which I don't -- hope the Court wouldn't do and don't think the Court would do given the law, but that would essentially eviscerate all of the underlying individual personal injury complaints.

So we still are waiting to see whether or not that issue is dealt with, and that was the point that we made on our second call with plaintiffs' leadership committee was that we were less -- we didn't intend to say that you can't assert an economic claim as part of the injury complaint. We did intend to say that you cannot assert a personal injury claim as part of a class action complaint. I think that was clarified.

All this is -- you're right. We're talking about a procedure. I think we overall agree to the procedure. I don't know what counsel is referring to when he says that I agreed that we wouldn't move to dismiss on certain grounds.

Counsel has filed a couple cases in Ohio. We've moved

to dismiss those. He knows what they look like. He knows what our issues would be with the complaint. So we assume that those thought processes will be used to file the consolidated complaint. We haven't seen it. We don't want to waive our right to move to dismiss those claims since we haven't seen it.

THE COURT: Nobody's waiving anything just yet. I mean, we're two -- we're three months in. There's no waiver happening.

Okay. So here's my thought. I mean, as you know, I came out last time and said, "Look. You give me reasonable dates, I'm going to adopt them. If we get to a point where we're not moving, then I'm going to get grumpy," or something like that. So that's true.

So you got moved here in February, and we're talking about May. That doesn't seem unreasonable to me to get together a complaint in a case like this. But are we going to have a complaint by May or June? Because that needs to happen.

MR. LONDON: I think that's -- your Honor, if you're directing that to me, yeah, I absolutely think that is the -- our intent. We want to have this complaint filed. We want to have the short-form adoption-by-references filed and following it.

So to answer that question, yes. I think there -- I don't want to say that there will be devils -- the devil is in the details, but perhaps, yes. And I think that's why we put

the shorter deadline. To the extent that we can't have this agreed to, we will bring the discrete issues of the complaint to the Court.

THE COURT: Right, because the devil in the details, that's where I get involved and rule.

MR. LONDON: Yes.

THE COURT: So I really appreciate that everybody is talking. And I know you guys do this a lot in different cases, different contexts, and you know a lot about how to work these disputes out and what to reserve, what not to waive. And I don't want to get involved if I don't need to, and I don't want to make a mess.

On the other hand, sometimes you can talk yourselves around for two years and the case doesn't move. And I don't want to do that, and I don't think anybody here wants to do that.

So if you want a hard deadline, I can do that. If you want to report back to me on May 15th, I can do that. But I don't want you to just be reporting back to me for six more months and we don't have a complaint because we can't really -- I don't know what it's holding up, but I know cases can't move without a complaint. I know that.

MR. ELLIS: I agree.

THE COURT: Obviously.

So May 15th. What's that deadline mean? I'm getting

a status report, or I'm getting a complaint? What am I doing on May 15th?

MR. LONDON: So my hope on May -- or our hope, collective hope, on May 15th would be, your Honor, to have a court order that sets out the process for a master complaint.

If we cannot have one filed or amended or affixed to the CMO by that date -- excuse me -- it would be coming in short order. I'm just trying to think about the calendar right now, and I'll look back at the folks. I don't want to overcommit to May 15th, your Honor, but I certainly could commit to no later than June 1st to have a long-form master complaint to the Court.

THE COURT: Okay.

(Counsel conferring.)

THE COURT: So May 15th is almost four weeks. I don't know what you mean by looking at it for a calendar, but it's almost four weeks. It's a day shy of that. And you're saying June 1st. That's another two weeks. So it would be six weeks and a day or two to file your complaint.

MR. LONDON: And, your Honor, my hope -- I'm a pedal-to-the-metal person. I just don't want to have arrows shot at me right now -- is to have this master long-form complaint for the injury cases, the individual cases, to the Court by May 15th. I think we can do that.

If we ask for more time -- I'm hoping we don't, but I

think -- anyone standing up and yelling at me? There's one person who would be looking at me angry, and she is not.

THE COURT: Okay.

MR. LONDON: So I think we can endeavor to do that, your Honor. May 15th to have both the order and the long-form -- I'll just call it, quotes, "injury complaint" -- the long-form complaint to the Court, as well as the short-form adoption-by-reference.

THE COURT: And that's on the injury cases as opposed to the consumer protection cases.

MR. LONDON: And the class cases, your Honor, that's some different groups in there. And we are working to -- some of them not on our steering committee. And I think that's -- that's over here, if you will (indicating), and we're trying to -- there's seven cases, seven different class cases. For the most part, I think there's three law firms that are engaged in those. And so we're trying to figure out when that group can put their class together.

And to Mr. Ellis's point, we are trying to remove the injury cases from that class context. I personally don't disagree with his view of those proceeding as class actions.

THE COURT: So we maybe need to add another 30 days on that? Or you just need to file another status report on that?

MR. LONDON: I think a separate status report. I think it will require additional time to galvanize what those

consumer class claims are and to extricate the injury claims from the class context.

THE COURT: Are those lawyers not on the steering committee?

MR. LONDON: They are not.

THE COURT: Okay.

MR. LONDON: Oh, excuse me. One is, and one is not.

MR. ELLIS: The Aylstock firm -- I thought Ms. Hoekstra was a member of that committee.

THE COURT: Okay. So that's corrected. Okay.

MR. ELLIS: Am I right about that?

MR. LONDON: She has not asserted personal injury claims in her class complaint.

THE COURT: Okay.

MR. ELLIS: That's true, though. She did not assert personal injury in her claims. Some of the other people did. Bell Legal from South Carolina has three in there.

THE COURT: Okay. So there's some negotiation that has to happen.

MR. ELLIS: Yes.

THE COURT: Okay.

MR. ELLIS: I mean, not with me, but among them.

THE COURT: No, no. No, I understand. But you understand what's happening over there.

MR. ELLIS: Yeah, I do. I do.

THE COURT: Yeah, okay. So on May 15th, Mr. Ellis, they're going to -- someone is going to file potentially, it seems, a proposed court -- a proposed order for me that's going to contain an agreed process. And if you're not able to agree on that, then you're going to submit something to me that's going to say, "Hey, we need some help," and I'll get involved in that.

And then also on June 1st, which I want to make sure is not a weekend -- yeah, it's a Thursday -- you're going to then submit to me a -- your complaint, your master complaint, with the short form.

MR. LONDON: Yes, your Honor. I think we can try and get that by May 15th, that long-form --

THE COURT: Okay.

MR. LONDON: -- complaint by May 15th as well --

THE COURT: Okay.

MR. LONDON: -- with the short form.

THE COURT: Does that make sense to you?

MR. ELLIS: May I have a moment, your Honor, just to --

THE COURT: Sure, sure.

MR. ELLIS: And excuse me for turning my back to you.

THE COURT: No problem.

MR. ELLIS: I just want to check with my colleagues.

(Counsel conferring.)

MR. ELLIS: Yeah, that's fine, your Honor.

THE COURT: Okay. All right. Great.

Anything else on the complaint?

MR. LONDON: I do want to raise one other issue, your Honor. And my colleague Ms. Conroy might be standing right behind me.

THE COURT: Oh. I didn't give a date, though, to talk about the class complaint.

MR. LONDON: Okay.

THE COURT: Should we say that is June 15th?

MR. ELLIS: I just -- that's fine. It just has to happen because at least some of those class complaints subsume the personal injury claims. So we want to know that it's coming.

THE COURT: Yeah.

MR. ELLIS: If they're still negotiating and that's not out, we need to know that --

THE COURT: Right. And I want to have a deadline on it.

MR. ELLIS: -- before answering or dealing with the injury complaint --

THE COURT: Yeah.

MR. ELLIS: -- because there could be first-to-fall arguments, different things like that.

THE COURT: Well, and I would say this. I would stay

any answer or response to the master complaint until we got the class complaint sorted. So even if that took until July or whatever, we would be staying responses because they don't really know what they're dealing with until they get both complaints on file, right? That seems reasonable to me.

MR. LONDON: I don't think this personal injury in the class context is difficult. We hope to resolve it. I understand that.

THE COURT: Yeah, okay. So June 15th I'm going to get a proposed -- or the class complaint or some filing by plaintiffs saying, "Help" -- probably not that, but a class complaint.

MR. LONDON: That's --

THE COURT: Okay?

MR. ELLIS: Absolutely, your Honor.

THE COURT: Okay. All right. Can we move on?

MR. LONDON: We can -- I'm sorry to hesitate.

With respect to the complaint, your Honor, there is -- it's worth noting in the joint status report that we have an update on the Revlon bankruptcy.

THE COURT: Yes.

MR. LONDON: And I think I would be remiss if we didn't identify Revlon. And my colleague Ms. Conroy here -- somewhere here -- if it's okay, your Honor, because this may play a little bit into the complaint and naming a party.

THE COURT: Yes, right.

MR. LONDON: Ms. Conroy will address the Revlon bankruptcy.

THE COURT: Yes, thanks.

MS. CONROY: Good afternoon, your Honor. Jayne Conroy, Simmons Hanly Conroy.

Good news and bad news.

THE COURT: Yeah.

MS. CONROY: Revlon appears to -- it appears it will be emerging from bankruptcy at the end of this month/early May. And I think listening to the dates and the way we're setting this up, this is more of a defendants' problem potentially.

But we can get our -- we can get the complaint drafted and work the procedure. And there's some serendipity to the timing here because it looks like New Revlon will be up and running by early May. I'm assuming there will be defense counsel that will file an appearance here in your court. And I imagine they get folded into whatever the structure looks like.

And I don't want to speak for the defendants about what that looks like. But we can draft our complaint without talking to New Revlon's defense counsel, but I'm not sure they can work out structure. But it may all work out just fine.

MS. LESKIN: Your Honor, Lori Leskin, Arnold & Porter Kaye Scholer, for the Strength of Nature defendants.

I think that's right. We don't have Revlon on the

table. We can't speak for Revlon here today. I do have the same understanding that they are coming out of bankruptcy. What happens with all of the claimants that have come into the bankruptcy process I think needs to be worked out, and that will be part of I think what comes next.

And so as your Honor indicated, if we stay the response to the complaint -- obviously, we haven't seen the complaint yet. We don't know what it's going to look like. Give us the opportunity to speak to Revlon's counsel and work all of that in before we think -- you know, discuss and commit to what comes next after those initial complaints are filed.

THE COURT: So the initial complaint will name the New Revlon.

MS. CONROY: It will -- well, I'm assuming the stay will be lifted by May 15th, so that's my assumption. So --

THE COURT: Right.

MS. CONROY: -- yes, it will.

THE COURT: Okay. Well, assuming all that goes smoothly in the bankruptcy court, then -- and you name New Revlon and they get served and get appearances in here -- I'll just tell you this. I will give you adequate time to meet with them -- get their appearance in here and meet with them and have it done in an orderly fashion. I think that only makes sense. Okay?

MS. LESKIN: Thank you, your Honor.

THE COURT: Okay.

MS. CONROY: And, your Honor, we're making the assumption that we are able once a stay is filed to just file here in your court the New Revlon complaints as part of the subject matter of this MDL.

If anything appears that that's not the case, we will inform everyone. There may also be cases that are filed in other federal districts, and then there'd be tagalongs. But we're not anticipating a problem there.

THE COURT: I wouldn't either. The only people I would think would -- I can't imagine the MDL panel would want to talk about this again. They have a busy docket with other cases. So I don't imagine they want to revisit this because there's a new defendant coming out of bankruptcy.

MS. CONROY: I don't think you have to. But if you told us to let them know, we're happy to do that.

THE COURT: No.

MS. CONROY: But I think --

THE COURT: I can check on that. I'll put that on my homework. But I don't imagine they want to -- I know they're busy.

MS. LESKIN: And, your Honor, once they are named and appearances are entered, we can coordinate with defense counsel for Revlon to see -- make sure that -- see if they intended to object to transfer of these cases here as well.

THE COURT: Yeah, that would be good. And if they want to do that, then they'll have their own battle.

MS. LESKIN: Exactly.

THE COURT: Yeah, okay. Thanks.

MS. CONROY: Well, that's a problem let's hope we don't have.

THE COURT: Yeah, right, right.

MS. LESKIN: Thank you.

THE COURT: Okay. Bankruptcy. Okay.

So probate matters. I understand we're not proceeding -- plaintiffs are not proceeding with those at this point.

MS. DEBROSSE ZIMMERMANN: We are not, your Honor. Just in consideration of jurisdictional and comity concerns want to do the right thing early. We usually see this around settlement, some kind of discussion about these issues. And so we'll just reserve that for a later time.

THE COURT: Okay. And I entered the direct filing order that was proposed, I suppose, at some point, so that's been taken care of.

General causation I know is going to be a contested issue. And I have my general causation expert getting up on her feet.

MS. TROTTER: Yes.

THE COURT: But it looks like you're going to ask for

briefing on it.

MS. DEBROSSE ZIMMERMANN: We are, your Honor. I think at the first CMC on behalf of the plaintiffs I said I would consult with leadership, but I'm confident that we will be opposing the proposed general causation bifurcation.

We have met and conferred on it on quite a few occasions. We're in the same place and just kind of rely on Judge Kennelly in TRT saying, you know, generally it's not an efficient process. So we are prepared to brief the issue, but we are willing to continue to meet and confer. But I don't know if it's going to change a whole lot.

MS. LESKIN: Your Honor, Lori Leskin again.

We understood the Court's order to ask us to continue to meet and confer. We had hoped to see the master pleading so we could put our proposal in a little bit more context. As you know, that is a little bit delayed in how it's proceeding.

But we did send a proposal last week to the plaintiffs' steering committee, leadership committee, on how to set out a general causation schedule that would very promptly allow this Court to resolve the question of general causation. I think the schedule we gave them, consistent with Judge Cote's schedule in the Acetaminophen Litigation in New York, would have a decision sometime within the first year, during which time we could proceed with things like fact sheets, collecting information from the plaintiffs, getting the rest of the

plaintiffs here.

We have not yet had a conversation about the merits of that proposal except to hear that -- as you've heard now -- that plaintiffs continue to object to any type of front-loading of general causation questions.

So I think briefing will be important to allow us to put in context exactly what our proposal is and allow your Honor to see both how that is more efficient in this context, how it differs from the Testosterone Litigation that Judge Kennelly had and why it is more similar to what Judge Cote is doing in the Acetaminophen cases.

THE COURT: Okay. So is it wise to set that briefing now? It doesn't seem like it if we don't have the complaint.

MS. LESKIN: The proposal we had, your Honor, triggers from the filing of the master complaint. For example, what we asked -- what we proposed is within two weeks of the filing of the master complaint that the parties would sit and talk about what the schedule -- what topics would be consistent with general causation and that any remaining dispute would come to your Honor within 30 days to help identify what topics are relevant to general causation and which are not.

So the schedule we have would all trigger off the filing of the master complaint. And we're fine going forward and briefing that so we can move forward on the question of general causation while the rest of the issues, including the

various complaints, how we respond to that, short-form complaints, Revlon, and then fact sheet negotiations are continuing.

MS. DEBROSSE ZIMMERMANN: Your Honor, if I may. We don't believe it's dependent. And let me try to explain to the Court why it cannot be efficient.

Even the dialogue about the scope of discovery as it relates to general causation being in theory arguably pure science is false when it gets to a significant issue like notice.

Where do we generally find a lot of that testimony and evidence about notice? We find it in marketing. I understand this isn't a drug or device case; it's a cosmetic case. But in those cases, we find a lot being engaged in traditional discovery, being able to take marketing depositions, being able to take science depositions, being able to tell that story.

And when we talk about efficiency, even the context of depositions, we can all hear it now: "Objection. Exceeds the scope of general discovery." Then what? Do you instruct the witness to answer? Do we have to engage the Court? Will it call on a special master? Just as a preliminary overview, it is less efficient and it is more parallel to TRT and Judge Kennelly's position.

So if the Court thinks well of it, I never think it's a bad idea to have another discussion and to meet and confer.

But in real life, we will have two different discovery processes. This will be drawn out. We will argue about the scope of general discovery.

THE COURT: I'm not going to order you to meet and confer about this again. You're not going to agree about it. It's a basic -- you have a difference of opinion about this. I mean, I'm all about meeting and conferring, but not -- I was a public defender. I had a cement wall in my office. I beat my head against it constantly. Okay? There is no need to do that. Okay? Right here. Right here.

So that's not a good use of time.

MS. DEBROSSE ZIMMERMANN: Agreed.

THE COURT: My question is, is this something we should be briefing now? Is this something that can wait till later? Is this -- your proposal to me, your joint status report, says you need 21 days from today.

MS. DEBROSSE ZIMMERMANN: And we agree --

THE COURT: Now I'm hearing, no, we should wait until after the complaint. Two weeks after the complaint, you meet and confer again. Then you do it 21 days later. So I'm just -- I'm marking the calendar of what I'm going to get and when I'm going to get it. So I'm happy to set something due in two weeks.

I'm not a big one for briefing on discovery issues. As a general rule, don't start thinking, oh, we're going to be

briefing a lot of discovery. No. No. But I understand this is sort of a preliminary thing that is very significant to the case. So I'm happy to take some briefing on this.

But I'm not -- don't think you're going to be briefing whether someone should answer an interrogatory. That is not happening.

MS. LESKIN: And that is not our intention, your Honor --

THE COURT: Okay.

MS. LESKIN: -- because I think -- once the parameters of general causation are defined and whether we are proceeding that way, I have done this enough times to know that we are able to work out as grownups how to negotiate where the lines are and who the parties are.

In terms of timing, the 21 days I think was under the assumption that we would have the pleadings document pretty close to final. But we do not. So I think what my colleagues are asking is that we do that briefing subsequent to the receipt of the master complaint. And if that is coming in on May 15th, we can follow up with briefing from that date.

MS. DEBROSSE ZIMMERMANN: Your Honor, that was not part of the discussions that led to this. We had a discussion. It was 21 days from your Honor leading this hearing today. We're prepared to move forward with the briefing. It was not contemplated nor discussed in our meet-and-confers that that

time would begin to run.

As your Honor stated in the first CMC, we're ready to move this case forward. Defendants want to address the general causation issue. It was advanced at the first CMC, and we're prepared to address it.

THE COURT: Okay. Well, I'll let them look at the complaint before they have to address it. So I will enter an order that -- we're going to have simultaneous submissions. Yeah, that's great. So it will be 21 days after the complaint. So I'm assuming that that's going to be on 5/15, but I know that's -- I've got all the caveats.

MR. LONDON: Your Honor --

THE COURT: I've heard them all.

MR. LONDON: -- they're decreasing right now.

THE COURT: They're not increasing. No, they're not.

MS. DEBROSSE ZIMMERMANN: Decreasing, not increasing.

MR. LONDON: Decreasing, your Honor.

THE COURT: Oh, they're decreasing. Okay. Decreasing. Okay. Great. Okay.

Federal and state court coordination. Anything to say about that? I think the idea of that is there's no real plan. At this point we'll keep stewing about it.

MS. TROTTER: I think that's right, your Honor. I think at this point there's not an actual sort of plan in place, but we'll see how the, you know, litigation proceeds.

It's our understanding that at this point, the MDL is sort of still running ahead of the state court actions, at least to this point.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: And one point -- and I'm sure we'll be able to work it out, and we've been working well together -- is we hope the defendants can on a weekly basis -- and we've talked about this -- provide the state court cases that are pending. Clearly they're being sued and served and not us, and that would be helpful with these efforts just to know all of the cases that are pending out there.

THE COURT: Okay. Well --

MS. TROTTER: We'll take that under consideration, your Honor.

THE COURT: Okay.

MS. TROTTER: But I would say that since that proposal was made, it was actually one of the plaintiffs' leadership group that filed a state court complaint. So they're not completely in the dark about what's going on in the state court.

THE COURT: Okay.

All right. Preservation order, ESI protocol. I know I entered a qualified protective order.

MS. DEBROSSE ZIMMERMANN: Yes, your Honor. If I may take items 7, 8, and 10d and f. We could discuss the ESI

protocol, the preservation order, the confidentiality order, and the clawback order. Our teams have worked well, really resolved a lot of issues, continued to work through issues.

I believe -- and I'll let defendants speak for themselves -- that both sides have agreed to 14 days. We think our teams can get there on these four different issues.

THE COURT: Okay. That's an ESI, a protective order, a confidentiality order, and a clawback order.

MS. DEBROSSE ZIMMERMANN: Yes. And item 6 as well, your Honor, preservation order. ESI, confidentiality, and the clawback.

THE COURT: Okay.

A new person.

MR. BEGAKIS: New face.

THE COURT: Yes.

MR. BEGAKIS: Nick Begakis for the L'oréal USA entities, your Honor.

We're fine with the 14 days.

THE COURT: Okay. And so in 14 days you're going to submit these orders, potentially four separate orders or some jumbo order you think that are going to be agreed.

MR. BEGAKIS: The defendants' preference is for the jumbo order, your Honor.

THE COURT: Okay.

MR. BEGAKIS: There are some disputes that we don't

think -- there are at least two or three disputes that the parties have indicated they're going to stand on their objections, so those will remain and need to be resolved.

THE COURT: Okay. So 14 days is May 2. May 2nd.

MR. BEGAKIS: And so does the Court have a preference for what we should submit to resolve the remaining disputes? Because I know there's going to be at least a couple when we get there.

THE COURT: Well, are they going to be like, "Oh, we've agreed completely on ESI, but we have an issue, one issue in protective order"? I mean, how is it breaking out?

MR. BEGAKIS: There's one issue -- and I can just briefly for overview, your Honor. There's a few issues on the ESI order. With regard to the confidentiality order, there's one issue that is likely to be worked out. And then on the privilege logging, the privilege log order, there's an issue about when the cutoff is for logging documents that's going to remain in play.

THE COURT: So probably what would be easiest is you submit the orders that you agreed to. I'll enter the orders, although that's contrary to you wanting one jumbo order. And then maybe file a status report that just goes to these four things, and you can set forth your opposing viewpoints.

And what I'd like to do -- and I don't want to breach MDL protocol, but what I'd like to do is just get the people I

need on the phone.

MR. BEGAKIS: We do, your Honor, have a discovery subcommittee on both sides that's limited and not quite as large as the group that's here.

THE COURT: Yeah. I mean, I could do that, or I could put it over to the next status.

MR. ABRAMOWITZ: And, your Honor, if I may --

MS. DEBROSSE ZIMMERMANN: Your Honor, if I may. It's my partner Mark Abramowitz, who is one of the co-chairs of ESI. We have Kelly Heimann and Jennifer Hoekstra as well, the entire ESI team. So I thought someone who knows better should stand up there.

THE COURT: Yeah, so we could do that. I mean, it's your preference. I don't want to leave anybody out. I want people to feel like they can participate. They have the call-in number, all that. But I also don't need all of this -- all of this participation to resolve how are we going to do a clawback, you know, or whatever the issue is, you know, how many days for a clawback. Like, these are not -- these are decisions that are like this (indicating).

MR. ABRAMOWITZ: Good news is clawback is one of the ones that we have agreement on.

THE COURT: Okay. There you go.

So, you know, I can do it either way, but I do want to be mindful that there are lots of people who may want to be

involved.

MR. BEGAKIS: So, your Honor, we'll anticipate filing a status report in 14 days and proposing a way for the Court to resolve these issues.

THE COURT: Okay. That would be great.

MR. ABRAMOWITZ: Same here, your Honor. We're good with that.

THE COURT: Anything to add?

MR. ABRAMOWITZ: No, your Honor, not at this time.

THE COURT: Okay. Great. May 2nd.

MR. BEGAKIS: Thank you, your Honor.

THE COURT: May 2nd for these four matters. So that's preservation order, ESI, and, 10 -- my goodness -- confidentiality order and clawback.

MS. DEBROSSE ZIMMERMANN: Yes, your Honor.

THE COURT: Okay. Where are we then?

MS. DEBROSSE ZIMMERMANN: We addressed LDC item 9, and I think we're up to other matters. And what remains -- and I think we've discussed privilege log as well. I think Michael will address privilege log. But what remains is initial disclosure, future case management conferences.

THE COURT: Yes. So we're at odds over initial disclosures?

MS. DEBROSSE ZIMMERMANN: Yes, your Honor. The proposal is that a master set should be served by each

defendant. We think it's timely and proper, notwithstanding the stay, in terms of what's required to be disclosed by Rule 26. We have met and conferred on the issue, and this is where we are.

THE COURT: Mr. Ellis, you're back.

MR. ELLIS: I am, your Honor.

THE COURT: All right.

MR. ELLIS: I don't recall meeting and conferring on this issue. I remember that it was part of the joint report that was sent over, and we actually had offered some different viewpoints of what was said.

As Rule 26 says, there has to be a case management conference set, and then immediately as practicable, no later than 21 days, you are to have the Rule 26(f) conference. Obviously, there's many issues that go into that beyond just discovery. These status conferences, at least from our understanding, don't qualify as a case management conference necessarily.

And naturally, your Honor, I think the Court has heard some of the things we've said about how the filing of a master complaint and consolidated complaint dictates exactly what we can do. Right as things stand now, we don't know what products are going to be alleged in that complaint. We don't know what claims are going to be made in that complaint. We don't know what particular conditions are going to be made in that

complaint.

So both under Rule 26 and the timeliness issue, but also the need for a consolidated complaint to be filed, this was something that was added as an other matter that hadn't been discussed when we got the draft. And so we responded as we did, saying that we thought it was premature and it should be tied to the filing of the consolidated complaint.

If that happens on May 15th and the Court sets a CMC, we know what Rule 26 says and we'll be ready to comply with it.

THE COURT: Can I just -- I was looking through my notes -- I'm sorry -- when you were speaking. It says here that the plaintiffs' leadership counsel is prepared to waive this requirement of initial disclosures.

Am I missing something?

MS. DEBROSSE ZIMMERMANN: No. Your Honor, if you continue, we rather submit that the -- I think that's the next sentence -- a master set should be served by each defendant. So they're not -- you know, initial disclosure in each and every case in the MDL.

THE COURT: Right.

MS. DEBROSSE ZIMMERMANN: And a number of things, your Honor. First, I stand corrected. We discussed it, in my mind, but it was not a formal meet-and-confer. And so defense counsel is correct.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: The second -- I think it is an extraordinary statement to say we don't know the claims. We have pled claims.

THE COURT: I get it. Some of these things go right over a judge.

MS. DEBROSSE ZIMMERMANN: Okay. Okay. But you know I've got to say something.

THE COURT: But I know the plaintiffs say things too. They go right by me.

MS. DEBROSSE ZIMMERMANN: Yes, your Honor.

But -- so just to be clear, we know the products. We know the claims.

We have spent a lot of time, I think correctly, both sides and the Court, discussing efficiency, moving the case forward. That's the purpose of initial disclosures, to let us know preliminary information about the defendants moving forward.

We've proposed a master set from the defendants, and that's our proposal.

THE COURT: Okay. So -- but what are you proposing, that 30 days after the complaint, they're going to do a 26(a) disclosure, some kind of master 26(a) disclosure, and then you're going to have some kind of fact sheet or something from your plaintiffs 30 days after the complaint?

MS. DEBROSSE ZIMMERMANN: Well, let me consult for a

moment.

THE COURT: Is that what you -- is that what we would do?

MR. ELLIS: I don't know, your Honor, but --

MS. DEBROSSE ZIMMERMANN: Because we haven't discussed fact sheets in this context.

MR. ELLIS: -- I would like to be heard real quickly once we get back on point.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: Yeah. I mean, I don't know if they're tied to fact sheets. But we're saying within, and we would be fine, 30 days of the complaint making the initial disclosures for each defendant.

THE COURT: Okay.

MR. ELLIS: So it's interesting what you said, your Honor, because quite often in mass cases like this, the initial disclosures are waived. Each side waives them because they don't -- they have their own timing, what they want to provide on the plaintiffs' fact sheet.

And so it is a two-way street. They have to do the disclosures as well, but there's no discussion about what they're going to do.

So the point is that it has to happen at a place where the claims are known. Do I know that this is a personal injury case? Of course I do. Do I know that there are going to be

negligence/strict product liability claims pled? Of course I do.

Do I know from 116 complaints what specific products are at issue that are manufactured by my client? I do not.

You know why I do not? Because in my case, in L'oréal, they identify Dark & Lovely. That's a brand. It's not a product. They identify Optimum. That's a brand, not a product. There's ten relaxer products within Dark & Lovely's line at minimum. There's five within Optimum. Each individual defendant has lines of products and makes relaxers. There's potentially hundreds of specific products.

Some plaintiffs allege Dark & Lovely and Optimum. Some talk about Strength of Nature products and everything else or their lines, but they don't allege specific products. So without the complaint, there is a lack of knowledge about what do I offer as an initial disclosure.

Set that to the side for a second.

Again, the Court has it right. Oftentimes this is waived because the timing of what has been talked about with respect to the long-form complaint, a short-form adoption-of complaint, and plaintiffs' fact sheets has convoluted that normal process that we follow under Rule 26.

So the Court is correct. At the time that we would be providing our documents or our categories of documents and identifying where those are held -- because that's all we're

required to do as part of Rule 26 -- they should be providing information to us as well on the individual plaintiffs and their fact sheets and what products they use, when they used them, what their exposure rates, what the defects were for those products, and all of those things like that.

So it was interesting that we saw this in the joint report for the first time, and we responded to that. But I think the Court has heard from us and has heard certainly from me that the issue, first, all cases start with a complaint. Let's get that done, and then let's go to the next step.

So to come here and say, "I want all their discovery because they know what it is," I don't think it should go over anybody's head. We don't.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: Well --

THE COURT: Go ahead.

MS. DEBROSSE ZIMMERMANN: -- just a few notes, your Honor.

As defense counsel said, where are the documents? And I guess part of it is confounding and, you know, ob -- you know, just confusing things that really have no bearing. Perfect example: Dark & Lovely is a brand. And there are hair relaxers, part of that Dark & Lovely brand.

All of these complaints, 116 complaints and more that are being filed, contemplated hair relaxers, a very specific

product that relaxes the curl.

And so to stand before this Court and say, "We have no idea what products you're talking about. We so have no idea what products you're talking about" -- although we've alleged them in the complaint -- "that we can't tell you where those documents are."

There is nothing unusual about the process that's being contemplated here. We're asking for a master set for specific requirements under Rule 26(a). We can still move forward with everything that Mr. London contemplated as it related to the long form and the short form.

THE COURT: Okay. I'm not opposed to initial disclosures. They seem sensible to me. But I'm not going to have the defendants doing anything until they get a copy of the master complaint in their hand.

MS. DEBROSSE ZIMMERMANN: Understood.

THE COURT: Okay? So don't come back to me again and tell me you're still talking about it. Get the complaint done.

MS. DEBROSSE ZIMMERMANN: Yes, your Honor.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: It will be done.

THE COURT: I hear you.

So I'm not going to set any dates for initial disclosures. And I'm happy to talk more to you about that, about what makes sense in that regard.

MR. ELLIS: Thank you, your Honor.

MS. DEBROSSE ZIMMERMANN: Thank you, your Honor.

THE COURT: The last thing that you talked about was setting dates, I think, for the rest of the year. Do you want me to do that?

(Counsel conferring.)

MS. DEBROSSE ZIMMERMANN: Oh. Yes, your Honor.

May we address one housekeeping matter --

THE COURT: Of course.

MS. DEBROSSE ZIMMERMANN: -- which was an oversight on our part. I believe it was the qualified protective order you entered did not have a CMO number. And when we're at Document 939 --

THE COURT: Yes.

MS. DEBROSSE ZIMMERMANN: -- and we're yelling at ourselves trying to find the document, we'd like a CMO number. So if the Court thinks well of it, can we resubmit that order to ensure that it has a CMO number? Or how would you like us to handle that procedurally?

THE COURT: Kara, do we need a new one, or can we just put a --

LAW CLERK: Can we just say "amended" and add the CMO number?

MS. DEBROSSE ZIMMERMANN: I think so. That would be great. Thank you.

THE COURT: Okay. So we'll put a CMO number on it.

Okay. So we looked at dates just for our own purposes. And we were looking at six weeks -- you know, six-week dates if that works for all of you.

Now, some of those dates -- yes?

MS. DEBROSSE ZIMMERMANN: No, your Honor.

THE COURT: Okay.

Some of those dates are going to -- they're going to hit in the summer. They're going to hit Fourth of July. They kind of try to work around my trial schedule because having you here in a trial week is not too bad. You're only here 50 minutes, so that's not bad.

I don't know if it makes sense to schedule them out the whole year. I'm happy to do that. But, you know, if you're in the midst of briefing motions to dismiss -- which I know you think they're not going to file, but I'd be very surprised if they don't file any -- then, you know, I don't know if we really want to come in for a status. Particularly, I don't really want 70 people or 50 people coming in for a status.

So we could set them, and then if we decide we don't need one, then we would just go 12 weeks, I guess, without a status. So we can kind of play it by ear. Maybe you'd file something and say, "Hey, we don't need to see you this month," and we'd just move to the next one. But I'm happy to set them

because I know you're all very busy people, and then they'd kind of be -- we'd have placeholders for them.

MS. TROTTER: I think your Honor's point about potential, like, hearings let's say in the event there is a motion to dismiss, you know, that's a notable caution that, like, even if we wanted to come in on a status conference, we ought to be trying to combine that with a hearing, substantive hearing, if we're going to have one on serious issues.

THE COURT: Right, right.

MS. TROTTER: So it may make sense once it looks like the master complaint is going to be imminently filed, then we'll have a better sense of, okay. That got filed on that date, and that's going to trigger a bunch of things. Perhaps we can then meet and confer about some proposed -- some proposal for how often we ought to come in or how we might coordinate dates.

THE COURT: Right.

MS. DEBROSSE ZIMMERMANN: I think our instinct was every four weeks just to keep the ball moving.

THE COURT: Right.

MS. DEBROSSE ZIMMERMANN: And to know that we had the date set, especially with these large teams. You know, once your Honor sets that schedule, then we build everything around it if we're not set for trial or have other hearings. But I agree with Rhonda to the extent I think they should be set, and

then we can consult as things progress. But I think especially in light of some of the issues we talked about today, it would just help to know that we'll be before your Honor in four weeks. And if that needs to be moved, then we'll do that.

And your point is well taken, your Honor. The LDC was here today, but there will be less of us moving forward in the future.

THE COURT: Well, I guess certainly when we're in discovery, I would want to see you all the time because that does help people get together and meet and meet in the hallway and all that. But until we get to that point, I don't want to be wasting people's time. And I'm not sure when we're going to get there, although I've got May 15th emblazoned right here.

Okay. So why don't we -- what was our first proposed date, Kara?

LAW CLERK: May 31st.

THE COURT: So May 31st. I was trying to accommodate people maybe being away for the holiday.

MS. DEBROSSE ZIMMERMANN: Right.

THE COURT: So we kicked it a week.

MS. DEBROSSE ZIMMERMANN: It's my mother's birthday, so that's good luck.

THE COURT: Perfect. Perfect. We'll have cake.

MS. TROTTER: That works for the defense, your Honor.

THE COURT: Okay. And then I'm really tied up in June

with some travel and some trials. So the next time I had available was the week of the Fourth of July. That Thursday is the 6th. Is that too much of a drag for people with their lives?

MS. TROTTER: That's fine for the defense, your Honor.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: We'll make it work, your Honor.

THE COURT: Okay.

MR. ELLIS: Objection. Assumes facts: We have lives.

THE COURT: Yes, indeed.

MS. DEBROSSE ZIMMERMANN: I thought of explaining this to my children as we talked about June 6th.

THE COURT: Yes. Yes.

MS. DEBROSSE ZIMMERMANN: But they like shiny things. I'll make it work.

THE COURT: Terrible. Terrible.

Okay. And then what's next?

LAW CLERK: August 23rd.

THE COURT: And these are all at 1:00. And we'll have Webex, and we'll have telephone.

So August 23rd. That's the end of the summer. Kids are going back to school. Kids are going to college. You know, life is happening. So we can assess do we really need that, but we'll have it in our books.

Okay. September?

LAW CLERK: We did October 4th next.

THE COURT: October 4th. October 4th.

MS. DEBROSSE ZIMMERMANN: That's fine for us, your Honor.

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: Oh, your Honor, and I am so sorry. Our co-counsel Fidelma Fitzpatrick is not present -- and I meant to say it on the record -- because she's in trial. So I'm sure she will make these dates work, but we do have --

THE COURT: I think she wrote me about that. She does -- nobody needs to write to me about not being here because there's so many of you.

MS. DEBROSSE ZIMMERMANN: There are a lot of us, yes.

THE COURT: What else?

LAW CLERK: November 17th.

THE COURT: And then that was it. I thought we may not want to see each other in December.

MS. TROTTER: I think that's good, your Honor.

THE COURT: We'll see.

Okay. I'm looking forward to our next --

(Counsel conferring.)

MS. TROTTER: That works for the defense, your Honor.

THE COURT: Okay. Anything else for me?

MS. DEBROSSE ZIMMERMANN: Nothing more from the

plaintiffs. Thank you, your Honor.

MS. TROTTER: Nothing from the defendants. Thank you, your Honor.

THE COURT: Thank you, Ms. Trotter.

All right. So everybody have a good day. Travel safely back to where you're going. Look forward to hearing from you.

MS. TROTTER: Thank you, your Honor.

MS. DEBROSSE ZIMMERMANN: Thank you, your Honor.

Thank you both. Thank you.

(Concluded at 1:59 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *April 20, 2023*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

EXHIBIT F

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	)	MDL No. 3060 Master Docket No. 23 C 818
This Document Relates to All Cases	)	Chicago, Illinois July 6, 2023 1:00 p.m.

TRANSCRIPT OF PROCEEDINGS - Status
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(In open court.)

THE CLERK: 23 C 818, In re Hair Relaxer Marketing, Sales Practices, and Products Liability Litigation.

THE COURT: Hello, everyone.

MULTIPLE COUNSEL: Good afternoon, your Honor.

THE COURT: You can be seated.

All right. Two things. Anyone who is on Webex who is not speaking, if you could mute your microphone, that would be great.

And, secondly, if you are attending remotely and you want to have your appearance reflected on the record to show your clients later that you attended, make sure you give your name and firm information to your liaison counsel, either defendant or plaintiff, and then that person will provide it to us so the court reporter can log your appearance.

Okay. Good to see everyone.

My mic. Do I have my mic on?

Okay. So the complaint was filed on May 15th. And I got a motion to dismiss as we agreed on July 5th. And I have briefing already set on that motion, which is great.

Now I have gotten another motion based primarily on jurisdiction by PDC Brands and something, doing business as Parfums or something, and now I have some other briefing requested.

So how do plaintiffs want to handle that? I mean, I

was hoping to keep everybody on the same schedule. That's obviously not happening.

So I have -- Sally Beauty has a motion to dismiss due on 8/21. They are not part of the omnibus motion to dismiss that I saw. Mr. Ellis, I don't know if you're in charge of this, but I'm looking at you.

And then I have a defendant --

(Extraneous noise disrupts the proceedings.)

THE COURT: Someone needs to --

COURT REPORTER: Counsel who is remote, if you are not speaking, please mute your phone so we're not hearing your noise coming through into the courtroom. Thank you.

THE COURT: Thank you, Laura.

Defendant McBride, who has requested until 8/21, I do not see that defendant as part of the omnibus motion. So anything from defendant I'm happy to hear.

And then how would you like to handle briefing on behalf of the plaintiffs?

MS. FITZPATRICK: Your Honor, I think I can assist with the Sally Beauty one. Ms. Levine, who is --

THE COURT: And maybe an appearance, just in case.

MS. FITZPATRICK: Oh, I'm so sorry. Fidelma Fitzpatrick on behalf of the plaintiffs.

THE COURT: Yeah.

MS. FITZPATRICK: We have discussed this. The issue

with Sally Beauty is whether we have named the correct defendant. So we are working through those issues.

It's my understanding from the conversations that we've had that Sally -- whatever the correct Sally entity is will sign onto the briefing that has already been done by the defendants. They've looked at it, they've reviewed it, and they've only reserved anything about jurisdiction or something that would be specific to Sally.

So I think that we're fine in that regard, and we're hoping in the next two weeks we'll have that resolved with them so we won't need until August.

I don't know anything about the McBride. I saw that it got filed just before court. I don't know anything about who they are and what their position is.

But what we would hope is that we could keep as much on -- I'm going to call it the main issues on the same briefing schedule, particularly because it's my understanding that the defendants have shared that -- I'm going to call it the omnibus substantive briefing amongst themselves and have provided that.

THE COURT: Okay. That's my hope too.

But let me just follow up then. If Sally signs off on the omnibus but also wants to do a supplemental on personal jurisdiction and they do so by 8/21, do you want me to just set that briefing at 28 days? Do you want to propose a briefing? I mean, what do you want me to do?

MS. FITZPATRICK: We can do the 28 days, your Honor. But I believe -- I'm more than 90 percent confident that there will be no personal jurisdiction briefing because we're working through the issues of who is the correct defendant.

THE COURT: Okay. Great.

Anything from you? I don't know. These are people that you didn't file a brief on behalf of, so you don't have to stand in for them.

MR. ELLIS: Thank you, your Honor.

Dennis Ellis on behalf of L'oréal USA, Inc.; L'oréal USA Products, Inc.; SoftSheen-Carson, LLC.

I appreciate it.

THE COURT: And anything from you, though, on McBride? Even though I just excused you, now I've got you.

MR. ELLIS: I don't know anything about McBride either yet, your Honor.

THE COURT: Okay. Okay.

Okay. So McBride, they're requesting until 8/21. Do I have a hand going up on behalf of McBride?

Okay. So I'm going to grant that request.

(Counsel conferring.)

MR. WOLF: This is Tom Wolf. I've appeared via phone.

THE COURT: Yes. Can you state your name.

MR. WOLF: I'm sorry. I appeared via phone. It's attorney Tom Wolf, W-O-L-F, on behalf of McBride. I'm the

local counsel -- I think you're referring to it as the liaison counsel -- on behalf of that defendant. My partners in Florida will be filing appearances as the lead attorneys for McBride.

THE COURT: Okay.

MS. FITZPATRICK: Your Honor, honestly, we saw this a couple hours before we came over. I don't even know that we have a position.

What I would suggest is maybe give us a couple of days to actually talk to their lawyers and figure out what this is about and, if it's okay, maybe report back to your Honor early to mid next week on where we are with that.

THE COURT: Okay. So here's what I'll do. So right now I have pending a motion requesting until 8/21 to answer or otherwise plead, which seems reasonable since they're just arising.

Yes? I have someone standing up.

MR. WILLIAMS: Your Honor, I was just going to wait until you're done with this, and then I had the Parfums de Coeur motion. I was going to give an update on that. But I can wait for --

THE COURT: Okay. So do you want to file then a status at a certain point on McBride? And you can let me know what's going to happen.

MS. FITZPATRICK: Yes, your Honor. If you don't mind --

THE COURT: Sure.

MS. FITZPATRICK: -- if you can give us till next week to meet and confer with them and work out the issues and then report back to you, I'd appreciate that.

THE COURT: So next week is -- you want to say the 14th, next Friday?

MS. FITZPATRICK: Sure, that works.

THE COURT: Okay. So next -- so I'm going to give them till -- so McBride, I'm going to grant the motion for them to respond to the complaint by August 21st. But I'll get a status report from plaintiff just on that very narrow issue by 8/14, and you'll either set a briefing schedule --

MS. FITZPATRICK: 7/14, your Honor, I think.

THE COURT: 7/14.

MS. FITZPATRICK: Yes.

THE COURT: 7/14. Thank you. 7/14.

So you'll either set a briefing schedule, or you'll tell me the whole thing is taken care of and they're part of the omnibus or something like that.

MS. FITZPATRICK: That's right, your Honor. We'll let you know.

THE COURT: Okay. Great.

MS. FITZPATRICK: Thank you.

THE COURT: That's it for me on motions to dismiss, unless --

MR. WILLIAMS: Your Honor, the first motion to dismiss you mentioned was Parfums de Coeur. We were defendants in two cases, and we filed a motion to dismiss yesterday. One of the plaintiffs' firms that filed against us has agreed to dismiss. We're going to do that paperwork in the next few days. And we're speaking with the other firm as well.

So I don't think we need a briefing schedule at this point. We'll probably be able to work it out.

THE COURT: Okay.

MR. WILLIAMS: And, if not, we can request a briefing schedule.

THE COURT: Okay. Great.

MR. WILLIAMS: Thank you.

COURT REPORTER: Your name, please.

THE COURT: Yes.

COURT REPORTER: Your name, please.

MR. WILLIAMS: Jim Williams.

COURT REPORTER: Thank you.

THE COURT: So I won't set a briefing schedule on that. Does that seem reasonable? Because I was going to. I mean, I was going to set the same briefing schedule, but --

MS. FITZPATRICK: Yes, your Honor. I mean, it would -- if that motion is going to go forward in that single case, we would suggest that we do it in the 28 days to keep it in the -- that we could respond to it within the 28 days to

keep it on track with everything else. I'd hate for it to become just a tagalong later.

MR. WILLIAMS: That's fine, your Honor.

THE COURT: Okay. So I'm going to set the same briefing schedule, with the anticipation that it's magically going to disappear. Okay. Great.

Now, this next class complaint is due on 7/31. So looking forward to that. I don't think I need to hear anything about that.

MS. DEBROSSE ZIMMERMANN: On schedule.

THE COURT: Okay.

I thought next we would talk about Revlon. Do I have Revlon people here?

MS. DEBROSSE ZIMMERMANN: Yes, your Honor.

Diandra Debrosse for the plaintiffs. And Jayne Conroy is chair of our bankruptcy committee and will be speaking on the bankruptcy issues, along with bankruptcy counsel for the plaintiffs, who will make an appearance as well, your Honor.

THE COURT: Okay. And I think I have some people on Webex regarding Revlon. So maybe you could state your appearance.

MR. LUSKEY: Good afternoon, your Honor. Randy Luskey from Paul Weiss appearing by video on behalf of defendant Revlon, Inc.; Revlon Consumer Products Corporation; and Revlon Group Holdings, LLC. I apologize I couldn't be with you all in

the courtroom today. I look forward to joining for future appearances.

I'm joined today by my colleague Robert Britton, who is restructuring counsel representing Revlon in the bankruptcy proceedings in the Southern District of New York bankruptcy court. Mr. Britton is available to answer any questions the Court may have about those proceedings.

MR. BRITTON: Good afternoon, your Honor.

THE COURT: Good afternoon.

And do you have an appearance, Mr. Luskey, in this case?

MR. LUSKEY: I do, your Honor.

THE COURT: Okay. All right.

MS. CONROY: Jayne Conroy -- good afternoon, your Honor -- for the plaintiffs.

THE COURT: Good afternoon.

Okay. So I've read your submissions. I don't feel at this point that I'm being asked to resolve anything. Maybe I'm missing something in the pleadings. I understand there were 30,000 claims filed. I don't know if they all have to do with this matter or if they have other -- I know there were some talc issues, so that's not my bailiwick.

And Revlon has filed challenges to -- or objections to -- on a batch basis to 3,000 of those claims. I mean, that's all for the bankruptcy judge, bless his or her heart.

That's not my -- it's outside my lane.

But what I guess my question is, if there's 30,000 claims -- let's say there's 25,000 claims over there. I mean, I only have 250 cases. Am I missing something? Am I going to get an avalanche? What's happening? Because I should prepare.

MS. CONROY: Let me -- I have -- I am the bearer of bad news, yes.

THE COURT: Okay.

MS. CONROY: So the proofs of claim -- we had some extreme sports in the bankruptcy. And we were given a date in April for proofs of claim, which have a very different standard --

THE COURT: Right.

MS. CONROY: -- of proof to be filed, of which I think we're really closer to 31,000 proofs of claim, which are all, as we understand it -- and many of them are our own clients -- hair straightener claims, not talc claims.

THE COURT: Okay.

MS. CONROY: So maybe that's bigger than an avalanche.

As -- to set up the timing of this, once those proofs of claims were filed -- and they were for all potential possible claims that would ever be filed against Revlon -- in order for a woman to have any access to justice in your court, your Honor, she would then need to file a complaint in this court by September 14th of 2023, which was a date that was

keyed off of your direct filing order.

So what we are asking you to do is to sort of deal with that timing issue, or that administration issue, in the MDL because the only way a woman has access to justice is to actually file a complaint. But the date is not something that can't be -- can't be moved. It just goes off of a direct filing order.

And there are two ways we could look at this. The first is your direct filing order that was entered back in March was before Revlon actually had an appearance in the case. So it's a question whether the direct filing order even applies to Revlon.

And to be clear, we don't have a problem with ultimately filing complaints on behalf of these women. But it's a very, very fast track to do that, and there's no statute of limitations issue for these women.

The second way would be for you to supersede your direct filing order and change the date to another date that would give us an opportunity to take more time with those claims. And, I mean, some of them are even duplicate claims that are -- just have been filed by different firms.

It's just 31,000 claims is an enormous number of claims. And the burden is on us to get them into this MDL if -- you know, as time goes on.

THE COURT: Okay. So why wouldn't they already be

here against, you know, L'oréal?

MS. CONROY: I'm sorry?

THE COURT: Why wouldn't they already be here against, you know, a different defendant like L'oréal, somebody who wasn't in bankruptcy?

MS. CONROY: The timing. The L'oréal complaints, a client that -- or a potential client that comes to our office, we would be able to collect their medical records, speak to them, listen to whatever product identification information they have. And we have quite a while before we need to file that complaint here in the MDL. This is significantly shortening that period of time.

It's also causing a woman who has a potential claim against Revlon to file a complaint because she has a proof of claim filed. So it's a different -- it's just a little bit different.

THE COURT: But the woman who comes to your office who has a potential claim against Revlon and has a potential claim against L'oréal because she used various products over the years, which can't be that uncommon given the product, what -- is she going to be filing then in this court a claim against both Revlon and L'oréal?

MS. CONROY: I would -- I think that that's the practical reality, that if we are filing 31,000 complaints against Revlon at the end of the summer, it will be against all

of the defendants or at least the defendants that our clients tell us they were exposed to.

THE COURT: Okay.

MS. CONROY: I mean, they're going to pay the $400, you know, once.

THE COURT: Uh-huh. Have you --

MR. LUSKEY: Your Honor, may I address the point about --

THE COURT: Hold on. Hold on.

Have you been talking to my current defense counsel about that, these people?

MS. CONROY: No.

THE COURT: Okay. So, Mr. Luskey, I have a tremendous amount of respect for the bankruptcy court, of course, and the bankruptcy process. And I do bankruptcy appeals. You know, that's how it goes. I otherwise never practiced bankruptcy law, I'm happy to report.

But I'm a little bit -- it's a little odd to me that the bankruptcy court would set the final date, you know, over a statute of limitations. So maybe you can help me with that.

MR. LUSKEY: Certainly, your Honor. And I'll ask Mr. Britton to address specific questions about how that date came to be.

I will note, though, just at the outset that we have in the April 3rd confirmation order from the bankruptcy

court -- there is a September 14th filing deadline. It's not keyed off of the direct filing order as plaintiffs just represented. That section, which is -- of the confirmation order, which is Article IX.A.6 in that final order, states that the deadline is the later of September 14th, 2023, or 90 days after the direct filing order.

And the plaintiffs had the opportunity to challenge that filing deadline, to appeal it, as your Honor just alluded to. They could have appealed to the district court in the Southern District. They did not do that.

We now have a final, nonappealable order. The appeals deadline has passed.

And so I'm not -- I seem to be hearing sort of these collateral attacks on this deadline or whether it can be moved, but I don't think that would be procedurally appropriate.

And, Mr. Britton, I don't know if you had any commentary to add on the question raised about how that date came to be.

THE COURT: I just want to be clear. I thought I read that it had been appealed. So I just want to be clear about that. Am I mistaken that the bankruptcy decision has -- is subject to an appeal?

MR. BRITTON: You are ... there are pending appeals, but not as to this point. So maybe it makes sense for me --

And good afternoon. For the record, Robert Britton --

Paul Weiss -- on behalf of Revlon.

THE COURT: Okay. You are kind of cutting in and out, Mr. Britton. Maybe put your headset on or put your phone on.

MR. BRITTON: Is this better, your Honor?

THE COURT: That is better. That is better.

MR. BRITTON: Okay. Great. Sorry about that, your Honor.

So again, Bob Britton -- Paul Weiss -- on behalf of Revlon.

It is true that there's been a limited appeal pending, but not on this issue. So perhaps it makes sense for me, your Honor, to back up and sort of explain the claims process and how that came to be ...

THE COURT: Can you hear?

MR. BRITTON: ... appeal is part of that as well.

And I'll just before I do that address one comment that was made by plaintiffs' counsel, which is that there's somehow a lower standard for proofs of claim in the bankruptcy process. I'm not sure that's true, your Honor. And when somebody files a proof of claim in bankruptcy, they do so under penalty of perjury that the allegations are true and correct.

And, you know, we'll sort through that in the bankruptcy process, but I'm surprised to hear somehow that it would be more difficult to file a complaint than a proof of claim.

So in the bankruptcy, your Honor, we had a general bar date. There was ...

COURT REPORTER: Would you repeat the last thing you said, please? We couldn't hear you well.

THE COURT: Anyone in the courtroom who has headphones, you'll have an easier time hearing with the headphones. You have some on the table. They're very helpful. I recommend them.

You're very choppy, Mr. Britton.

MR. BRITTON: Would you like me to try to dial in, your Honor, on the phone?

THE COURT: How about that, Laura, a dial-in?

MR. BRITTON: I can try that. Give me one moment. I apologize.

THE COURT: That would help -- or that might help.

(Pause in proceedings.)

THE COURT: While he's dialing, since I still have Mr. Luskey, the plaintiffs who are before me, are they going to amend and state claims against Revlon?

MR. LUSKEY: Your Honor, there are already five plaintiffs that have brought claims against Revlon. And you'll have to ask plaintiffs' counsel their intention with respect to the others.

THE COURT: Okay. That's actually who I was asking. Thank you.

MR. BRITTON: Your Honor, apologies. Can you hear me now?

MR. LUSKEY: I'm sorry.

THE COURT: Yes, I can.

That's all right.

Yes, I can hear you now, Mr. Britton.

MR. BRITTON: Okay. Very good.

So in Revlon's bankruptcy, Revlon's filing was not a mass tort filing. It was a normal financial distress filing. And the context, during the bankruptcy cases, the study came out from the National Institutes of Health alleging a correlation between the use of hair straightening products and certain cancers.

When that report came out, the debtor was already in its -- within its bar-date period; that is, that it had a bar date approved by the Court, and creditors were within the period when they were able to file a claim. That bar date occurred -- I don't know the exact timeline, but about a week or two after that study was published.

And as a result, certain plaintiffs' firms, including some of the MDL lead counsel here, I believe, filed motions within the bankruptcy court several months later to extend the general bar date --

THE COURT: I'm aware. I'm aware of that.

MR. BRITTON: -- to allow the late filing --

THE COURT: I'm aware of that, Mr. Britton.

MR. BRITTON: Right. So ultimately the Court -- the Court allowed the filing of late hair straightening claims with the consent of the debtor, provided that the hair straightening plaintiffs fill out a specialized proof of claim form providing information about their alleged injury and product use.

It's that proof of claim form, not the hair straightening bar date or the deadline to file on the MDL. It's that proof of hair claim form itself that's on appeal right now and whether or not plaintiffs had to fill out that hair straightening proof of claim form, including the specialized information that was set forth on it, as opposed to only including the information set forth on the standard proof of claim form.

That's the appeal that's a pending -- that's pending currently.

THE COURT: Okay.

MR. BRITTON: As part of the plan negotiations, your Honor, we engaged with both our insurers and certain plaintiffs' counsel who had appeared in the case, including, again, some of the MDL lead counsel here, in order to negotiate a process that would facilitate the bankruptcy principle of finality while also giving the plaintiffs the ability to liquidate validly filed proofs of claim through this MDL process.

And so in the context of those negotiations, the date -- the September 14th deadline to file complaints in your court was negotiated. It was sent out on notice to all parties in interest and ultimately approved by the Court in the confirmation order and in the plan. That order is now final and nonappealable, your Honor.

THE COURT: Okay.

MR. BRITTON: The -- yeah. The only thing I'll say about that deadline is it is not correct that that deadline is the final deadline for all plaintiffs. If a woman is diagnosed with cancer at some point in the future based on alleged prepetition use of the debtors' product, she will have an opportunity to file a complaint after that September deadline. That was part of our negotiation.

THE COURT: Right. Okay.

So you have an agreement with -- I mean, it's your position that you have an agreement with the MDL plaintiffs that 9/14 is the deadline.

MR. BRITTON: And that -- it was negotiated with certain counsel, your Honor, who appeared in the bankruptcy proceedings, and it is now part of a final bankruptcy court order.

THE COURT: Okay.

(Extraneous noise disrupts the proceedings.)

THE COURT: I can't hear. Who is speaking?

Who is speaking?

(No response.)

THE COURT: Okay.

MS. DEBROSSE ZIMMERMANN: Your Honor, if I may. Diandra Debrosse for the plaintiffs.

I'd like to give some additional context. And Attorney Conroy's done a great job. And Tristan is bankruptcy counsel, and he'll address some issues just in terms of how this came to be and why it's important, your Honor, as we risk 30,000 cases being filed in September.

My firm did file the first case. Within 30 hours, we became aware that Revlon was in bankruptcy. There were certain firms, including mine, that have been identified that dealt with the bankruptcy. And literally -- what was it, Jayne? -- two weeks we had to cross the country and tell law firms about this bankruptcy.

So I'm talking 30,000 women before you who had less than I think 15 or 16 days, if I recall, to make sure they got their information to their lawyers to make sure the bankruptcy claims were filed.

And in support of what Jayne stated earlier about the standard and the opportunity to properly vet and represent these folks before they have filed in the MDL, that was two weeks to submit a bankruptcy claim, which is significantly different from the due diligence that would be involved in

filing a personal injury case here in the MDL.

And I just wanted to add some additional context to what was happening at that time and the different posture of some of the plaintiffs as it relates to the Revlon defendant versus the rest of the defendants.

And I'm going to stop talking because I am not a bankruptcy lawyer. So I'm going to let our bankruptcy lawyer --

MR. AXELROD: Thank you.

Your Honor, Tristan Axelrod, Brown Rudnick, LLP, for the plaintiffs' leadership committee and executive committee.

I think we're a little off track with the talk of appeals and collateral attacks. To be really -- excuse me. To be really clear about what the plan says, it's the latest of -- the filings in this MDL have to be made on the latest of 90 days after a direct filing order, which is sort of loosely defined; or September 14th; or if someone is diagnosed after April 11th, then it's six months after the diagnosis. But that person, as I understand it, would still have had to file a proof of claim prior.

I will add, actually, there's a fourth category, which is that this only applies to essentially maladies that result from exposure to certain products prior to Revlon's petition date, June 15th of 2022. If someone was exposed to Revlon products after June 15th and that caused a malady, none of this

applies because it's postpetition, in bankruptcy parlance.

So we are not asking to change September 14th. What we're suggesting is the direct filing order is an order that only this Court can enter. The bankruptcy court could never say this MDL must have a direct filing order on such-and-such a date, and here is what it should say.

It is inherent to the power of this Court to say who can come before it and when they should come. And if this Court doesn't want 30,000 filings that aren't diligenced in the manner that plaintiffs' counsel would like it, then the Court can inform the parties of that. So that's -- that's what we're suggesting.

I would also just note that the bankruptcy plan contains a lot of dates that are just put there in every bankruptcy plan to make sure that the process moves forward. And, for example, one of them is what's called an administrative claims bar date. That's where parties who did some business with Revlon after the petition date are supposed to make their claims so that they can be processed and paid.

Revlon is now moving to push that date. And the reason is not all of the administrative claimants are ready to make their claims. And so if you push a deadline on them, they would have to bring broader and less-prepared claims than they might otherwise. And that's not ideal. It's a bit of a problem. So Revlon is trying to change that.

We're not doing exactly the same thing, but it's a very similar idea. There are 31,000 claims here, and they were filed because this hair straightening claims bar date order said essentially anybody who had exposure to these products and might have a claim in the future, whether or not you're sick, you need to file a proof of claim now or you'll forever lose it.

There was an agreement to a certain timeline which incorporated this Court's inherent power. But those 31,000 claims had to be filed. In an ideal world with a little more time, that number could come down, in part because there might be some duplicative claims -- and there's been some talk and action in the bankruptcy court about that -- but also because you have more time to work with people. You decide it's not the best way to bring these claims.

So we might be talking 15,000. We might be talking fewer. That's why we consider the direct filing order to be the right approach here, to give every party enough time to make this process run smoothly so that the filing of all these claims doesn't become a problem not just for plaintiffs, but for every other defendant.

I think it's worth suggesting here one of the big problems is that with 31,000 claimants, if they're all forced to file, that's a burden on them. It's also a burden on counsel. There are filing fees. It's over $12 million in

filing fees.

Now, ordinarily, if we were talking two defendants who don't want to be sued by 30,000 people -- maybe they'd prefer 15 -- you would think they would agree to this. We actually have talked to Revlon about this issue. We were told in no uncertain terms they don't want to move the date.

And to the best we can figure, it seems like a tax. They want a tax on these plaintiffs to discourage the filings. Frankly, we don't think that that is proper within this Court for the use of its inherent powers. And if this Court is inclined to enter a revised direct filing order, the process, just to be clear, we would go and run it by the bankruptcy court to make sure that it's kosher with the bankruptcy court's view of the plan and that it's essentially not a collateral attack and not an appeal.

We would need the bankruptcy court's approval to do this as well. But we are trying to do it really in the interests of all the parties here, to make the process run smoothly so that these claims can be liquidated in the MDL, which, to be very clear, that's what Revlon's bankruptcy plan says --

THE COURT: Right.

MR. AXELROD: -- is you liquidate these claims in the MDL.

THE COURT: Right.

MR. AXELROD: We don't do it in the bankruptcy court.

THE COURT: Okay. I've read what you've given me.

Is that me echoing, Laura? Yeah. I'm sorry, Laura.

I've read what you've given me. I don't see probably the final what I need to see from the bankruptcy court. So I see a response by the debtors.

MR. AXELROD: I'd be happy to give an update of where the bankruptcy court is.

THE COURT: Yeah, I'm probably seeing what plaintiffs filed because that's what they usually give me. And I'm -- you know, and then I'm seeing your position paper and, obviously, I'm seeing Revlon's position paper.

What I'd like to see is the bankruptcy judge's order.

MR. AXELROD: Which order would that be, your Honor?

THE COURT: Well, approving -- you know, the final approval where -- is it a he or a she?

MR. AXELROD: He. Judge David Jones of the Southern District.

THE COURT: Okay. Where Judge Jones articulated these filing dates and that there were four options for these filing dates.

MR. AXELROD: So in our papers -- it's at page 10 --

THE COURT: Okay.

MR. AXELROD: -- there's a citation to Article IX.A.6 of the plan. And in bold towards the end of that paragraph

citation, it says, "All Hair Straightening Liquidation Actions" --

THE COURT: Uh-huh. Okay. So these are our four -- these are your -- these are your options.

MR. AXELROD: Those are the three options. It's sort of intrinsic --

THE COURT: (a), (b), and (c), yeah.

MR. AXELROD: Yes.

THE COURT: Okay. Anything else from Revlon? I don't see your faces anymore, but I know you're still on there.

MR. LUSKEY: No, your Honor. I'm still here. Randy Luskey.

If the Court would like additional briefing on this issue, we're happy to do that. It does seem like the -- that plaintiffs' counsel is attempting to redefine the definition of "direct filing order" in the confirmation -- in the fully approved confirmation order.

As you see from the text in front of you, the order contemplates "90 days after entry of the MDL Direct Filing Order," which had just been issued by this Court. And we're certainly happy to brief the issue that plaintiffs' counsel just raised if it would be helpful to the Court.

THE COURT: Do you understand that plaintiffs' counsel is going to bring this to the bankruptcy judge for approval?

MR. AXELROD: Your Honor, if I may. We need guidance

from this Court before we would go to the bankruptcy court.

THE COURT: No, I understand that.

MR. AXELROD: Okay.

MS. CONROY: And also, to be clear, your Honor, if we were to -- we could submit a superseded direct filing order or a direct filing order with respect to just Revlon because if there was a question whether or not -- it's just a little bit -- not as precise, the direct filing order, but Revlon was not here in the case at the time that the direct filing order was entered.

So there are probably two avenues we could go, either a superseded direct filing order that we could provide to you to review and take a look at or just a Revlon-specific direct filing order. And then with that direction from you, we could go to the bankruptcy court.

THE COURT: And what kind of time are you talking about?

MS. CONROY: I think we would like to have, from today, six months rather than just the summer to vet the claims. Revlon knows who the claimants are, but we would like the opportunity to be able to speak to them all.

THE COURT: So you're talking about mid-January.

MR. BRITTON: Briefly, for Revlon.

MS. CONROY: Yes.

THE COURT: Is someone trying to speak for Revlon?

MR. BRITTON: Thank you, your Honor.

MR. LUSKEY: No. It appears someone is off --

MR. BRITTON: If I may, your Honor.

MR. LUSKEY: -- off mute, your Honor.

THE COURT: Okay. Uh-huh.

Mr. Luskey?

MR. LUSKEY: I wasn't trying to speak. It appears someone else is off mute on the Webex.

THE COURT: Okay.

MR. BRITTON: No, your Honor. Bob Britton from Paul Weiss on behalf of Revlon. Can you hear me?

THE COURT: Uh-huh. We can.

MR. BRITTON: Okay. Very good.

Your Honor, I think it's clear in the plan which direct filing order was -- it doesn't say the last-filed direct filing order; it says on the date of entry of a direct filing order. And counsel understood at that time that your Honor was potentially considering and going to enter a direct filing order in your case.

Mr. Axelrod represented the official committee of unsecured creditors in the Revlon bankruptcy and so was very much involved in the negotiation and -- and agreement around the filing of -- around the date being triggered off of your Honor's direct filing order. Revlon would not agree that a subsequently entered direct filing order would reset -- would

somehow reset that clock.

And in any case, Judge Jones in the Southern District of New York under the bankruptcy plan that's been approved has retained jurisdiction to interpret his own court order. And so to the extent that they want relief from that court order, I do think they would need to go to the bankruptcy court rather than this Court.

THE COURT: Mm-hmm. Mm-hmm.

Okay. Anything else?

So when you enter -- when this order was entered, Mr. Axelrod, I had not yet entered "the" -- as it's called, "the 'Direct Filing Order.'"

MR. AXELROD: So this version of the plan containing this language was filed on March 16th of this year. I believe that the Court's direct filing order that's on now -- and I want to say it's Docket No. 28 -- was filed some two weeks later.

And to be clear, this was filed -- it was confirmed sometime later. It became effective in May.

THE COURT: Okay.

MS. CONROY: We also were not aware of the number of proofs of claim.

MR. AXELROD: A lot of water under the bridge since that time.

THE COURT: Yeah. Mr. Britton, can I just ask you, as

a practical matter, does it seem -- and I know you have a client to protect and represent, and I'm sure you've done an excellent job in the bankruptcy court. But does it seem realistic to you from where I sit to get 20,000 complaints drafted and filed in 60 days? I mean, think of what I'm going to get.

MR. BRITTON: No, your Honor. Right. I doubt -- I mean, you're just asking me a practical question, and I doubt that it's 20,000, your Honor. I suspect that many proofs of claim were filed in bankruptcy proceedings without being fully vetted. And since that bar date, the plaintiffs' firms will have had not just two months, right? They've had since the bar date, knowing that this date was coming. They will have had time to further vet those claims and figure out which complaints they intend to file.

So I would not -- I would not expect that it will be 30,000 or 20,000 complaints ultimately get filed.

MS. CONROY: Your Honor --

THE COURT: Did you say something about 90 complaints?

MR. BRITTON: No, your Honor. I would not expect that it would be 30 or even 20,000 complaints that are ultimately filed.

THE COURT: Okay. Yes.

MS. CONROY: I'm controlling myself a little bit because it's a little difficult for me to appreciate how the

Revlon bankruptcy counsel, knowing that 31,000 women filled out very detailed proofs of claim, that they would not then seek access to justice against Revlon by filing a complaint.

And as their lawyers, we would file those complaints. So I -- I don't know how many. None of us can say. Maybe they're going to be -- you know, who knows. Maybe every single one of them is going to file a complaint. We have no way of knowing.

THE COURT: Mm-hmm.

MR. BRITTON: Your Honor, there's one other point.

MR. AXELROD: I think that that number would go down with more time. But to be clear, if the deadline comes, it's going to be everyone who is not saying, "I won't file a complaint," will file a complaint.

THE COURT: I know. Okay.

MR. BRITTON: And in the interim, your Honor, I should point out that we will continue the claims reconciliation process in the bankruptcy court to -- to disallow invalidly filed proofs of claim, which goes in part to a statement that counsel just made, which is that all of these proofs of claim were highly detailed. In fact, I think many, many thousands of them just have a name and very basic information attached to them and are likely to be the subject of objections in the bankruptcy court between now and September.

MR. AXELROD: And I think we expect to have a voice in

that process as well, your Honor, but that will be before the bankruptcy court.

THE COURT: How much of that is actually going to be handled between now and September in the bankruptcy court? And does that preclude filing here?

MR. AXELROD: Well, your Honor, if I can speak for a moment. We sort of just went through an exercise in the bankruptcy court like this.

There's an omnibus objection process --

THE COURT: Right.

MR. AXELROD: -- in many Chapter 11 cases. What happens is they put names on a spreadsheet. That spreadsheet gets filed. You have 20 days to respond. If you don't respond, you lose your claim.

Our view, which we expressed to the Court -- and there is disagreement on this -- was that this edges up on a very substantive process. It has a substantive effect. And the use of an omnibus objection against thousands of tort claimants at the same time is not consistent with the plan as we see it, which is to liquidate these claims, to do the substantive work here.

Revlon clearly takes a different view of the plan. That's their prerogative. But I think what we're hearing is there is going to be a lot of that. There's going to be more argument on that before the bankruptcy court. And I'd like to

hear from Mr. Britton what the timeline for that is. But in their view of the world, it seems like there's nothing to stop them from filing a spreadsheet with 29,000 names on it tomorrow and saying this will all be done in three weeks.

THE COURT: And then those people would not file here?

MR. AXELROD: Well, if the bankruptcy court entered an order disallowing their claims, that would cause some problems. I don't see that as how that plays out. But people do need to have a facially valid proof of claim in the bankruptcy before they come here.

THE COURT: Mm-hmm.

MR. AXELROD: And to be clear -- excuse me -- there's what's called a claims objection bar date. I think it's referenced in Revlon's papers. That's actually out in October.

And so what could happen is we file these 30,000 complaints because we're up against a deadline. And then after we go through that, after we pay $12 million in filing fees, Revlon still has a month and tries to object to thousands of those claims.

At that point the plaintiffs, their attorneys, they've wasted an immense amount of time and money. So, I mean, the fact that that claims objection bar date comes after September 14th compounds this problem tremendously.

THE COURT: Mm-hmm. But if the filing deadline gets extended, the claims objection deadline is potentially going to

get extended by Judge Jones, isn't it?

MR. AXELROD: Well, they could move to extend that claims objection bar date. That's -- to my point earlier, that's one of those dates in the plan that you can move. And that's -- without, frankly, collaterally attacking a plan, you can just move those things.

I think we would certainly have a say in extending that date as well. As a certain point -- you know, that date has to come first, in our view, before complaints get filed here.

THE COURT: Okay. Well, I guess my -- you know, I'm looking at this kind of from 30,000 feet right now, and I see that I have to get in the weeds a little bit more. And I'm happy to do that.

If the concept is that the claims are to be liquidated here, then I would like to create a scenario and a path where that can be done efficiently but orderly. And I don't know that there will be 30,000 complaints. I find that a little bit hard to wrap my head around.

But I don't think that doing that in 60 or 90 days is a reasonable task or really healthy or good for anyone in terms of the case or reaching liability or damages or resolving the case in an orderly fashion. That's my gut. What that means between Judge Jones and I, I'm not quite sure. So let me ponder it.

MS. CONROY: Thank you, your Honor.

THE COURT: All right. Yep. Thanks to the Revlon folks for appearing.

All right.

MR. LUSKEY: Thank you, your Honor.

MR. BRITTON: Thank you, your Honor.

THE COURT: Discovery.

Anything else on Revlon from my people who have been here?

(No response.)

THE COURT: So you have filed your position papers on discovery. I mean, I see we're going to do initial disclosures on August 7th, so that's good. Everybody's in agreement about that.

So I have some questions about the idea, about really defense counsel's idea. So who is in charge of this from defense counsel?

MS. TROTTER: Your Honor, if it's the question about general causation --

THE COURT: Yes.

MS. TROTTER: -- in particular, that's Ms. Leskin.

THE COURT: Okay. I thought so.

MS. LESKIN: Thank you. Lori Leskin, Arnold & Porter, for the Strength of Nature defendants.

THE COURT: So you -- maybe I'm just dense in reading

your document. But you're telling me that you're not asking for bifurcation.

MS. LESKIN: Correct.

THE COURT: Okay. But it's reading a lot like bifurcation to me because here's my question. So, you know, you serve out a lot of discovery about causation. You're really focused on causation. We're laser-focused on causation. But you say I'm not -- you're not asking for bifurcation, so I don't bifurcate.

Well, plaintiffs' lawyer is going to send you a bunch of discovery that doesn't have to do with causation, and you're going to answer it because you're telling me we're not bifurcating. Okay. So what are we arguing about? I mean, you're just doing discovery because they're not going to limit themselves to causation, I can tell you right now. You should see their heads are bobbing.

MS. LESKIN: I've seen, yes.

THE COURT: So I'm not quite understanding. I thought you were proposing bifurcation. And then I read your document, and I said, oh, they're not proposing bifurcation.

Maybe you're proposing something at the back end where we have briefing on causation before we have other briefing. I can comprehend that. I'm not saying I'm a fan of that. I mean, I try to limit the number of rounds of summary judgment and rounds of *Daubert* motions. But, you know, we can talk

about that later.

But if you're -- if what you're proposing is we just go hog wild on discovery, you're going to be focused on causation. We all know that. And you're going to be drilling them about, "What do you have to tell us that proves that our products actually caused any of this harm, any of it?" We know that. They know that's coming.

But they're -- at the same time, they're going to be turning to you and saying, "We want all of your advertising. We want all of your knowledge about this," you know, whatever their thing is. So what are we debating?

MS. LESKIN: So let -- I think --

THE COURT: Because I don't understand.

MS. LESKIN: I understand that there is some confusion there.

THE COURT: Okay.

MS. LESKIN: And, first, let me just be clear. You know, we heard the concerns the Court expressed the first time we raised this. We've heard some of the concerns that the plaintiffs had raised. And so in crafting our proposal, what we were trying -- what we're trying to do is find a way forward that puts some of the critical key issues in this litigation early.

We've heard there's a lot of things that are going to be happening in these cases. We're not even going to have all

of the plaintiffs here for -- I don't know -- months. Months, right? And so there's a lot of work to be done before we get there.

There are certain issues in this case that are going to be across wide swaths of plaintiffs. Right now we have numerous defendants, numerous products, involving numerous alleged chemicals, alleging numerous injuries. At some point the Court has an obligation to try to narrow that scope.

And so what we're proposing is to take that issue and move it earlier in the process. So, yes, plaintiffs will serve discovery. And we will sit and meet and confer. And they'll ask for documents. And we'll say, "Here's the custodians." We'll reach an agreement.

We obviously aren't going to just dump everything at the same time. There's a way to order that so that the first custodians are ones who are most likely to have information relative to general causation issues -- the science people, the regulatory people, the R&D people -- as opposed to marketing and advertising and sales, which have nothing to do with general causation.

Not saying we won't do it. We've heard the concerns that have been raised. But we get those out early so they can start working with them. We continue down the road. We talk about depositions. We start with the people at depositions who are focused more on the regulatory, the science, the

formulations. We put the marketing people, the salespeople, later on in the process.

What the key issue is, is to set that early date for expert deadlines on general causation so that we can see what the science is that they are relying on, so we can assess whether that science is admissible because what will happen is this Court will then be asked to decide, do they have admissible evidence that something in our product -- we'll put aside if they can identify what the product is -- something in our product, some chemical, causes uterine cancer. What if we start with that one.

And let's say your Honor decides, "I'd find there's admissible evidence that chemical X can be linked to -- can be linked to uterine cancer under certain circumstances, but not chemicals Y, Z, A, and D. And it can't be linked to ovarian cancer, to fibroids, to endometrial cancer, or any of the others injuries that have been alleged in this litigation."

Well, for my client, just finding that general causation is only applicable for uterine cancer eliminates almost 60 percent of the claims against my client.

THE COURT: Okay. So I understand that theory. I mean, I understand how you're talking about staging.

First of all, I'm not understanding why we're not calling that bifurcation, but maybe you talked to your PR people because there's a lot of labeling: you know, side

effects. They're not really side effects. They're the effects of the drug. Okay.

But here's my question. At the same time that you're -- front-loading? Should we call it front-loading?

MS. LESKIN: Prioritizing.

THE COURT: Prioritizing. Okay. So at the same time that you're prioritizing general causation, the plaintiffs are going to be prioritizing whatever it is they're prioritizing. I don't know. They seem to always raise advertising. I don't know what that is. But they're going to be -- advertisement.

And the thing is they have this thing called the burden, so I've got to be mindful of that. And you have -- your clients have a lot more information than their clients have. So I've got to be mindful of that. So they're going to want a lot of information from you.

So I'm trying to figure out, just as a trial judge who sits here, how does this work in a practical sense? So you send out your discovery saying, "Okay, plaintiffs. Tell us how you're going to prove that chemical Y leads to ovarian cancer." Okay. So they've got a lot of lawyers over here, so they've got their cluster of experts on that. Okay.

But then the lawyers -- the plaintiffs who want information about, you know, all the other things that your people have that they don't have, am I telling them, "Cool your heels"? Or am I saying, "No, that will be turned over in

30 days"? Because what's the prioritizing? I'm trying to understand. How does it work?

MS. LESKIN: Of course. Of course.

THE COURT: Because they're not going to wait to take the depositions of the PR people until you're done with all your discovery. That's just not how it works.

MS. LESKIN: Well, we understand, your Honor. And there's obviously many different ways that many different courts have structured it, right? And some courts have issued strict bifurcation orders and "You're not going to that side of it until after I decide *Daubert*." That's what we're doing in the APAP litigation.

THE COURT: Yeah.

MS. LESKIN: That's not what we're asking for here, and you're right. We came in thinking maybe we would bifurcate it because we do think that's a more efficient way. But hearing the concerns that have been raised, we agree that perhaps maybe that's not the way to go here.

And we're not saying we're not going to do the other discovery. What we're saying is you have a deadline to get us your general causation plaintiffs, your -- the experts for that. So everyone will be motivated to finish that discovery first.

THE COURT: So all you're really asking for is a deadline for plaintiffs to provide discovery on general

causation.

MS. LESKIN: To provide -- exactly, to provide the experts so that we can start that process while the rest of it continues under its --

THE COURT: Okay. And they could otherwise do whatever discovery they felt, obviously, within the rules is appropriate.

MS. LESKIN: Correct.

THE COURT: And you would also say, "Okay. We don't need to do any damages discovery." I mean, you could put that on the back burner --

MS. LESKIN: That would certainly --

THE COURT: -- because you're not interested in that.

MS. LESKIN: And we would certainly wait till bellwether selection for individual damages.

THE COURT: Okay. So let me hear it.

I mean, I think October -- I think September 1st is overly aggressive, and I think a trial date -- what was the proposed trial date? September 2024?

MS. FITZPATRICK: That's what we proposed, your Honor, yes.

THE COURT: Oh.

MS. LESKIN: What we've asked for, your Honor, is not their reports in September. What we've proposed is just the subject areas.

THE COURT: I know, yeah.

MS. LESKIN: But their reports, we're not -- we would not ask -- we had not proposed them until February.

THE COURT: So now that I have clarity that we're prioritizing but not bifurcating, and you would still be able to do whatever discovery -- obviously, within the rules -- is appropriate, so not limited to causation, tell me what your objections are.

MS. FITZPATRICK: Your Honor, you know, a rose by any other name is still a rose. This is bifurcation.

THE COURT: Okay.

MS. FITZPATRICK: There's the issue of what discovery we are allowed to do, and your Honor is clear, and we agree. We have the burden of proof. We have the burden of proof to establish the claims that we have brought that we believe are well pled that you will decide in the motion to dismiss.

And we believe at this juncture that what is actually happening is -- what the defendants have done is taken a defense that they believe that they have, and that's general causation.

And make no mistake about this, your Honor. Every single solitary MDL that deals with a product, that deals with a drug, that deals with a device that's got a personal injury, there has never, I believe, in the history of litigation been any defendant who believes that there's been general causation

that's been established early.

It is always an issue. It is always a dispute. There's nothing new or unique to this case that puts general causation in any kind of different framework than it is in every other case.

But what defendants are saying is, "We will give you some more discovery as we feel we should," though I did hear defendants saying that they were going to prioritize the deponents and give them to us as they believed that they were relevant to general causation as opposed to the way that we would want the deponents, to take the depositions that we need.

I also heard that they would prioritize the production of documents to us along the lines of what I'm -- I'm looking at science, regulatory, and R&D, but not relevant to marketing and sales. Prioritization is bifurcation.

And it goes further, your Honor, when you take it outside of the discovery, that the plan that the defendants are labeling as a discovery plan is actually a plan for a bifurcated proceeding here where all of the experts that deal with general causation are I think designated and done by January 1st and go forward on *Daubert* hearings -- I'm looking at this -- to be scheduled at the convenience of the Court at some point in July.

But the plan that they've proposed is bifurcation. It's deal with all of the legal issues and the discovery as

relates to general causation up front, and as a throwaway, we'll let plaintiffs do a little bit of other discovery on other issues. It's bifurcation, your Honor.

We oppose bifurcation for all of the reasons that we set forth in the memo that we submitted to the Court. We oppose it for a whole host of reasons.

First of all, it deals with allowing the defendants to dictate or design or become the architects of the discovery that the plaintiffs need to do to support their case and their burden in this case.

There is no doubt we see these cases as very different. We keep hearing about products and ingredient X leading to injury Y. To be clear, your Honor, the case here is that the products that have been created by these defendants, the hair relaxer products as they are sold, cause an increased risk of cancer in women.

It is not about whether ingredient X or ingredient Y or ingredient Z in some way can be linked to cancer down the road. It is whether these products as they are constituted, as they are sold, and as women are instructed to use them can cause cancer and did cause cancer in our plaintiffs.

It is a very different theory than the one that the defendants have been selling to your Honor for the last several hearings.

We want to do discovery and we want to try a case

based on our theory, which is that the constituted products as they are sold in those kits cause cancer. That's what the epidemiology tells us. That's what the epidemiology supports. That's the case that we want to try. We get to make that decision. It's our case. It's our trial. It's how we decide we want to do something.

And the way that we want to do it is to deal with the science issues, which includes science. It includes testing. It includes regulatory compliance. It does include research and development. That's all of the things that go on behind the scenes at these corporations that you and I and nobody else can ever know about because it's in the four walls. And the only way we get to do that is discovery.

But equally important is the forward-facing part of that, which is we call it marketing; we call it sales. But you need to think about it. That's the arm of these corporations that go out and tell women what to do with these products. They instruct them how to use them. They sell them to various places. They are available.

They are not distinct entities in these corporations. They are very integrated. R&D and science and regulatory always works hand in hand with marketing and sales. And it influences marketing and sales, and marketing and sales influences the science, the regulations, and the R&D that goes on in these corporations. That's how they work.

And what we want to do is to tell the entire story because it's only by telling the entire story that we are able to make the case that we want to make. And that is consistent with so many MDL courts that have come before. And it's why what we do is we -- what we want to do is to go out, and we want to take discovery.

And I'll tell you how we want to do it. We served earlier this month after the last status conference what we consider to be targeted depositions and interrogatories and requests for productions.

We served three deposition notices for 30(b)(6) depositions. They deal with corporate structure, which we need to know about. They deal with ESI, where their documents are stored, which we need to know about. And there's also a 30(b)(6) deposition that deals with brand and product names at the various corporations that came out of some of the arguments that were made last time. Very basic information that we need, and we're looking at it as the foundation for the later discovery we will serve.

We have also served 11 -- total of 11 interrogatories and a total of 16 requests for production. We told you that they were targeted, so let me tell you a little bit about what they are. They're the organizational charts. We asked for the correspondence to and from the FDA and other regulatory agencies about hair relaxer products. We asked for the labels.

We asked for the instructions for use. We asked for the policies and procedures that they use to run these various departments within -- within these corporations. We asked for the testing and the studies that they've internally done.

What we attempted to do in asking this -- and we asked intentionally this time, your Honor, the same set of discovery against each defendant. We did it for this reason. It's kind of the objective information. It doesn't require custodians. It doesn't require search terms. It doesn't require interpretation. It's easily identifiable documents that these defendants should have and should be able to give us. That was our idea of establishing the foundation so we can understand how each of these defendants are similar, but also, equally important, how each of them are different.

Based on the responses that we get to that discovery, which should be, you know, within the next -- I've lost track of time, but say two to three weeks -- that would be the deadline -- what we intend to do is take a look at it for each individual defendant and then craft discovery that is relevant to each individual defendant. They are not all the same. They're not all -- they're not all organized the same. They don't all do the same thing. They're not all as big or as small or anything.

And so what we believed is by getting this foundational discovery, it would allow us to go forth and

actually have enough information to make reasonable determinations about what we can and should be doing against each defendant family separately so we could go in with something that was thoughtful as opposed to just a whole bunch of discovery and let's see what we will get.

We believe that that is the absolute correct approach here. We believe that going forward, we have status conferences with your Honor every six weeks where you can check in with us on what's going on.

But because these issues are so intertwined, we can't front-load discovery in the way that has been suggested by the defendants. We also can't necessarily have this clear delineation between general causation on -- on causation versus marketing causation versus other kinds of causation versus looking at what's being said publicly and whether that contradicts what's being said by the FDA. That would be a regulatory expert. You can't have a regulatory expert who only talks about the FDA without also talking potentially about "And here's what was being represented outside of the FDA."

So they're all so intertwined that it's our position that what the defendants have proposed is, one, it's usurping. It's taking our ability to define our case in the way that we want to define our case and to proceed as we think we should. Two, it's creating this morass of whole bunch of additional discovery, where depositions begin, where depositions end, how

they're -- work together.

And, three, your Honor, it just causes this delay. We can get from here to trial. That can happen. Your Honor can -- will have your opportunity to look at whatever *Daubert* motions the plaintiffs file, whatever *Daubert* motions the defendants file in the context of a real case, of a real woman who has a real injury. And you can look at those and decide what you think about those various experts in the context of trial as is typically done. And then once those are resolved, we'll be ready to go to trial. We'll be ready to do it.

But we do strongly oppose this attempt by the defendants to redefine our case and then to try to control how we meet our burden of proof and how we proceed in our discovery and with what we need to do.

They're great lawyers on the other side. But they've been hired by corporations to defend corporations, which is very different than being hired by plaintiffs to represent women. We have different themes. We have different skills. We want to be able to do our cases our way.

MS. LESKIN: Your Honor, if I may. No matter what the claim is by any plaintiff in this or any other litigation, they must show as an element that the product they've identified caused the injury in the plaintiff. They have to show that it was capable of causing it and that it did cause it.

So I have no problem with anything counsel said and

how they want to structure their case, which is exactly why we are not asking for bifurcation. What we are asking for is for this Court in a litigation where we are about to have 30,000 plaintiffs come into this case to get early on where that -- where that science is.

Plaintiff -- counsel said to you that their theory is that the products as formulated cause an increased risk of cancer in women. That's no different than what we have said is the general causation. Can our products cause cancer in women? Not any cancer. Can it cause uterine cancer? Can it cause endometrial cancer? Can it cause breast cancer? There are at least nine different injuries that have been alleged in the complaint so far.

It makes no sense for us to go to 30,000 plaintiffs, figure out a bellwether, go all the way to trial, only to find out that the science isn't there at all that -- that establishes that these products are even capable of causing uterine cancer.

So what we --

THE COURT: Okay. But we're not going to go to trial. I mean, we're going to have *Daubert* motions before that. So if they don't have any experts who can tie the product -- a given entity's product to cancer, we're not going to go to trial because I'm going to strike their expert, and then you're probably going to get summary judgment.

MS. LESKIN: Right. But if we're at the eve of trial, we've wasted a lot of time on an individual plaintiff as opposed to taking that decision now of whether it's even capable of causing uterine cancer before we've identified.

40 percent of the plaintiffs in my cases have claimed uterine cancer. If this Court were to find that there's no science to establish that my products can cause uterine cancer, that's 40 percent of the docket that is out early in this case, not a year and a half or two years or three years from now when we're on the eve of trial.

THE COURT: So I'm interested -- so, first of all, I'm not requiring plaintiffs to identify experts regarding -- general causation experts by September 1st. I'm just not doing that.

But I am interested in knowing more about -- because I'm hearing a disconnect. And maybe I'm misunderstanding. But I'm hearing plaintiffs say the products cause cancer, period, cancer in women, so, you know, certain types of cancer.

And I'm hearing defendants say, no, you have to prove that a particular chemical -- let's say there's ten chemicals in this, in these products. I don't know. There's probably more -- but a particular chemical has to be tied to a particular type of cancer.

So that's going to be a fight --

MS. FITZPATRICK: Mm-hmm.

THE COURT: -- that has to be resolved at some point well before trial.

So I do want to get to a point where we have clarity about that so that we know who's talking -- who's on first and what's on second -- okay? -- so that I know what we're talking about. If that requires a ruling by me, that's great. If I need to hear from the experts, that's wonderful too. This will be our Science Day maybe.

But I want to make sure we're on the same page with the case. And you have a right to present the case. It's your case. You control your complaint. I'm a big believer in that. But I do want to be sure that I'm understanding your theory and that you have a right to present your defense.

So I hear you talking past each other, or at least advocating your positions. They may not give you a causation expert that addresses your concerns, and your expert will tear them to shreds for that. And that's a beautiful thing.

MS. FITZPATRICK: Not really, your Honor.

THE COURT: No, not really. But that's how it is. They're up here doing their thing.

So I'm not going -- I'm not opposed to putting some pressure on the plaintiffs to produce their causation people -- because they're mostly people. They're going to be experts.

MS. LESKIN: Experts, exactly.

THE COURT: They're not documents. They don't have

anything like that.

But not this fast. This is not realistic. You're here on an MDL. I mean, I love moving cases. You guys are saying you're going to go to trial in 15 months. Are you kidding? I've got single-plaintiff cases against single defendants. I can't get them to move. I love this, but it's not realistic.

And I said the first time we were here when I set dates, I mean them. But I don't set unrealistic dates because it just throws havoc into everybody's schedule. So if I set a trial for September 2024, what good is that going to do? It just means I can't set other trials that day.

MS. LESKIN: That we agree on, your Honor.

THE COURT: I mean, I can't do that.

So they're not giving you an expert in September. They're going to be busy filing 30,000 claims in September.

MS. LESKIN: That's not --

THE COURT: The people need to sleep, for God's sakes.

MS. LESKIN: And to be clear, that's not what we asked, your Honor. What we said was the categories. Our proposal was give us the categories: "I'm going to give you an epidemiologist, a toxicologist."

THE COURT: You said general causation experts.

MS. LESKIN: Provide a list of subject areas in which they propose to identify general causation --

THE COURT: Oh, my God. I thought they had to name Mary Rowland as an expert or something. Okay.

MS. LESKIN: We proposed the plaintiffs to serve Rule 26 expert reports on general causation on February 1st, 2024.

THE COURT: No. I'm moving that back. I'm going to let you do fact discovery just like normal -- a normal case.

But -- but -- your causation question is coming because the thing that they're griping about, which I have some empathy for, is you keep raising the Testosterone Replacement case. And you're probably doing that because Judge Kennelly is in my building, and he's very smart, and he's very well respected, and I -- he's my go-to guy, right? I call him. He's on speed dial. He doesn't take my call half the time because he's -- "Oh, Rowland again."

But, you know, he's smart. We all call him.

And it is different because they already had been warned that they had cancer-causing problems with that -- or, no, it wasn't cancer-causing. It was heart stuff, right? Cardiac issues.

So they were in a -- so that product was in a different procedural posture, if you will. That's probably not the proper term, but that product was in a different situation than this product is, at least at the level I'm at now.

I'm not saying when you get me in the weeds I won't

feel differently about that. But here I am. You guys get a study or two out. I don't know what the defendants already knew. Could be like the smoking thing where they've known for 50 years these problems. I mean, I don't know. But, you know, what I'm looking at now, they're in a different position than they were with the TRT people because that's just where they are.

Do you understand, Mr. Ellis, what I'm saying? Because you're looking at me quizzically.

MR. ELLIS: Yes, I understand what you're saying, your Honor.

THE COURT: So what that makes me feel like is I'm going to push up your causation duties because I want you to give them something because they're entitled to that. Their clients are entitled to it. Not them, but their clients are.

But what I really want to avoid because I'm only one person and you guys are 50 on each side is I don't want to have three rounds of *Daubert* motions. You know, I don't want to have two rounds of summary judgment. So that's partly got me worried is you think we're going to go through some round of summary judgment and *Daubert* on causation and then, if you don't prevail, then we're going to do some other round later.

I'd like to avoid that. I mean, if I have to, I have to. And I work every day, so what difference does it make what I'm working on. But I'd like to not do that in one case.

MS. LESKIN: Understood, your Honor.

And, obviously, we try to figure out a way to -- we could find clearer demarcations. Generally causation is one. Once there's a general causation ruling on the various injuries, the various products or chemicals, however it comes to us --

THE COURT: Right.

MS. LESKIN: -- what we suspect is then there would be specific causation questions as we come up on bellwethers because there's a very different question whether a product can cause an injury and whether it did in an individual woman.

THE COURT: Right.

MS. LESKIN: But that's down the road when we get to bellwether.

THE COURT: Yeah.

MS. LESKIN: Summary judgment, other than on a causation basis, you know, I can't stand here today and tell you we are not going to have general motions. I don't -- that's not what we're proposing at this point, and we can address that as we get further into the discovery. But for right now, our focus is there are large tranches of cases that we believe can be disposed of on the general causation front.

THE COURT: Right. But you understand that their theory is you don't get to get rid of your endometriosis cases, that it all goes together as a package.

MS. FITZPATRICK: Right, your Honor. And, you know, I keep coming back to I think where your Honor started. I don't know how this isn't talking about bifurcation. When I hear someone saying, well, we're going to front-load general causation, and then down the road we'll get to the very separate issue of specific causation and we can deal with that later, that is by definition bifurcation.

General causation and specific causation are very intertwined. Very often on our side, we will have the same expert that talks about general causation and specific causation in the context of a particular woman. It deals with issues of, you know, what you can rule in and what you can rule out. There's a whole host of reasons that those are very intertwined.

And so what I hear is a bifurcation plan that requires us -- whatever way we do it and whatever dates go into place here -- require the plaintiffs to prioritize or put first these science issues, as the defendants define them, as opposed to what we want to do discovery on just by very virtue of the fact that experts would be due at different dates.

Your Honor hit the nail on the head. What we're going to get to, you know, in the grand scheme of things, you have to have a trial. You have to have an actual person who has been injured to make any of this make total sense. There are going to be *Daubert* motions not only filed by the defendants, but I'm

pretty sure we'll be filing some as well. That's how you do the gatekeeping before trial. But it's done in the context of actual cases, actual claims, actual law, actual women.

And so this idea that we will front-load general causation and we'll get rid of however many percentage of the docket and then somewhere later we'll actually talk about the women who were injured doesn't make sense.

And it is bifurcation. Whatever -- it's been very cleverly PR'd or labeled up or, you know, reassigned. But what's being suggested here is just the very typical bifurcation that has been advocated for and rejected by the majority of the courts because the recognition is the way that you resolve these issues is in the context of someone who has actually been injured.

MS. LESKIN: Well --

MS. FITZPATRICK: This is not an abstract question in and of itself. It has to come in in the context of everything that you would look at to get to a jury on all of these issues and all of the claims that are out there.

So your question, your Honor, about two ships passing in the night, I think it is, about how we define causation, what our case is versus what the defendants' case -- they think the case is, that's a -- that's a definitional issue. That's something that, you know, we rise and fall on. That's something that you do in a motion to dismiss. That's something

that you do in those contexts.

But having made this decision to go forward in these trials and believing very strongly that that's what the science supports, we don't then have this requirement that before we are allowed to get to a trial, we've got to prove that. We prove it in the context of a trial, not as an impediment to getting to trial.

And so putting this together in a *Daubert* context, which provides your Honor with all facets of the case -- not just a single defense that the defendants have picked out because they like it best, I guess, but in the context of everything -- is what allows the full case to be tried with the full experts, with the intertwining of the experts, meaning experts that will touch on many of these issues and not just a singular issue. That's how it's traditionally done, and it's done that way because you cannot meet these clear demarcation lines that have been suggested by the defendants.

And so what we believe makes sense at this point, your Honor, is there are going to be issues. There's going to be issues on science. There's going to be issues on how we define the case. But we want to just get started first. Before we get to all of the problems that can come at the end and how to unravel them, that might be hypothetical and maybe this will happen, maybe that will happen, and maybe -- well, maybe they will, and maybe they won't.

Let's just start. Let's do traditional discovery. Let's be checking in with your Honor every six months -- or six weeks. Excuse me. And these things tend to work themselves out, and issues tend to get much more crystallized when you're doing it in the context of real facts and real discovery as opposed to the bogeyman that may come up with whatever trial date your Honor believes is the appropriate date.

THE COURT: Okay.

MS. LESKIN: Your Honor, if I may.

THE COURT: Yeah. Last word.

MS. LESKIN: Sure. Two things.

First, in the context of getting to trial, getting to trial. If we were in a single-plaintiff case, I appreciate that we can do general and specific causation together. We're in an MDL. We're looking at close to 30,000 plaintiffs were threatened to come in here. Even if it's half of that, you know, even if it's just the 200 we have now, it's not feasible to wait until the end of everything to decide the intro question. We have to -- the Court -- and the JPML has given your Honor the responsibility. That's put forth in the rules, the Manual for Complex Litigation.

The whole purpose for an MDL is to find the defining issues and find ways to reach them efficiently and quickly so that it guides the rest of the case to resolution. That's why general causation does come up in some of these cases, because

unlike TRT where it was already on the label, you're talking about a single epidemiological study here which on its face has significant flaws we've already outlined. I'm not going to get into them here.

But that's not sufficient under *Daubert*. Seventh Circuit law repeatedly says a single case doesn't do it. So there has to be more.

So the second point on that is it's not just product and cancer. The development of a uterine cancer versus endometrial cancer and a breast cancer are very different. And you have to look at the individual chemical processes, the cellular processes and can the products, including whether a chemical in those products impacts it. That's why we're breaking it down to chemicals and individual injury.

We are confident that when we get expert reports, your Honor is going to understand that we cannot just say "your products and cancer," that it has to get down to evidence at a much more specific level. And that's why ultimately we believe that if the whole case is not dismissed that individual pieces can be cut off and dismissed, and it can be narrowed and we can go to resolution. That's why we're talking about doing this up front as we get past it and work towards the rest of the litigation.

THE COURT: I've heard you both. I understand your positions. I am not going to adopt the defendants' position as

it is just yet. I am going to allow for routine fact discovery, but I am telling the plaintiffs that they're -- I don't know when we're going to get to expert discovery, but we are going to get there, obviously.

And I've said from the beginning once I set dates, I mean those dates. And your needing to produce causation experts is going to be front and center once we get to expert discovery. And we will then talk about doing *Daubert* motions on just causation or general causation. We need to talk about it again when that happens because I'm going to need to be reminded of all this, and things will develop and change as we move along. But right now, that seems a very sensible move.

And after our Science Day, which I know plaintiffs don't think is necessary but I do, I will be probably in a better position to understand all this.

Now, my question is plaintiffs have already served out some discovery, apparently, a couple weeks ago. I don't know. Defendants probably haven't. How would you like to proceed? Would you like me to set dates --

MS. LESKIN: I'm going to let --

THE COURT: -- randomly? I'm happy to do that. Would you guys like to talk and send me a proposed schedule? I'm happy to do it any which way.

MS. FITZPATRICK: I think, your Honor, if we can, with the guidance from your Honor, meet and confer, we can probably

try to come up with dates. And if we can't come up with dates, what might be helpful that we've done -- I've done in other litigations is we can hopefully at least get you a proposed order --

THE COURT: That's fine.

MS. FITZPATRICK: -- on everything we agree on and then the plaintiffs' position/defendants' position on certain things.

THE COURT: And you are?

MS. WELCH: Your Honor, Donna Welch for the Namasté and specially appearing Dabur defendants.

THE COURT: Okay.

MS. WELCH: We agree, obviously, the discovery was served prior to initial disclosures being due. We think there's some duplication about what would be going into initial disclosures and what's being requested in the written discovery. We'd like an opportunity to meet and confer.

THE COURT: Sure. But for further dates? Will you meet and confer and then submit something to me in terms of further dates?

MS. WELCH: I would assume we can come to an agreement and submit a status that suggests some further dates. If we reach a sticking point, I understand your Honor has allowed us to even get in touch with you by phone, if necessary.

THE COURT: Sure. Happy to. Happy to.

So what I would propose is that we get through fact discovery, which includes your depositions, you know, your oral discovery. And I'm open to suggestion. If you think that's going to take six months, that doesn't seem insane to me. You've got a lot of lawyers here.

Mr. Ellis is frowning at me. I don't know if that means that's too long or too short.

MR. ELLIS: I'm not frowning. That's just the way I look.

THE COURT: Okay. Resting frown face over there.

MS. WELCH: Your Honor, I think -- you know, and folks will correct me if I'm speaking out of turn. But I think from the defense perspective, it's hard to know right now whether it's 6 months, whether it's 12 months.

In our proposal, we had suggested 12 months for completion of all discovery, with an interim date for some targeted -- more targeted general causation discovery.

THE COURT: Right.

MS. WELCH: Part of it is going to depend on what products ultimately are really at issue.

THE COURT: Right. So take -- remember, I'm not even going to have fully briefed motions to dismiss until probably the end of the summer. I don't know what that schedule is. But --

MS. FITZPATRICK: I think that's right, your Honor. I

think it's -- I know we have -- I want to say it's something like August 28th or something like that.

MR. ELLIS: 25th. Our brief is due August 25th.

THE COURT: Okay. So -- and I'm on trial all of September. So, you know, you're not going to get a ruling from me if you think products are falling out -- that's not going to happen anytime before at least October.

And then you have -- and I know that, you know, some products go way back in time, so things aren't electronic. Then other products, obviously, we're going to be more current on. There's going to be ESI discovery.

So, I mean, give yourself time and then -- but keep it moving is my thought. And I'll adopt probably any dates you give me as long as you're giving yourself time and keeping it moving.

MS. FITZPATRICK: Okay, your Honor. I think we can -- we can meet and confer on that close of fact discovery, keeping in mind everything your Honor has mentioned.

THE COURT: Okay. And then at the close of fact discovery, I will rehear the idea of causation as a front-loaded. If there are other experts, I don't know. Maybe there would be damage experts or something. But I would -- I would at that point be very interested in focusing on causation, even keeping in mind all of your arguments.

MS. WELCH: Your Honor, we understand that.

One clarification. And I think what your Honor is suggesting right now is that for scheduling purposes, we're talking about fact discovery right now.

Plaintiffs obviously had proposed in their portion of the joint submission that a bellwether selection process start in January and that we be looking at selecting bellwethers early in the process next year. At the risk of going back to science, we obviously think that puts the cart way before the horse. So I assume your Honor is also not contemplating going down the path yet of a bellwether selection process until we see how long fact discovery is taking, until we see how many of the potential 31,000 claims are coming in.

And I hear your Honor saying there's going to be a point in time where some pressure gets put on the plaintiffs with respect to causation. Respectfully, we just want to make sure that point in time comes before we're deep in the heart of trying to select bellwether cases to move forward on a trial track.

THE COURT: Yes. I'm reluctant to get involved in bellwether before I know if there are 30,000 people. And I think you need me to figure that -- figure out how much time you have to join those 30,000 people, and you're looking for more time.

And I'm inclined to give you more time. I just want to make sure I'm not stepping on the bankruptcy judge's feet

and that I'm within my lane to do that. So I need to figure that out.

MS. FITZPATRICK: Yes.

THE COURT: So I may give you until January to bring those claims. Well, if I'm giving you till January to do those claims, we can't be picking bellwethers --

MS. WELCH: Agreed.

THE COURT: -- in December.

MS. FITZPATRICK: Understood, your Honor.

So the issue is if you give us till, say, January to bring those claims, it's not a situation that on -- that -- say it's January 15th -- that I would assume that you would get 15,000, 20,000, whatever number it's going to be of claims.

The way we see this working is that as people who have filed proofs of claim are vetting the cases and doing the due diligence that those cases will just be regularly and orderly filed --

THE COURT: Right.

MS. FITZPATRICK: -- into this MDL.

THE COURT: Right.

MS. FITZPATRICK: And there's no magic cutoff date for picking bellwethers. Now, obviously, you have to have enough. But you never, ever can get to all claims that have possibly been filed because outside of Revlon, we're going to have women that develop cancer next year and the year after and the year

after.

THE COURT: Right.

MS. FITZPATRICK: So I don't think it's a question of waiting until we get to whatever date that would be in January if your Honor were so inclined.

But what I do think would be probably helpful is that -- and then we have -- I can't remember what the next status conference is -- but in the next few status conferences to be able to give you at those points in time what volume is out there and what we see as coming and to keep updating you on that because there will come a time when there are enough cases that are filed that we can move to the bellwether process, and it certainly doesn't have to be -- January isn't the magic date for that, particularly depending on how filings are going.

MS. WELCH: We certainly hear that and look forward to the updates. And we think as the additional cases come in, fact development is going on on a parallel track. We're working through issues of the short-form complaint, which didn't get referenced in plaintiffs' proposal for the schedule.

As all of that begins to come in, we'll -- they may be pushing for bellwether. We may be back, your Honor, pushing for an orderly process to tee up threshold science issues.

THE COURT: Okay.

MS. FITZPATRICK: And, your Honor, we have -- also there's been some outstanding issues about plaintiff fact

sheets and defense fact sheets that would be case-specific. We'll wrap that up into the discussion that we're having with the defendants as well. And hopefully -- I think we're back in front of you in six weeks. But if -- hopefully we'll be able to --

THE COURT: We are.

MS. FITZPATRICK: -- get in touch with you earlier than that to let you know where we are on the schedule.

THE COURT: Any time. Any time.

MS. WELCH: Yeah, in addition to the plaintiff fact sheets and the defense sheet that they've proposed -- we want to hear more about that, obviously --

MS. FITZPATRICK: Right, right.

MS. WELCH: -- we think it's important that we come back to your Honor at the next status conference with their plan and our reactions to when short-form complaints are going to be filed now that a motion to dismiss is on file and your Honor has the schedule set for the hearing on the motion to dismiss.

MS. FITZPATRICK: Well, your Honor, I wanted short-form complaints six weeks ago. So I think that was something that your Honor had -- we had proposed that we use the short-form complaints now to ease the filing process, meaning instead of filing long forms and then filing your short form that what we would do is just use the short form now. And

if we have to amend it later, that is significantly less work. But I think that that was something the defendants had objected to. So we're kind of here without that short-form complaint.

THE COURT: Because -- didn't we have an objection because the short form didn't contain the proper products according to the defendant?

MS. WELCH: Yeah, we just want to know that either in the long form, based on the motion-to-dismiss process, or in the short form when that happens that the product identification per plaintiff happens and when they used the products.

THE COURT: But can't they use the short form that they have proposed if they feel it's appropriate? Or it's still defendants' position that they don't have the proper products on there?

MS. WELCH: It's our position -- and Mr. Ellis can speak to this. If there's more to be said, Dennis, please.

But the form they proposed had brands. It did not list products that a plaintiff would have used. So we believe the products and the time periods of use need to be identified for each of the plaintiffs.

MS. FITZPATRICK: Hopefully, your Honor, some of this is going to be resolved with both the interrogatories and the 30(b)(6) depositions that we have served and once we have responses to that.

But let me put it this way. We would very much love to be using a short-form complaint, particularly if we're looking at even a third of these 30,000 being filed here. We would love to be doing that. So we will work with the defendants on that.

THE COURT: I very much want a short-form complaint to handle the -- whatever the influx is. Let's say it's 2,000. Let's say it's 5,000. I very much want a short-form complaint. So could you answer the interrogatory question about products without objections? You can state all your objections and then provide a substantive answer.

MR. ELLIS: No. No, we could not. The definition, for example, of "hair straightening product" in the interrogatories includes hair relaxers, but it also says anything that changes the texture of the hair. And so if you were to literally interpret that, there is going to be a disagreement over what qualifies --

THE COURT: Conditioner?

MR. ELLIS: Yes, conditioner, for example; texturizers that only are really used by men.

So I don't want to necessarily go too deep on this because I think the Court dealt with this very effectively at the last hearing.

THE COURT: Well, apparently not because here we are.

MR. ELLIS: Well, I think you did. So maybe I could

refresh recollection, and maybe that might help.

What happened was is that there was a question about whether or not either the master complaint or the short-form complaint had identified products. And you said, "Do you guys want to meet and confer over what constitutes a product?"

THE COURT: Mm-hmm.

MR. ELLIS: And you used kind of a lift in your voice that to me suggested like you thought that would be a good idea to meet and confer over what the definition is of "product" and not "brand." And they said no.

And so having faced that and their statement that they were unequivocally assured that their master complaint would survive any challenges on a motion to dismiss, then you decided, "Okay. Let's set a briefing schedule." So that's what we did.

And then as part of that discussion, again with a little lift in your voice, you said, "Okay. It may take quite a while for us to resolve the issues with the master complaint," which would delay, presumably, the question of whether or not either the master complaint or the short-form complaint had to state products.

Now you have that brief. You will decide that issue, as the Court said, on its schedule, setting that briefing schedule. And then at some point in time, once you decide that issue, we'll go up or down on it, and then you will now know

and all the parties will know whether or not either the master complaint or the short-form complaint has to have the products identified with the exposure period to defendants and those type of things. But that was a plaintiffs' decision, not a defendants' decision, because we had always said we could continue to meet and confer on that.

What we've said and what we've sent to them many times is that if you want to not have necessarily a checkbox -- we know you like the checkboxes, your Honor. I'm not denigrating checkboxes. What I am saying is that something has to have the products identified, the exposure rates. And what we proposed to them that they have was just the blank lines where they would write that in.

If they want to go back and look at that again, meet and confer with us over that and talk about a short-form complaint that identifies products and exposures, we're happy to have that conversation, and maybe the parties can work this out. Short of that, we need your ruling on the issues --

THE COURT: Okay.

MR. ELLIS: -- of whether or not it's going to be decided or not.

Some of their discovery, I think, is focused on that issue. And if we can come to agreement on definitions of what "hair straightening products" was -- and I think everybody working together could do that -- then maybe we could resolve

some of those issues. And then they may then come up with checkboxes that identify products, and then maybe we resolve issues.

So I do think that this is not an issue for the Court today. It's for us because of their decision to not meet and confer then. They can still do it now. I don't think they wrote that in stone. They never would.

Now they know what we're saying about brands versus products. They have the motion to dismiss. And the Court does too. And if they want to go to a ruling on that, they can. Or otherwise, we could continue to meet and confer and try to figure it out.

THE COURT: Okay. Let me say this. It sounds like a revised interrogatory that is more narrow might be helpful here because you want to get rid of that objection. But you want to -- you want to get the answer out of Mr. Ellis to name the darn products so you can get that on a list so that your folks, whether there's 5,000 of them or 10,000 of them, can check those boxes. This is just not a fight worth having.

And then if I say brand is fine, okay. So you won that battle. But in the meantime, you want people to be able to check boxes. That's just what I would do.

MS. FITZPATRICK: Your Honor, if I may.

THE COURT: And I would get conditioner out of that interrogatory.

MS. FITZPATRICK: Your Honor, if I may, on the interrogatories, just so your Honor knows. Interrogatory No. 2: "Provide each of the brand names under which you have made hair relaxing products available for sale or distribution in the United States."

THE COURT: Okay. Well --

MR. ELLIS: And if --

MS. FITZPATRICK: And we've gone on with -- Mr. Ellis, I'm so sorry.

MR. ELLIS: Oh, I'm sorry.

MS. FITZPATRICK: I wasn't finished yet.

MR. ELLIS: I thought you were finished.

MS. FITZPATRICK: If we go on, we can look at -- we've then asked for each of the brand, and then we've each asked for the product name.

If the objection is the definition of "hair relaxing product," which has been defined in this -- and I'm happy to provide your Honor with a copy should you be so inclined. But we looked at the -- it's a lot of things that -- any product that you've made to chemically straighten or alter the texture of hair.

If Mr. Ellis at this point does not understand that this case is about hair relaxer kits that have been sold to relax hair, I am currently telling him that. It is -- it is not a problem of the definition. It's not a problem of how the

interrogatory is worded, though I'm happy to meet and confer as early as tomorrow to resolve whatever it is and to clarify it further.

It's a question of the defendants simply don't want to give us the information, and that is what the impediment was. We had offered at the last case management conference. We said, "Feel free to give us the list, and we will then put it in the short-form complaint." And Mr. Ellis said, "Oh, no, no, no, no. I don't have to do that till I get discovery."

We served discovery. We say, "Give us the list." And it's still a problem. And this is what concerns us because we are trying to get to that point on something that should be pretty easy, which is, what is the brand? What is the product? What is the date you made it? Give us that in discovery, and we will give you whatever it is that you want in these checkboxes or not checkboxes.

THE COURT: Okay. We've got a long haul here. We're only two hours -- we're two hours in. We've got a probably five-year case here. Work out the products for each of these brands. I know you can do it. I know you can do it.

Give them the names of the brands. You can preserve your objection to the definition. Get the names of the brands into their hands so that they can create the short form so that we can get whatever these people who are hanging out in the New York bankruptcy court -- so we can get them checking boxes.

Okay?

That's a lot of moving parts. Let's just get through the bankruptcy issue and get the people in before the Court so we can move forward on to causation.

Okay. Everybody have a great day.

(Concluded at 2:45 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *July 10, 2023*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

EXHIBIT G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	MDL No. 2545
This Document Relates to All Cases	Master Docket Case No. 1:14-cv-01748 Hon. Judge Matthew F. Kennelly

DEFENDANTS' SUPPLEMENTAL BRIEF
IN FURTHER SUPPORT OF THEIR REVISED CASE SCHEDULE

This supplemental brief provides further information in response to the Court's questions at the November 4 oral argument about the parties' proposed case schedules.

I. General Causation

On October 30, AbbVie proposed a case schedule that begins by allowing Plaintiffs to take ***all*** of their discovery on ***all*** topics, followed by general causation proceedings (expert reports, depositions, and *Daubert* motions). At the November 4 oral argument, Plaintiffs gave just one reason for opposing that schedule including general causation proceedings: it would require them to take discovery of all Defendants at the same time, which they claimed would be more than they could accomplish.

That claim directly contradicts the schedule that Plaintiffs themselves originally proposed on October 20. Their original proposal was that "generic liability discovery of the defendants"—***all*** Defendants—would take place at the outset of the case schedule. (Plaintiffs' October 20 Brief, Dkt. 428 at 1.) That is exactly what AbbVie now proposes. If taking discovery from all Defendants at the same time was an option under Plaintiffs' original schedule, it ought to be an option under AbbVie's revised schedule.

What's more, when seeking their leadership positions, Plaintiffs' counsel argued to the Court that an oversize Plaintiffs Steering Committee was justified precisely because of the need to take discovery from all Defendants and divide responsibility for getting it done. "We recommend a PSC that is larger than typical for mass tort litigation," because "this is an atypical MDL in that the litigation will require the prosecution of claims against six different defendants." (Dkt. 150 at 4.) The necessary discovery would include "common issues of fact such as ***general causation***" as well as "unique evidence" for proving each Defendant's liability. (*Id*. (emphasis added).)

The plan that Plaintiffs announced was to use the efforts of "six teams within the PSC, each of which will be tasked with prosecuting the claim against a particular Defendant." (*Id*.) "Each committee will be chaired by one or more members of the executive committee and comprised of approximately 12-20 individual lawyers which will include PSC members,

associates at their firms, and other interested counsel in this litigation." (*Id.* at 9.) Corresponding to the main Defendants, the committees were to include "d. ABBVIE COMMITTEE; e. ELI LILLY COMMITTEE; f. ACTAVIS COMMITTEE; g. PFIZER COMMITTEE; h. ENDO COMMITTEE; [and] i. AUXILIUM COMMITTEE." (*Id*. at 10.)

Plaintiffs have more than enough lawyers to take discovery from more than one Defendant at the same time. The Plaintiffs' Steering Committee, including Co-Leads, Executive Committee, and regular membership, totals ***32 lawyers from 32 different law firms,*** each of whom told the Court that they have sufficient staffing and resources to litigate the claims in this MDL. By combining the efforts of those firms with the efforts of some of the dozens of other firms that have filed cases in the MDL, Plaintiffs planned to staff each committee, for each Defendant, with 12-20 lawyers. That is plenty of lawyers to review documents and take depositions. It is a much larger team of attorneys than AbbVie, for example, is using to litigate this case.

In sum, Plaintiffs have enough lawyers to take discovery from all Defendants at the same time, they have made plans for how they intend to take discovery from all Defendants at the same time, and they proposed to the Court a schedule that would require them to take discovery from all Defendants at the same time. They should not now be heard to argue that taking discovery from all Defendants at the same time would be difficult or treat Plaintiffs unfairly, especially given—as their own original proposed schedule recognized—that Plaintiffs will be seeking a great deal of the same discovery, such as discovery on general causation, from all Defendants in any event.

Plaintiffs were also unable to explain, at the November 4 oral argument, when they would be able to take discovery of all Defendants. If they intend to take discovery from just one Defendant at a time—for example beginning discovery of the second Defendant when discovery of AbbVie ends in late 2015—it would extend the overall MDL case schedule by many years. It is odd, to say the least, for Plaintiffs who have pushed so hard for an extraordinarily quick first trial date (in September 2016, compared to AbbVie's revised proposal of December 2016), to

announce new plans for discovery of Defendants that evidently contemplate that this MDL will be operating long into the future. Under AbbVie's plan, by contrast, all discovery of all Defendants will take place at the same time, prior to general causation proceedings. Then, if these cases survive the general causation challenge and continue, only the bellwether portion of the case would begin with AbbVie, with the other Defendants trailing not far behind.

For the reasons explained above and in AbbVie's October 20 and 30 briefs, Defendants respectfully urge the Court to adopt AbbVie's proposal for general causation proceedings to follow all fact discovery of all Defendants.

II. Fact Discovery Cut-Off

Plaintiffs acknowledge that under their proposed schedule, fact discovery of Defendants would never end, even after trials begin. At the oral argument, Plaintiffs argued that because TRTs are still on the market, relevant future events or scientific findings may occur, which justifies discovery without limits. For two reasons, Plaintiffs' argument has no merit.

First, Plaintiffs may not pursue their claims in this litigation indefinitely, hoping that one day the evidence or science may change to help them prove their claims. As the Supreme Court put it, "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. ***Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly***." *Daubert v. Merrell Dow Pharms*., 509 U.S. 579, 596-97 (1993) (emphasis added); *see also Rosen v. Ciba-Geigy*, 78 F.3d 316, 319 (7th Cir. 1996) ("Law lags science; it does not lead it."). Having chosen to file these lawsuits, "plaintiffs [must] carry the burden of proving ***today*** based on ***currently available scientifically valid evidence*** that [the drug] can cause [the alleged injuries]." *In re Bextra and Celebrex*, 524 F. Supp. 2d 1166, 1181 (N.D. Cal. 2007) (emphasis added). In fact, Plaintiffs have not only sued, they have pressed for an extraordinarily quick resolution of their claims. They cannot rely on unknown hoped-for future events to keep discovery open forever.

Second, as the Court stated during the November 4 oral argument, it would be all but unheard-of for a case to have no fact discovery deadline. MDL courts establish a fact discovery

deadline as a matter of course, ***including in cases when a drug is still on the market***. *See, e.g., Incretin* (MDL 2542, Ex. 1 at 1); *Viagra* (MDL 1724, Ex. 2 at 3); *Accutane* (MDL 1626, Ex. 3 at 3); *Vioxx* (MDL 1657, Ex. 4 at 4). As the Court also stated, leaving discovery open would result in unending revisions to expert reports and re-depositions of experts, not to mention after-the-fact challenges to *Daubert* rulings and summary judgment rulings. Unending discovery may also eliminate the benefit that bellwether trials are supposed to produce: giving the parties reliable test cases, the results of which may be extrapolated to the population of all cases. If the discovery and evidence continues to change, the bellwethers may not serve their purpose.

III. Bellwether Selection

At the October 24 status hearing, the Court observed that Plaintiffs' original proposed schedule called for bellwethers to be picked too early, which decreases the likelihood of selecting truly representative cases. In response to the Court's comments, Plaintiffs only moved back their proposed bellwether selection date by 3 months (from April to July 2015). AbbVie's revised proposal has bellwether selection an additional 5 months later (December 2015), and the small amount of extra time is very valuable. It will allow many more cases to be on file and many more medical records to be collected. Defendants feel strongly that having more time to pick the bellwethers is essential to the fairness of the process and to picking bellwethers that will serve for both sides as true representative test cases.

IV. Conclusion

For all of these reasons and those stated in their October 20 and 30 briefs, Defendants respectfully urges the Court to adopt AbbVie's revised schedule.

Dated: November 5, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott Ahmad, hereby certify that on November 5, 2014, the foregoing document was filed via the Court's CM/ECF system, which will automatically serve and send email notification of such filing to all registered attorneys of record.

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