



April 27, 2018

**VIA ECF AND FEDERAL EXPRESS**

Honorable Judge Claire C. Cecchi  
United States District Court  
District of New Jersey  
Martin Luther King Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

**In Re: Proton-Pump Inhibitor Products Liability Litigation (II)  
2:17-md-2789 (CCC)(MF) (MDL 2789)**

Dear Judge Cecchi,

The PSC respectfully submits this correspondence to set forth Plaintiffs' position regarding certain disputed issues listed on the Joint Status Report and Agenda for the upcoming Case Management Conference ("CMC") on May 1, 2018.

***Proposed Scheduling Order***

As the Court may recall, the PSC has been trying to negotiate a scheduling order and "trial date" with Defendants since September, 2017.<sup>1</sup> At that time, the PSC's proposal was rejected out of hand by Defendants as premature. The PSC revisited the issue at the November 2017 CMC but again, the Defendants refused to engage. The Court, however, directed the parties, "to meet and confer regarding the Scheduling Order and be prepared to discuss it at the next conference." Nov. 8, 2017, Case Management Conference Tran. at 9. Having failed to get any meaningful response from Defendants, the PSC provided them with another proposed Scheduling Order in February 2018. (*See* Exhibit A, annexed hereto.) At this point, the Defendants finally agreed to confer with us and provided, via email, a counter proposal that set forth the parties' differences with respect to critical milestone dates. (*See* Exhibit B, annexed hereto.)

Following the telephonic CMC on April 10, 2018, the parties continued to meet and confer on a Scheduling Order. However, on April 16, 2018, Defendants blindsided Plaintiffs by withdrawing their prior scheduling proposal and declaring that instead, they would be proposing a completely different schedule, under which, the Court would resolve issues of general causation and preemption, prior to preparing any individual cases for trial.<sup>2</sup> This proposal is not only a 180-

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<sup>1</sup> *See* Sept. 12, 2017, Case Management Conference Tr. at 30.

<sup>2</sup> Defendants have suggested either limiting discovery to general causation and preemption issues, or alternatively, permitting broader discovery but delaying working any individual cases up for trial until after the Court has held hearings on general causation and preemption first. Neither scenario should be permitted by this Court, as they both will create needless delay.

degree change in Defendants' most recent purported position, but it is a return to a pre-trial schedule that was long ago rejected by this Court.<sup>3</sup> Moreover, this approach was also rejected by other Courts who heard the issue before the MDL was established.<sup>4</sup> Finally, there is nothing in the PSC's proposed schedule that prevents Defendants from challenging causation or raising preemption at the appropriate time.

While we anticipate Defendants will claim that some new development in the litigation warrants this change in position, the PSC submits that any purported "new" information has likely been available to Defendants for some time. Further, there is nothing to be gained by delaying a trial in this litigation, as the parties need trials to evaluate the strengths and weaknesses in their claims and defenses to bring resolution of the thousands of cases that have and will be filed. Moreover, under Defendants' proposal, it would be years before a single case is tried.<sup>5</sup> Our clients, many of whom are elderly, should not have to wait years to have their cases heard. Nor should Defendants be permitted to engage in further gamesmanship and delay with respect to moving this litigation forward.

Accordingly, the PSC submits that its proposed Scheduling Order should be entered by the Court at this time (annexed hereto as Exhibit C). The time for meeting and conferring is over and the parties need the Court to decide this disputed issue. Moreover, the PSC's proposed Order includes significant compromises in Plaintiffs' initial position in order to accommodate Defendants. For example, the PSC's proposed Scheduling Order utilizes a February 2020 trial date. This is 8 months later than the date initially proposed by the PSC (June 2019) and 7 months before the date previously proposed by Defendants (August 2020). Additionally, the PSC's initial schedule required selection of bellwether cases within a shorter time frame. In consideration of Defendants' request for more time in which to collect records and evaluate potential cases, the PSC's present proposal now provides for additional time.

The PSC respectfully submits that our proposed Scheduling order is reasonable and will advance the litigation in the most efficient manner, and thus, should be entered by the Court.

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<sup>3</sup> See, Joint Status Report and Proposed Initial Discovery Plan at 11-15, *Goodstein v. Astrazeneca Pharmaceuticals LP et al.*, 16-cv-05143 (DNJ Mar. 15, 2017) Doc. No. 29; and Joint Status Report and Proposed Agenda, *Goodstein v. Astrazeneca Pharmaceuticals LP et al.*, 16-cv-05143 (DNJ Apr. 21, 2017) Doc. No. 30. Defendants' proposal was rejected by this Court. See, Case Management Order No. 1 (Scheduling), *Goodstein v. Astrazeneca Pharmaceuticals LP et al.*, 16-cv-05143 (DNJ May 25, 2017) Doc. No. 39.

<sup>4</sup> Indeed, unified, *not bifurcated*, pretrial discovery plans were Ordered in several other District Courts before the case was centralized as an MDL before this Court. These included, but are not limited to, the: Southern District of Ohio; Southern District of West Virginia; Southern District of Illinois; and District of Kansas.

<sup>5</sup> For example, if Defendants were to lose a preemption motion, they would undoubtedly seek to appeal, creating further delay.

***AstraZeneca's Document Productions***

During the last Case Management Conference, the Court ordered AstraZeneca to make a rolling production of an initial set of 10 custodians, utilizing Plaintiffs' search terms. AstraZeneca made its first production from the set of custodians on April 25, 2018. This production, however, is problematic for two reasons. First, we do not believe this represents a "rolling production" in the spirit intended by the Court or anticipated by Plaintiffs. While we did not anticipate production of all 10 custodians within two weeks, we did expect we would receive at least 3-5 custodians. However, rather than produce a single complete custodial file, AstraZeneca made a partial production (typically ranging between 75-1,000 documents per custodian) for all 10 custodians. Receiving custodial productions in this piecemeal fashion is very inefficient, as it prevents Plaintiffs from completing the review of a custodial file within a defined time period. This makes it difficult to review documents within the context of a potential witness's entire file (e.g., related emails or documents may be produced to Plaintiffs weeks apart). Additionally, it makes it impossible to prioritize document productions of custodians and to schedule their depositions, as we do not know when any single custodial file production will be completed. Second, AstraZeneca's counsel is unable to tell us when they will complete the production of the 10 custodial files ordered by the Court. The PSC needs this production completed promptly. Indeed, we need the pace of document productions to increase, so we can complete our reviews and schedule depositions.

Plaintiffs have previously requested that we confer on a document production schedule (including both non-custodial and custodial sources), to ensure that we are getting documents in a timely and efficient manner. While we raise this matter with respect to AstraZeneca, we think such a protocol should be in place for all Defendants.

***Limitations on Discovery***

Plaintiffs' understanding is that Defendants intend to submit to the Court a proposed order that significantly limits the number of custodial files each Defendant will be required to produce, as well as the number of depositions that Plaintiffs' can request. Additionally, Defendants propose a general discovery cut-off date, despite the fact the products at issue are still on the market.

Plaintiffs oppose any such restriction at this time, as discovery in this case is still in its infancy—largely due to the repeated delays and gamesmanship on the part of Defendants. For example, the majority of Defendants have identified only a fraction of the true number of custodians who played a significant role in, among other issues, the development, regulatory matters, and promotion of the products at issue, despite the fact that these products were developed and marketed over a period of 20-40 years and were managed by hundreds, if not thousands of employees.

| <b>Defendant</b> | <b>Products(s)</b>     | <b>Development/Marketing Time Period</b> | <b>Witnesses Identified by Defendants</b> |
|------------------|------------------------|--|---|
| AstraZeneca      | Prilosec<br>Nexium     | Approx. 1980-2018<br>(38 years)          | 46  |
| Pfizer/Wyeth     | Protonix<br>Nexium OTC | Approx. 1985-2018<br>(33 years)          | 28  |
| Takeda           | Prevacid<br>Dexilant   | Approx. 1988-2018<br>(30 years)          | 14  |
| P&G              | Prolosec OTC           | Approx. 1998-2018<br>(20 years)          | 9   |

Notably, while AstraZeneca has identified 46 custodians it claims had significant involvement with the products at issue, they identified very few custodians who were involved with Prilosec. Indeed, their 30(b)(6) witnesses were largely restricted to the time-period from 1999 to the present. Yet, in their proposed order, AstraZeneca seeks to limit Plaintiffs to 60 custodial files and 25 depositions.

While Plaintiffs are working diligently to fill in the gaps by identifying additional custodians and witnesses, this task is made even more difficult because custodial files are only just starting to be produced and 30(b)(6) depositions could not be completed due to Defendants' inability to produce witnesses covering the relevant time-period. Plaintiffs need additional documents and information, so we can evaluate who the key players were in the development and marketing of these products. Thus, any discussion of discovery limits is premature.

We look forward to discussing these issues in more detail with the Court at the May 1, 2018 status conference.

Respectfully submitted,

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*Plaintiffs' Co-Lead Counsel*

cc: All Counsel of Record (via ECF)

**EXHIBIT A**

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**From:** Michael London  
**Sent:** Wednesday, February 14, 2018 9:49 AM  
**To:** 'Brown, Arthur E.' <Arthur.Brown@arnoldporter.com>  
**Cc:** Holian, Matt <Matt.Holian@dlapiper.com>; kcgreen@ulmer.com; Sherry A. Knutson (Sherry.Knutson@tuckerellis.com) <Sherry.Knutson@tuckerellis.com>; Jeff Grand <JGrand@seegerweiss.com>; Seth Katz <skatz@burgsimpson.com>; Pennock, Paul <PPennock@weitzlux.com>; Douglas, Matthew J. <Matthew.Douglas@arnoldporter.com>  
**Subject:** RE: PPI - Scheduling Order CMO

Arthur and team,

Following our call last week, attached is a draft of the proposed Scheduling Order that lays out a rough timeline. As was suggested by the defense side, in the spirit of compromise, we have inserted a placeholder of the Summer (July 12, 2018) by which to submit a more plan with more specifics on case numbers, etc....

Also you will see, we have highlighted in yellow, various names for these early work-up cases, to the extent the word "bellwether" was troubling to AZ.

Please send us any redlines, if any, as soon as you can, so that hopefully we can submit this CMO shortly.

---

**From:** Brown, Arthur E. [<mailto:Arthur.Brown@arnoldporter.com>]  
**Sent:** Thursday, February 01, 2018 10:00 PM  
**To:** Michael London <[mlondon@douglasandlondon.com](mailto:mlondon@douglasandlondon.com)>  
**Cc:** Holian, Matt <[Matt.Holian@dlapiper.com](mailto:Matt.Holian@dlapiper.com)>; [kcgreen@ulmer.com](mailto:kcgreen@ulmer.com); Sherry A. Knutson ([Sherry.Knutson@tuckerellis.com](mailto:Sherry.Knutson@tuckerellis.com)) <[Sherry.Knutson@tuckerellis.com](mailto:Sherry.Knutson@tuckerellis.com)>; Jeff Grand <[JGrand@seegerweiss.com](mailto:JGrand@seegerweiss.com)>; Seth Katz <[skatz@burgsimpson.com](mailto:skatz@burgsimpson.com)>; Pennock, Paul <[PPennock@weitzlux.com](mailto:PPennock@weitzlux.com)>; Douglas, Matthew J. <[Matthew.Douglas@arnoldporter.com](mailto:Matthew.Douglas@arnoldporter.com)>  
**Subject:** Re: PPI - Scheduling Order CMO

Defendants can make it work Monday afternoon at 4pm.

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**Sent:** Tuesday, January 23, 2018 2:07 PM  
**To:** Brown, Arthur E.  
**Cc:** Holian, Matt; [zzz.External.kcgreen@ulmer.com](mailto:zzz.External.kcgreen@ulmer.com); Sherry A. Knutson ([Sherry.Knutson@tuckerellis.com](mailto:Sherry.Knutson@tuckerellis.com)); Jeff Grand; Seth Katz; Pennock, Paul  
**Subject:** PPI - Scheduling Order CMO

Hello everyone,

Please let me know who the PSC should discuss the scheduling order CMO with on behalf of the defendants so we can get cracking, and hopefully not be stuck with 11th hour negotiation or briefing.

Thanks

\*\*\*\*\*

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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**IN RE: PROTON-PUMP INHIBITOR  
PRODUCTS LIABILITY LITIGATION  
(No. II)**

**1:17-MD-2789 (CCC)(MF)  
(MDL 2789)**

**Judge Claire C. Cecchi**

**This Document Relates to: ALL ACTIONS**

**[PROPOSED]  
CASE MANAGEMENT ORDER #\_\_**

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**CASE MANAGEMENT ORDER NO. [REDACTED]**

**(Preliminary Trial Plans)**

**1. SCOPE AND APPLICABILITY OF PLAN**

A. This Preliminary Plan and Procedures (the “Plan”) is intended to conserve judicial and party resources, eliminate duplicative discovery, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation. The following protocols and limitations in this Case Management Order (“CMO”) shall apply in all cases in MDL-2789:

**2. TRIAL CASES**

A. The parties shall present the Court with a trial plan, including a plan to select representative cases to serve as **bellwether cases/early work-up cases** that will undergo additional discovery (beyond the PFS and DFS). The parties shall endeavor to submit this plan on or before July 12, 2018. This plan shall include a timeline by which this limited discovery will occur, as well as a plan and timeline for how these **bellwether cases/early work-up cases** will be narrowed down to a secondary sub-set of cases that will be further prepared as actual trial cases (hereinafter referred to as “**Bellwether Trial Cases**” / “**Early Trial Cases**”). This subset of **Bellwether Trial Cases / Early Trial Cases**, will then undergo preparation for trial, which may

include additional trial discovery, including but not limited to disclosure of expert witnesses and ultimately dispositive and trial-related motion practice. The above aspects, including the number of cases and defendants in said cases will be the subject of the plan and joint CMO that the parties shall endeavor to submit on or before July 12, 2018.

**B.** It is the parties present intention to select bellwether cases/early work-up cases by September 7, 2018; to conduct “core discovery” on those cases from that time through December 7, 2018. The parties would contemplate selecting final Bellwether Trial Cases / Early Trial Cases with the Court’s input and approval by December 21, 2018, and then to complete final trial discovery on those cases, including expert reports and expert discovery, followed by summary judgment and *Daubert* motion practice, on a schedule to be submitted with the plan and joint CMO that the parties shall endeavor to submit on or before July 12, 2018.

**C.** Trial Plan: The parties will endeavor to work out the details of the trial selection and bellwether process by agreement, and the Court contemplates the first trial in this MDL to be held on or about June 3, 2019, with subsequent bellwether trials to follow. Therefore, as the parties develop the bellwether process timeline and dispositive motion practice schedule related to the bellwether cases (*e.g.*, summary judgment and/or *Daubert*) they should be guided by this time-frame.

**D.** Lexecon: Defendants will to provide the Court and PSC their position on *Lexecon* waivers for the bellwether cases/early work-up cases on or before March 9, 2018

**EXHIBIT B**

**From:** Douglas, Matthew J. [mailto:Matthew.Douglas@arnoldporter.com]  
**Sent:** Friday, February 16, 2018 4:46 PM  
**To:** Michael London <mlondon@douglasandlondon.com>; Brown, Arthur E. <Arthur.Brown@arnoldporter.com>  
**Cc:** Holian, Matt <Matt.Holian@dlapiper.com>; kcgreen@ulmer.com; Sherry A. Knutson (Sherry.Knutson@tuckerellis.com) <Sherry.Knutson@tuckerellis.com>; Jeff Grand <JGrand@seegerweiss.com>; Seth Katz <skatz@burgsimpson.com>; Pennock, Paul <PPennock@weitzlux.com>  
**Subject:** RE: PPI - Scheduling Order CMO

Mike,

We have mapped out a full schedule that we believe is more feasible, and even that is based on an assumption that there will be reasonable limits on the number of company witness depositions and custodians, which we would like to continue discussing as the subject of a separate CMO. Below is a chart that compares the schedule you propose with our counter-proposal. We're happy to meet and confer about this at your convenience.

|  | <b><u>Plaintiffs' Proposed Deadline</u></b> | <b><u>Defendants' Proposed Deadline</u></b>          |
|--|---|--|
| Defendants will to provide the Court and PSC their position on <i>Lexecon</i> waivers early discovery and trial cases  | March 9, 2018                               | Should be the subject of a separate discussion/order |
| Submission of agreed CMO (or brief regarding disputes, if any) regarding selection of cases for early discovery pool, including (1) which cases will be eligible, (2) how and when cases will be selected, and (3) discovery to be conducted in those cases. | July 12, 2018                               | October 1, 2018                                      |
| Selection of cases for inclusion in early discovery pool.  | September 7, 2018                           | December 3, 2018                                     |
| Completion of fact discovery on the Defendants (with appropriate safety valve for limited additional discovery if there are new developments/information/regulatory actions regarding PPIs after the deadline).  | TBD   | March 22, 2019                                       |
| Completion of case-specific discovery in early   | December 7,                                 | August 30, 2019                                      |

|   |                   |                    |
|---|-------------------|--------------------|
| discovery pool  | 2018              |                    |
| Selection of cases from early discovery pool for early trial cases (selection process and additional discovery allowed to be subject of subsequent order) | December 21, 2018 | September 27, 2019 |
| Completion of additional fact discovery for early trial cases   | TBD               | December 21, 2019  |
| Deadline for Plaintiffs' expert disclosures in early trial cases  | TBD               | January 10, 2020   |
| Deadline for Defendants' expert disclosures in early trial cases  | TBD               | February 7, 2020   |
| Completion of expert depositions in early trial cases   | TBD               | March 13, 2020     |
| Dispositive motions and <i>Daubert</i> motions in early trial cases   | TBD               | April 3, 2020      |
| Hearing on dispositive motions and <i>Daubert</i> motions in early trial cases  | TBD               | June 18, 2020      |
| Commencement of first early trial   | June 3, 2019      | August 10, 2020    |

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**EXHIBIT C**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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PRODUCTS LIABILITY LITIGATION  
(No. II)**

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**Judge Claire C. Cecchi**

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A. This Preliminary Plan and Procedure (is intended to conserve judicial and party resources, eliminate duplicative discovery, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation. The following protocols and limitations in this Case Management Order (“CMO”) shall apply to all cases in MDL-2789:

**2. BELLWETHER SELECTION**

A. The parties shall present the Court with a trial plan, including a plan to select representative cases to serve as Bellwether Discovery Cases/Early Work-Up cases that will undergo additional discovery (beyond the PFS and DFS), which shall be referred to as “Core Discovery.” The parties shall submit this plan on or before December 1, 2018. This plan shall set forth how these bellwether cases (“Bellwether Discovery Cases”) will be narrowed down to smaller pool of trial cases (hereinafter referred to as “Bellwether Trial Cases” Trial Case”). The Bellwether Trial Cases will then undergo preparation for trial, which may include additional discovery, including but not limited to disclosure of expert witnesses and ultimately dispositive

and trial-related motion practice. The above aspects will be the subject of the plan and joint CMO that the parties shall submit on or before December 1, 2018, with the following deadlines set forth below maintained.

**3. BELLWETHER/EARLY WORK-UP FACT DISCOVERY SCHEDULE**

A. The parties shall meet and confer as to the process by which to select Bellwether Cases to work up for Bellwether Discovery, but it shall be no more than a pool of 10 cases. These cases shall be selected on February 28, 2019. The parties shall conduct Core Discovery on those cases from that time through May 24, 2018. Core discovery shall be defined to set a maximum of four (4) depositions per side for each case.

B. Following completion of the Core Discovery, the parties shall select the Bellwether Trial Case(s) by May 31, 2019, with the Court's input and final decision should an agreement not be reached. The parties shall then complete fact discovery on the Trial Cases by July 19, 2019.

**4. BELLWETHER TRIAL CASE/EARLY TRIAL CASE EXPERT SCHEDULE**

A. On or before August 17, 2019, Plaintiffs shall disclose expert witness reports for the Trial Case(s) pursuant to Fed. R. Civ. P. 26(a)(2).

B. On or before September 14, 2019, Defendants shall disclose expert witness reports for the Trial case(s) pursuant to Fed. R. Civ. P. 26(a)(2).

C. Plaintiffs to disclose rebuttal expert witness reports, if any, by October 5, 2019.

D. Each expert witness disclosure shall include at least two available dates when each expert is available for a deposition. Depositions can only commence after both sides expert reports have been served.

E. Depositions of expert witnesses are to be completed by November 9, 2019.

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.

**5. SUMMARY JUDGMENT AND DISPOSITIVE MOTIONS IN TRIAL CASES**

A. Any motion for summary judgment or for partial summary judgment shall be filed on or before November 16, 2019.

B. Any motions seeking to challenge expert testimony pursuant to *Daubert* shall be filed on or before November 16, 2019.

C. Responses to summary judgment motions shall be filed on or before December 16, 2019.

D. Responses to *Daubert* motions shall be filed on or before December 19, 2019.

E. A more robust and detailed pretrial schedule for final pretrial matters, exhibit lists, motions *in limine*, deposition designations will be set forth on a schedule to be submitted within 30 days after the Court selects the final trial cases in accordance with Section 3.B, above.

**6. TRIAL SCHEDULE**

A. The Court anticipates that the first trial in this MDL will be held on or about February 13, 2020, with subsequent bellwether trials to follow.

B. Lexecon: Defendants will provide the Court and PSC their position on *Lexecon* waivers for the Bellwether Discovery Cases on or before May 11, 2018. In the event the

Defendants do not waive *Lexecon*, the Court will maintain all of the pre-trial dates provided herein and will entertain any options for being able to preside over initial bellwether cases.

**IT IS SO ORDERED**

SIGNED \_\_\_\_\_ day of \_\_\_\_\_, 2018.

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United States District Judge