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

IN RE: TEPEZZA MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION, This Document Relates to All Cases	No. 23 C 3568 MDL No. 3079 Judge Thomas M. Durkin Magistrate Judge M. David Weisman

The PLC's Opposition to Horizon's Motion to Extend its Bellwether-Selection Deadline

Plaintiffs oppose Horizon's motion for a second 60-day extension of the bellwether-selection deadline. Horizon lacks good cause for its request. Horizon has obtained more than enough information in the past 90+ days to meet the stipulated (and already extended) deadline to select cases for discovery.

BACKGROUND

A. The parties negotiated an agreed Bellwether Protocol to select which cases would enter the discovery process.

On November 1, 2023, this Court entered Case Management Order 3. ECF No. 69. CMO 3 included a detailed Bellwether Protocol that was painstakingly negotiated by the parties over the course of several months. In selecting the Initial Bellwether Discovery Cases, the Bellwether protocol states that "the parties shall select cases that they have a good-faith belief are representative of then-filed cases as a whole, and that should be subject to Fed. R. Civ. P. 12 motion practice, discovery, Fed. R. Civ. P. motion practice, Fed. R. Evid. 702 motions, and trial." ECF No. 69 at PageID #:956.

In stipulating to this Protocol, the parties understood they were agreeing to select which representative cases would *enter the discovery process*. Completing this

selection process does not require that the information collected be perfect. Nor is exactitude the anticipated outcome of a preliminary sweep for records; the objective is to determine which cases should enter discovery.

To facilitate bellwether discovery selection, the parties agreed that Plaintiff Profile Forms, all the medical records in a Plaintiff's or a Plaintiff's counsel's possession, and executed authorizations for medical records and employment and disability records (as applicable) were due 30 days from November 1. The PLC secured a vendor, Rubris, to facilitate this process and provide a platform to share these records in a centralized and organized fashion. *See* Declaration of Timothy J. Becker (Mar. 12, 2024) at ¶ 3. All records are uploaded to Rubris, and each day any new uploads are shared with Horizon's counsel. *Id*. The bellwether-eligible plaintiffs substantially complied with these obligations and tendered the required documents on December 1. *Id*. At the time, Horizon was represented by attorneys Lori Hammond and Eric Reigner of Frost Brown Todd and Daniel McGrath of Hinshaw & Culbertson LLP, each of whom remains counsel of record for Horizon in this MDL.

Under CMO 3, the PLC was to provide its selections on January 2, 2024 (60 days from the entry of CMO 3, taking into account the court holiday) and Horizon was to identify its picks on January 30, 2024 (90 days from the entry of CMO 3). In agreeing to this deadline, Horizon agreed that 60 days with the PPFs, medical records, and authorizations was enough time to select the Initial Bellwether Discovery Cases. This was a reasonable assessment. As *both* parties were aware at the time they were negotiating the terms of CMO 3, records collection is always

largely within the control of third-party medical providers and seldom are the initial sweeps for records perfect. Armed with that knowledge, Horizon still agreed 60 days was adequate time within which to select Initial Bellwether Discovery Cases.

B. Horizon requests a 60-day extension of the selection of Initial Bellwether Discovery Cases; the PLC agrees given that the entry of new counsel often results in delay.

Nevertheless, on the eve of the holiday weekend, Horizon requested its first 60-day extension of the selection deadlines, claiming deficiencies with Plaintiff Profile Forms and records collection. The PLC acquiesced, chiefly because new counsel had moved, on December 17, 2023, to appear *pro hac vice* for Horizon (Grant Hollingsworth, Kathryn Jensen, and Robert Johnston of Hollingsworth LLP), ECF No. 80–82, and the PLC anticipated a request for additional time related to new counsel appearing. In the joint stipulated order extending the deadlines filed on January 2, 2024, Plaintiffs agreed to make their discovery selections on March 1, 2024, and Horizon would make its selections on April 1, 2024. ECF No. 91. Contrary to Horizon's claim that this agreement was premised on some understanding that the PLC would agree to another extension, in agreeing to extend the selection deadline, the PLC made clear that it did not intend to agree to a second extension to allow new counsel to get up to speed. *See* Becker Decl. Ex. 1, email from T. Becker to L. Hammond, et al. (Dec. 31, 2023).

C. Horizon's new counsel attempts to delay the discovery process.

Hard on the heels of seeking the deadline extension above, Horizon attempted to delay the January 9, 2024 status hearing before Magistrate Judge Weisman. ECF No. 95. The PLC opposed this request. ECF No. 97. Judge Weisman denied Horizon's

motion, noting that "the discovery process has been slow to gain traction." ECF No. 98. Based largely on the impetus from Judge Weisman's refusal to further delay discovery by putting off the scheduled status hearing, the parties were able to finalize not only the ESI Protocol but also agreed to search terms. ECF No. 100.

D. Horizon continues to try to tap the brakes on this MDL by requesting a second 60-day extension to select Initial Bellwether Discovery Cases.

Now, Horizon requests a second 60-day extension, claiming that it faces significant hurdles in the medical-records-collection process resulting in an "informational imbalance" that precludes it from meaningfully evaluating potential bellwether cases by Horizon's current bellwether selection deadline of April 1, 2024. Plaintiffs disagree that another extension is warranted.

1. The parties are on equal footing: the PLC selected its Initial Bellwether Discovery Cases from the information provided to Horizon on December 1.

To begin, there is no "informational imbalance;" as mandated by CMO 3, Plaintiffs provided all the medical records in their possession months ago. This is the corpus of information from which the PLC selected its cases on March 1. Becker Decl. at ¶ 4. Horizon has collected enough information about a critical mass of plaintiffs to ascertain which constitute representative cases appropriate to enter the discovery process.

The assertion that the PLC is significantly advantaged by the ability to talk freely with all plaintiffs about their medical histories is entirely beside the point: the plaintiffs have a layperson's understanding of medical issues. By Horizon's rationale, the parties could never be on equal footing (and Horizon could never pick its Initial

Bellwether Discovery Cases) because defendants may talk to plaintiffs only in depositions. What is relevant is that the parties have equal access to the information from which the PLC made its bellwether selections. The parties painstakingly negotiated the Bellwether Protocol and the format of the PPFs to ensure that all parties possessed adequate information from which to select their Bellwether cases. In fact, Horizon likely possesses *more* information than the PLC did given CMO No. 3 *requires* plaintiffs to produce all medial records in their possession.

That Horizon wants to collect medical records from every treating provider a plaintiff has ever seen—rather than only the ones who prescribed Tepezza and treated the plaintiffs' resulting hearing loss—is putting the cart before the horse. A broader sweep for available medical records (beyond a plaintiff's Tepezza-related treatment and the consequent injuries) is properly part of the discovery process rather than the pre-discovery selection process.

2. Horizon's lack of diligence, plodding onboarding of additional defense counsel, and insistence on securing more information than it needs to pick cases for discovery explain its request for a second 60-day extension of the agreed deadline.

That Horizon claims it has obtained only roughly half of the medical records from the treating providers identified in the PPFs since December 1 speaks to Horizon's lack of diligence. Horizon blames deficiencies in plaintiffs' authorizations and PPFs for the delay; however, despite Horizon committing to "identify to the PLC any purported deficiencies associated with outstanding Plaintiff Profile Forms," ECF No. 91, Horizon has made no effort to enlist the assistance of the PLC in securing

additional information or addressing any purported deficiencies (beyond demanding blank authorization forms).

Horizon has, however, repeatedly sent demands for authorizations that the PLC had already provided. *See e.g.*, Becker Decl. Exs. 2 and 3, letter from O. Sacks re-requesting authorizations for Plaintiff Guevara (Feb. 5, 2024) and letter from O. Sacks re-requesting authorizations for Plaintiff McKuhen (Feb. 5, 2024). Through this unnecessary work, the PLC learned that Horizon's counsel at Frost Brown Todd (who remain counsel of record in the case) had not taken any steps to facilitate Horizon's new counsel's access to Rubris (which the PLC assumed would be achieved in the normal and obvious course of incorporating additional counsel into a matter). Becker Decl. at ¶ 5. Hollingsworth waited until *February 15*—nearly two months after its attorneys' appearance in this litigation—to request access to the Rubris platform where the PPFs, medical records, and authorizations are housed. Becker Decl. Ex. 4, email from L. Kaas to PLC (Feb. 15, 2024).

How Horizon allocates work amongst the various law firms it has engaged to represent it is Horizon's prerogative. But expanding the team of lawyers should expedite—rather than delay—the case's progress. The extension to which the PLC previously stipulated was more than adequate time for these additional counsel to familiarize themselves with Horizon's existing obligations under the stipulated scheduling orders. To the extent Horizon has failed to collect records, this should not delay the progress of the case into discovery. Plaintiffs disagree that it was "unrealistic" to expect Horizon to collect the records during this time frame. It was

not Plaintiffs' responsibility to determine how long it would take Horizon to collect records, and if Horizon believed it needed more time to collect records, it should never have stipulated to the deadlines originally set in CMO 3, or to the extended deadline *Horizon itself proposed* in ECF No. 91.

3. Horizon's questionable selection of a records vendor has stymied its efforts, as has its insistence on wet signatures.

Further, that Horizon's vendor has experienced difficulty collecting every medical record with the authorization form it requested is neither surprising nor the responsibility of the PLC. The PLC accepted the authorization form proposed by Horizon with no edits. Becker Decl. at ¶ 6. In other words, **this is the exact authorization form Horizon requested and its vendor designed**. If that form has proved imperfect for its intended purpose, the time for Horizon to address that concern was in December, when the issues with Horizon's vendor and the authorization form it designed became apparent.

Given the frequency with which Horizon received nonresponsive records in response to the authorizations it submitted, it should have been obvious that the form was problematic. Horizon could have addressed this with its vendor and revised the authorization form to avoid further delay, but it did not. Instead, it suggested that Plaintiffs provide blank authorizations—a suggestion, contrary to Horizon's continued assertion, to which the PLC *did not* agree. Becker Decl. at ¶ 7. The PLC agreed only to inform plaintiffs' counsel of the request after which it was up to counsel for each individual plaintiff to decide. *Id.* at ¶ 8; *See* Becker Decl. Ex. 5, email exchange between T. Miracle and L. Hammond, *et al.* (Jan. 10, 2024). While several

firms did supply Horizon with blank authorizations, counsel for plaintiffs were not required to do so.

If the recurring issues with its authorization form were not a compelling enough reason to doubt the vendor's competency, that the vendor was sending subpoenas to providers in Horizon's counsel's name should have given Horizon pause. *See* Becker Decl. Ex. 6, email from L. Hammond to T. Becker, *et al*. (Dec. 20, 2023) (acknowledging that Horizon's vendor had issued subpoena in Horizon's counsel's name without his knowledge or consent and without providing the required notice to the PLC). Still, Horizon continued course with this vendor. The delay in obtaining medical records that resulted is a consequence of Horizon's own making, and not one for which the plaintiffs should have to account by suffering further delay.

The final link in the chain to Horizon's ability to meet its selection deadline is its insistence on obtaining *wet signatures* on authorizations when the bulk of sophisticated providers process DocuSigned authorizations without issue. The PLC requested that Horizon accept DocuSigned authorizations to expedite the process but Horizon refused. *See* Becker Decl. Ex. 7, email exchange between T. Becker and L. Hammond, *et al*. (Dec. 8, 2023). Horizon insisted on the byzantine process of mailing documents back and forth for wet signatures as it identified new providers—beyond the key treating physicians relevant to a plaintiff's use of Tepezza or Tepezza-related injuries. That is Horizon's prerogative. But given its insistence that its vendor form be hand signed, Horizon should have anticipated the additional time this would

require. This additional self-imposed hinderance should not be rewarded with additional time to collect even more records.

ARGUMENT

A. Horizon's lack of diligence precludes a finding of "good cause" to permit a second 60-day extension of its selection deadline.

"District court oversight is encouraged to avoid 'protracted discovery, the bane of modern litigation.'" *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000). A scheduling order "is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Naud v. City of Rockford*, No. 09 CV 50074, 2013 WL 4447028 (N.D. Ill. Aug. 16, 2013) (internal citations and quotations omitted). Compliance with case-management orders is essential, particularly in complex litigation such as this. As the Court of Appeals for the Ninth Circuit has explained:

> multidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts. The district court needs to have broad discretion to administer the proceeding as a whole, which necessarily includes keeping the parts in line. Case management orders are the engine that drives disposition on the merits.

In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1229 (9th Cir. 2006).

A request to extend unexpired deadlines in the scheduling order must be premised on a showing of good cause. Fed. R. Civ. P. 16(b)(4). "Good cause" exists only when a deadline "cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 advisory committee's note to 1983 amendment; *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542 (7th Cir. 2005)

("Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking amendment."). "Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minnesota*, 187 F.R.D. 578 (D. Minn. 1999) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)).

Horizon's claim of incomplete medical records does not constitute "good cause" to modify, for the second time, the scheduling order to which it freely stipulated. The records-collection process is just that—a process; one that Horizon should have anticipated and planned for accordingly. Foreseeable obstacles do not justify Horizon's motion to extend deadlines in the scheduling order, especially when they are obstacles of which Horizon was aware on January 2, when it agreed to make its selections by April 1, 2024. *See McCann v. Cullinan*, No. 11 CV 50125, 2015 WL 4254226 (N.D. Ill. July 14, 2015) (noting that counsel voiced no concern about his ability to meet the deadline on the date the Court set the deadline, and motion to extend would be denied under Rule 16(b)(4)); *see also Ebel v. Eli Lilly & Co.*, 248 F.R.D. 208 (S.D. Tex. 2007) (denying the parties' joint motion to modify a scheduling order where the scheduling conflicts were foreseeable when the parties agreed on the deadlines in an earlier motion to modify the scheduling order).

Horizon knew when setting the first deadline for selecting Initial Bellwether Discovery Cases that collecting the Plaintiffs' medical records would be a time-consuming process subject to the cooperation of third-party providers. Horizon chose and persisted with a vendor that by all accounts has proved incompetent in managing

the records-collection process. Horizon also decided to add new counsel amid this selection process and failed to take steps to facilitate its new counsel's access to the Rubris platform where the records are housed, resulting in Horizon's counsel sending demands for authorizations that had already been provided.

Horizon claims that it has reviewed and promptly submitted authorizations from plaintiffs as they were received, but neglects to mention that its new counsel did not request access to the central platform until February 15, further proving Horizon's lack of diligence; were Horizon making every effort to obtain medical records by the agreed-upon deadline—or "working tirelessly" since December 1 as it claims— it should not have taken this long for its additional counsel to request access to the platform housing the PPFs, medical records, and authorizations. Good cause is not shown where a party's actions "do not bespeak diligence or any sense of urgency." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217 (D.C. Cir. 2011); *see Thurmond v. Bayer Healthcare Pharms., Inc.*, 649 F. App'x 1003 (11th Cir. 2016) (finding no good cause to extend fact-discovery and expert-disclosure deadlines where the plaintiff did not submit her first request for production for four months after the court entered the discovery schedule).

It is axiomatic that "cases, and arguments raised in cases, belong to the parties, not the attorneys." *In re Asbestos, Catalyst, & Silica Toxic Dust Exposure Litig.*, 67 V.I. 544 (Super. Ct. 2017) (quoting *Daniel v. Borinquen Ins. Co.*, SX–98–CV–192, 2017 V.I. LEXIS 117, *17 n.11 (Super. Ct. June 28, 2017)). "Parties cannot avoid the consequences of not ensuring that their attorneys have adequate resources"—or in

this case, access to the resources the PLC made readily available—"to meet court-imposed deadlines." *Id.* Horizon's inaction cannot justify further delay in the progress of this litigation. *See Rosario v. Livaditis*, 963 F.2d 1013 (7th Cir. 1992) ("A party who fails to pursue discovery in the face of a court ordered cut-off cannot plead prejudice from his own inaction.").

Finally, contrary to Horizon's claim, "the dearth of medical records alone" *does not* amount to good cause; Horizon must demonstrate that it acted with diligence to obtain the records. In *Williams v. James River Grp. Inc.*, 627 F. Supp. 3d 1172, 1180 (D. Nev. 2022), the court denied the parties' *joint stipulation* to extend case-management deadlines, holding that the need to review medical records does not establish good cause where the stipulation failed to indicate the process by which the medical records were obtained, any *unexpected* delays in obtaining them, or any corresponding dates with respect to that reasoning. The Court also rejected the notion that the appearance of a new attorney establishes good cause for an extension, noting that the new attorney was counsel of record with respect to the discovery plan that was accepted in formulating the scheduling order. *Id.* at 1179.

Here, Horizon's engagement of additional counsel months into this MDL underlies the delays that have occurred over the three months since their appearance. Moreover, Horizon cannot point to any "unexpected" delays in obtaining the medical records. To the contrary, Horizon acknowledges the hurdles were anticipated and resulting delays evident at the time that the parties agreed to the first extension.

Still, Horizon agreed to make its selections by April 1. If Horizon believed this deadline to be "unrealistic," it should not have proposed the April 1 deadline.

Horizon's cavalier attitude with respect to the CMO 3 and ECF No. 91 gives the impression that Horizon agreed to the April 1 deadline with the full intention of requesting this second extension. This conduct should not be rewarded; "[i]t is not the right of a party who chooses not to comply with deadlines to be able to restructure them at will." *Finwall v. City of Chicago*, 239 F.R.D. 494, *objections overruled*, 239 F.R.D. 504 (N.D. Ill. 2006). "Time limits coordinate and expedite a complex process; they pervade the legal system.... 'Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won.'" *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 302 (7th Cir.1994) (internal citations omitted).

B. "Fundamental Fairness" is not a proper consideration under Rule 16, but to the extent that it is considered, Plaintiffs—not Defendant--will be prejudiced by continued delay.

Horizon cites the proper standard in its motion but offers little to demonstrate its diligence. Instead, the bulk of Horizon's argument centers on the "fundamental fairness" required of the bellwether-selection process.

That Horizon has not acted diligently to meet the deadlines to which the parties agreed should end the inquiry. *McCann*, 2015 WL 4254226, at *11; *Peters v. Wal-Mart Stores E.*, LP, 512 Fed.Appx. 622, 627–28 (7th Cir. 2013). But to the extent that it doesn't, Plaintiffs emphasize that Horizon will not be prejudiced should the Court deny its motion.

The parties are in comparable positions to select Discovery Plaintiffs. Horizon does not "lack access to information regarding the Bellwether pool," as Plaintiffs

provided Horizon with *all* medical records in their possession and met all of their obligations under the CMO 3. Horizon has sought and obtained extensive records for several Plaintiffs beyond those the Plaintiffs received from the provider and produced to Horizon months ago. Becker Decl. Ex. 8, letter from R. Johnston to PLC (Feb. 27, 2024) (acknowledging that Horizon received a more fulsome production from a provider for Plaintiff Sadonis than her counsel did). Given that Horizon possesses all of the same information on which the PLC relied to make its selections (and then some), to allow Horizon an additional 60 days to collect records would tilt the process in Horizon's favor—exactly the result Horizon argues is unfair.

Further, while Plaintiffs can agree that parties should have a reasonable amount of time for discovery, Horizon *has* had a reasonable amount of time. Its failure to obtain all of the medical records (from more providers than it actually needs to start the discovery process) is due to its own lack of diligence, leisurely incorporation of new counsel, and careless vendor selection, not inadequate time.

Plaintiffs, on the other hand, will be unfairly prejudiced by the continued delay. Delays increase the cost of litigation, to the detriment of the parties enmeshed in it. *Spears v. City of Indianapolis*, 74 F.3d 153 (7th Cir. 1996). In a vacuum, a lone 60-day extension amounts to almost nothing and should readily be professionally supplied—which the PLC did when Horizon requested its first extension. But this case does not occur in a vacuum; each extension creates a domino effect that further delays discovery, trial, and ultimately resolution. This is the difference between an MDL that lasts three-to-five years and one that lasts five-to-ten. The JPML

transferred these cases to this Court more than nine months ago. Yet not a single deposition has occurred. Given Horizon has access to at least the *same data* the PLC possessed to make its timely selections, the purported need for additional time to gain additional information should not be well received.

Allowing Horizon to modify the scheduling order for a second time in these circumstances "would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). The just and efficient resolution of this litigation requires Horizon's adherence to the deadline Horizon proposed and the parties agreed to over two months ago.

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Respectfully submitted,

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