UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	))))	Case No. 14-cv-1748 MDL No. 2545
THIS DOCUMENT RELATES TO ALL CASES	))	Hon. Matthew F. Kennelly

DEFENDANTS' SUBMISSION IN SUPPORT OF THEIR PROPOSED CASE MANAGEMENT ORDER ON COORDINATION WITH STATE COURT CASES

On August 22, the Court asked the parties for "tools" to assist in coordinating this MDL with the parallel state court cases. The parties were to work together to "try to get some coordination done," to help Defendants avoid being "whipsawed" between the sets of cases on discovery and other issues.

Defendants drafted and proposed to Plaintiffs a state court coordination order. It contained specific provisions (a) inviting state courts to coordinate, (b) appointing State-Federal Liaison Counsel and establishing his responsibilities, (c) endeavoring to put the various cases on similar schedules, (d) setting up procedures to avoid duplicative document productions, (e) encouraging the use of joint written discovery such as interrogatories, and (f) avoiding the potential for multiple depositions of the same witness. These provisions were drawn from the best practices in prior MDLs. Defendants respectfully submit that their proposed order provides the tools the Court requested.

Plaintiffs' Co-Lead Counsel marked up certain provisions of the draft with comments and questions, leaving other provisions untouched. The parties then had a productive call in which they discussed the comments and questions in detail. Following the call, Defendants prepared a revised version of the order that addressed all of the comments and questions. Defendants sent the revised draft to Plaintiffs' Co-Lead Counsel and invited edits to it.

But Plaintiffs' Co-Lead Counsel then abruptly changed course, completely abandoning the draft the parties were negotiating and proposing in its stead a very short order that simply

requires the parties in the MDL to "make reasonable efforts to coordinate with each other, to the extent practicable" the MDL with the state court cases. It is not specific. It gives the parties and the Court no tools. When sending it, Plaintiffs' Co-Lead Counsel gave no indication of why the draft already being negotiated—including provisions to which Plaintiffs had never objected—had suddenly been rejected in favor of a short, non-specific, toothless order that will accomplish little or nothing in the way of actual coordination.

The parties conferred via phone on December 3, 2014. They concurred that their proposals were too far apart to bridge the gap and agreed to file simultaneous submissions along with their respective proposed coordination orders.

Defendants' proposed coordination order is attached as Exhibit 1. It includes the changes Defendants made to address the comments and questions from Plaintiffs. Defendants respectfully urge the Court to enter it as a case management order in this MDL.

BACKGROUND

As the Court is aware, several state courts have testosterone replacement therapy cases that are identical in substance to the cases in the MDL. This submission uses AbbVie's state court cases as an example.

AbbVie is a defendant in 32 state court cases across the country. These include cases in (a) Cook County, Illinois, where a single judge (the Honorable Donald Suriano) has been designated to handle all of the cases; (b) Philadelphia, Pennsylvania; (c) Orange County, California; (d) St. Louis, Missouri; and (e) Lake County, Indiana.[1] As a result, AbbVie faces inconsistent schedules and inconsistent or duplicative discovery demands.

This is no mere theoretical concern. In the cases pending in the MDL, Cook County, and Philadelphia, AbbVie has already been served with 314 requests for production of documents, 133 interrogatories, and 92 requests for corporate testimony. These discovery requests are often duplicative. The Court will recall that they have also been inconsistent, as when the MDL

[1] The cases in Missouri and Indiana were recently removed to federal court, where the plaintiffs have filed motions to remand that are now pending.

Plaintiffs asked this Court to order Defendants to produce their documents in native format even after Judge Suriano ordered AbbVie to produce its documents in TIFF format. The MDL Plaintiffs wanted AbbVie to produce each of its documents twice, in different formats.

Defendants have encountered these obstacles to coordination even when the same Plaintiffs' lawyers are handling both sets of cases. One example is the document production format dispute mentioned above. Lawyers who were appointed by this Court to be one of Plaintiffs' Co-Lead Counsel and to be one of Plaintiffs' Co-Liaison Counsel are also handling cases in Cook County. They nonetheless urged this Court to impose extraordinarily costly, burdensome, and unnecessary document production requirements in the MDL that were inconsistent with the parallel requirements already imposed in Cook County.

Another example is the current negotiations over the search terms that Defendants will use to locate potentially responsive electronically stored information (ESI) in custodial files and associated databases. AbbVie proposed to the MDL Plaintiffs and the Cook County Plaintiffs a list of 22 broad product identifying search terms, followed by 38 broad search terms designed to capture documents bearing on alleged injuries suffered by Plaintiffs. The Cook County Plaintiffs (in negotiations handled by an attorney who is not part of the MDL) accepted those search terms under the ESI protocol (which is virtually identical to the one in this case). But the negotiations with the MDL Plaintiffs continued, and in an attempt to compromise and avoid disputes requiring the Court's attention, AbbVie expanded the list to 128 search terms. But the MDL Plaintiffs are demanding the use of 542 search terms, without any product qualifiers. So, for example, a search for pulmonary embolism will call up that term for all of AbbVie's products, not just AndroGel, which will expand the review pool exponentially. Furthermore, the MDL Plaintiffs are insisting on the right to add to this list—so it is essentially ever-growing. Meanwhile, in state court in Philadelphia, an attorney has demanded that Auxilium use ***82 pages*** of search terms! The Philadelphia attorney is also a member of the Plaintiffs' Steering Committee in the MDL.

Without coordination on these issues, and knowing what search terms to use, Defendants are put in the untenable position of not knowing how to search for documents, even though it is obvious that all of the plaintiffs' attorneys want all of the same documents. This is the opposite of sensible coordination and efficiency. It takes little imagination to foresee how these problems will multiply once full-fledged discovery is underway in all of the various state courts, especially depositions.

Plaintiffs' Co-Lead Counsel initially appeared to understand and be sympathetic to these concerns. As explained above, he gave comments and questions on Defendants' initial draft of the coordination order, and he participated in a productive call to discuss it. Defendants made changes to the order to address the issues he raised. Defendants' redline draft, showing those changes, is attached as Exhibit 2. But that was the end of useful negotiations.

Plaintiffs' Co-Lead Counsel sent back an entirely new order, consisting of around a page and a half of text, that supposedly aspired to coordination but lacked meaningful detail about *how* the cases would be coordinated. Plaintiffs' proposed order is attached as Exhibit 3. In the email transmitting it to Defendants, Plaintiffs' Co-Lead Counsel stated that "the attached draft order is very close to what we believe should be entered by the court." There was no explanation about why the previously negotiated order had suddenly been rejected.

For the reasons explained in this submission, Defendants respectfully ask the Court to enter their proposed coordination order, Exhibit 1, as a case management order in the MDL.

ARGUMENT

As the Manual for Complex Litigation notes, "[s]tate and federal judges, faced with the lack of a comprehensive statutory scheme, have undertaken innovative efforts to coordinate parallel or related litigation." The publication *Multijurisdiction Litigation*—a joint project by the National Center for State Courts, the U.S. Panel on Multidistrict Litigation, and the Federal Judicial Center—explains the advantages of coordination.[2]

[2] Advantages of Coordination, *Multijurisdiction Litigation*, http://multijurisdictionlitigation.wordpress.com/advantages-of-coordination/.

The attorneys appointed as Plaintiffs' Co-Lead Counsel have all recognized the importance of effective state court coordination, as they stressed repeatedly in their application to be appointed:

- "[I]n forming the agreed to slate, several factors were, and respectfully should be, considered, including…[p]roven ability to work collectively with parallel state court venues."
- "As a result it is expected that this combined slate will provide the efficiencies for all parties, as well as the Court, including one common document depository for all Plaintiffs, a uniform deposition protocol, coordination of state court trials and many other aspects that all complex multi-jurisdictional mass torts present."
- "[I]t is vital to the success of an MDL to coordinate and cooperate with counsel representing clients in parallel state court actions in order to efficiently move the litigation as a whole…To this end, this proposed PSC slate has included in its membership and/or the lawyers involved herein, those we believe, to be the most active and involved state court litigants so as to ensure this cooperation from the onset."
- "In recent pharmaceutical MDLs, one should observe that it has become regular practice to work jointly with the counsel of parallel state court actions.…[T]he MDL court and state courts often work jointly on issues affecting all parties, and all counsel must support and share with each other in order to fulfill the requirements of the courts….[O]ne must acknowledge that it is absolutely necessary and critical that the PSC members be more than willing and able to work side-by-side with those involved in the state court venues."

See ECF No. 150, Joint Application for Appointment to the Plaintiffs' Steering Committee, at 3, 4, 10, 14.

To advance the related goals of increasing efficiency, reducing costs, and avoiding duplication of efforts in different courts, Defendants' proposed order sets forth procedures that

will apply in the MDL in order to facilitate, to the maximum extent possible, coordination with the parallel state court cases.

I. Defendants' proposed order has clear, specific provisions that give the parties and the Court real tools to coordinate with state courts.

In contrast with Plaintiffs' proposed order, which says almost nothing of substance, Defendants' proposed order establishes real responsibilities and real mechanisms for coordinating the MDL with the parallel state court cases. A summary of each provision is set out below.

A. State-Federal Liaison Counsel

After inviting and welcoming contacts and cooperation between this Court and state courts on issues of common interest in testosterone replacement therapy cases, Defendants' proposed order begins by appointing a State-Federal Liaison Counsel and also Liaison Counsel to individual state courts. Defendants' proposed order also establishes the responsibilities of liaison counsel. Among the most important of those responsibilities are communicating on a regular basis with plaintiffs' counsel in the state court cases, coordinating discovery and case schedules between the MDL and the state court cases, and avoiding inconsistent discovery obligations by using the same orders (such as case schedules, protective orders, confidentiality orders, ESI protocols, and preservations orders) and discovery tools (such as plaintiff and defendant fact sheets) in the MDL and in state court cases. (Ex. 1 §§ II. 6. (b), (c), and (d).)

Appointing liaison counsel and assigning specific responsibilities is a normal feature of an MDL coordination order. *See, e.g.*, Ex. 4, *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, Order #8. Yet Plaintiffs' proposed order does not assign liaison counsel any specific responsibilities beyond reporting in the MDL on the status of state court cases and coordination.

B. Document production

In order to avoid multiple requests for, and multiple different productions of, the same documents, Defendants' proposed order allows any plaintiff's counsel in any of the state court

cases[3] to request production from any Defendant of the documents produced by that Defendant in the MDL, which will ensure consistency and uniformity in format and other elements of production, not to mention the contents of the production. (Ex. 1 §§ III(A)(7)-(8).) Defendants' proposed order makes clear, however, as Plaintiffs' Co-Lead Counsel requested, that plaintiff's counsel in state court cases are not entitled to free ride on the work product of MDL Plaintiffs' counsel.

As the Court stated during the August 14 status hearing, subjecting a party to inconsistent document production requirements that cover the same documents in different cases—including in terms of the format of the production, the timing or sequence of the production, and the confidentiality designations that apply to the production—is likely to increase costs needlessly and in some instances substantially. Defendants' submission addresses these concerns and should be part of any state-federal coordination order. Other MDLs have similar provisions. *See, e.g.*, Ex. 5, *In re Digitek Prods. Liab. Litig.*, MDL No. 1968, Pretrial Order #11; Ex. 6, *In re Ortho Evra*, MDL No. 1742, Case Management Order No. 8; Ex. 7, *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, Pretrial Order No. 467.

C. Written discovery

Defendants' proposed order also provides for coordinating written discovery. The parties in the MDL and in the state court cases are likely to serve written discovery—including document requests, interrogatories, and requests to admit—that in substance is identical or nearly so, but is presented using different requests drafted by different attorneys. Defendants' proposed order therefore directs the State-Federal Liaison Counsel and the Liaison Counsel to use their best efforts to encourage state court counsel to use joint or parallel written discovery that can be responded to only once, and to standardize and expedite certain discovery such as plaintiff fact sheets and defendant fact sheets. (Ex. 1 § III(B)(9)-(11).) Responding to discovery that is in

[3] Like some other provisions of Defendants' proposed order, this one requires the state court to have entered a protective order that provides substantially similar protections to the one entered in the MDL.

substance the same, but requires separate and different responses because the form is different, increases costs without a corresponding benefit. For that reason, similar provisions have been entered in other pharmaceutical MDLs. (Ex. 8, *In re Propulsid*, MDL No. 1355, Pretrial Order No. 14.) They should be included here as well.

D. Depositions

Unless depositions are coordinated, the same witnesses will almost certainly be deposed more than once or for longer than necessary, imposing inconvenience and unnecessary extra expense on the witnesses and parties. Defendants' proposed order facilitates coordination so that depositions are scheduled and conducted only once whenever possible, and it seeks to minimize the length of depositions and avoid overlap in examinations.[4] For example, Defendants' proposed order allows for cross-noticing depositions initiated in both the MDL and in state court cases. (Ex. 1 §§ III(C)(12)-(15).) It directs the parties to use best efforts to designate a single examining attorney or, if there are multiple examining attorneys, to reach agreement on such topics such as the order of examinations and the time allotted for each. (*Id.* § III(C)(16).) Similar provisions appear in state-federal coordination orders in other pharmaceutical MDLs. (Ex. 9, *In re Zoloft Prods. Liab. Litig.*, MDL No. 2342, Pretrial Order No. 30, at 6 (length of cross-noticed depositions shall not exceed seven hours); Ex. 10, *In re Zimmer NexGen Knee Implant Prods. Liab. Litig.*, MDL No. 2272, Case Management Order 5.) These concrete provisions will benefit all parties, and they should be included in any order on coordination.

II. Plaintiffs' proposed order lacks specifics and will accomplish little or nothing.

The substance of Plaintiffs' proposed order is to direct the parties to "coordinate," but only when "practicable." Apparently to emphasize how difficult and fruitless a task this will be, the word "practicable" is repeated six times in less than two pages.

[4] The parties anticipate reaching agreement with respect to other elements of deposition protocol, to be memorialized in a future case management order.

Setting aside these watered-down platitudes, Plaintiffs' proposed order gives the parties and the Court no tools for accomplishing the coordination of the cases. The word "deposition," as just one example, does not even appear in the document. Without specifics, Plaintiffs' proposed order is an empty shell, purporting to aspire to coordination but preventing any actual coordination from taking place.

When transmitting it to Defendants, the only justification that Plaintiffs' Co-Lead Counsel offered for their proposed order is that it is supposedly based on Judge Pallmeyer's coordination order in the NexGen MDL. That order, which is attached as Ex. 10, actually supports the entry of a coordination order with specific provisions.

For example, the NexGen order, like Defendants' proposed order but unlike Plaintiffs', provides that depositions may be cross-noticed in any state court proceeding, and it puts a time cap on total questioning inclusive of the seven hours permitted by Rule 30(d)(1). (*Id.* at 3.) The NexGen order also includes a provision under which the defendant shall direct state court plaintiffs' counsel to the PSC for the production of documents where a state court plaintiff serves discovery substantially similar to that previously served on the defendant in the MDL. *Id.* at 2-3. Under the order, the defendant is to identify by bates number the documents to be produced by the PSC and the PSC is to produce those documents, subject to cost sharing agreements. *Id.* The NexGen order further specifies that "It is contemplated by the Court and the parties that all discovery conducted in these proceedings may be utilized in any related state court action…" *Id.* at 1. This is a far cry from Plaintiffs' discovery provision, which merely indicates that "[t]he PSC, to the extent feasible and practicable, shall coordinate [] discovery with the plaintiffs in the state court proceedings…" Ex. 3 at 2.

Plaintiffs' proposed order may have used the NexGen order as a starting point, but Plaintiffs have stripped it of most of its meaning and substance. By contrast, Defendants' proposed order, with its specific provisions and clear responsibilities, provides the Court with the tools it requested for reasonable and workable coordination with the state court cases.

CONCLUSION

For the aforementioned reasons, Defendants respectfully urge the Court to enter their proposed case management order on coordination with state court cases.

Dated: December 3, 2014

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CERTIFICATE OF SERVICE

I, Marissa S. Ronk, hereby certify that on December 3, 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.

/s/ Marissa S. Ronk