



September 6, 2019

VIA ECF

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
2:17-md-2789 (CCC)(MF) (MDL 2789)**

Dear Judge Cecchi,

The Plaintiffs' Steering Committee (hereafter "PSC") respectfully submits this letter in response to the Defendants' letter to the Court dated September 5, 2019. Plaintiffs' understanding of what was expected by the Court seemed very clear. Both sides were asked to inform Your Honor if we accepted or rejected the Court's bellwether compromise proposal. The PSC reluctantly but clearly accepted the Court's proposal in chambers before all the parties at the last case management conference on August 13, 2019. Plaintiffs also made clear that we were not open to further negotiation. Apparently, Defendants are now rejecting the Court's compromise proposal.

At the conference and following a full day of extensive discussions with the parties, Your Honor set out the Court's proposal for the bellwether trial plan. According to the PSC's notes, Your Honor described it as follows:

- A random pool of 150 cases will be selected from all Stage 1 cases;
- The PSC and Defendants will supplement the pool with 20 cases (10 for Plaintiffs and 10 for Defendants), however, neither side will know which cases were the other side's picks;
- From the pool of 170 cases, the parties will select 30 cases (15 for Plaintiffs and 15 for Defendants). There will be a replenishment procedure in the event a case cannot proceed, which will be determined at a later date; and

- Each side will get 4 strikes, leaving a bellwether pool of 22 cases.
 - Following “core discovery” the Court will pick 6 cases from the 22 for trial settings.
 - A New Jersey trial will be the second trial setting.
 - All parties must commit to waive *Lexecon* for trials 1 and 3-6.

After setting forth the Court’s proposal, Your Honor instructed all parties to notify the Court by September 5, 2019, whether they will agree to the plan. This instruction could not have been clearer. Notably, the PSC accepted Your Honor’s proposal at the conclusion of the CMC, although we did so reluctantly. For clarity, the PSC objected to random selection (which Defendants demanded) because, as noted by the Honorable Matthew F. Kennelly when rejecting a randomization proposal in the TRT litigation: “Random doesn’t mean representative. Random means Random.”¹ The PSC also objected to the use of strikes (another non-negotiable demand by Defendants) because in our experience, strikes are just another way to manipulate the trial pool to prevent representative cases from being selected for trial. As a reminder, Defendants’ initial position was that they would try only New Jersey cases in this MDL, notwithstanding the fact that New Jersey plaintiffs present unique legal issues that are not typical of other plaintiffs from around the country.

While there were features of the plan that the PSC was opposed to, we agreed it was a compromise as the Court had considered the concerns of all parties when making its proposal.² However, we agreed to the plan with the expectation that the Defendants would inform the Court whether they would consent to the plan by September 5, 2019, and we were explicit that there would be no further negotiations with Defendants nor would we entertain any deviations or counterproposal from that plan that the defense might try to offer.

Instead of following Your Honor’s instructions and either accepting or rejecting the Court’s proposed bellwether plan, at approximately 9 p.m. on September 4, 2019, Defendants contacted the PSC with a “counter proposal.” In doing so, Defendants completely ignored Your Honor’s instructions, as well as the PSC’s explicit position. Thus, we rejected Defendants’ counterproposal. *See* September 5, 2019 Email from Chris Seeger to Arthur E. Brown (annexed hereto as Exh. A). We have already agreed to the Court’s bellwether plan. The time for negotiation is over. Indeed, this litigation has been delayed by months because of Defendants’ refusal to waive *Lexecon*. Defendants are free to agree to or reject the Court’s proposal, but any attempt by them to renegotiate the plan and further delay advancement of this litigation should not be tolerated.

Defendants’ eleventh-hour attempt to renegotiate the Court’s proposal is a tacit admission that it will not accept Your Honor’s proposal as set forth by the Court at the last case management conference. Therefore, the PSC respectfully suggests that the Court proceed as follows:

¹ *See also* the PSC submission to the Court, dated Dec. 11, 2018, at fn. 8 [Dkt. No. 283].

² The Court has been actively involved in the bellwether negotiations for the past year, dedicating several entire case management conference to this subject and many hours to achieving a compromise.

- On October 11, 2019, each side shall pick 10 cases for a total bellwether pool of 20 cases.
- Following core discovery, the Court shall pick the trial cases from this pool.

The PSC will ensure that its selections include cases that can proceed to trial without *Lexecon* waivers.

We respectfully request that the Court enter such an order at its earliest convenience, so the parties can proceed accordingly.

Respectfully submitted,

/s/ Christopher A. Seeger

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Plaintiffs' Co-Lead Counsel

cc: All Counsel of Record (via ECF)

EXHIBIT A

Re: Bellwethers

Chris Seeger

Thu 9/5/2019 12:50 PM

To: Brown, Arthur E. <Arthur.Brown@arnoldporter.com>; David Buchanan <DBuchanan@seegerweiss.com>;

Cc: ZZ-Thompson, Craig <cathompson@venable.com>; Holian, Matt <matt.holian@dlapiper.com>; kcgreen@ulmer.com <kcgreen@ulmer.com>; McConnell, Stephen J. <SMcConnell@ReedSmith.com>; Jeff Grand <JGrand@seegerweiss.com>; mlondon@douglasandlondon.com <mlondon@douglasandlondon.com>;

Arthur, re item 1, I recall you asking for a May 1 cut off of stage 1 cases but the Court expressed no view on that as I recall. We think the date should be through the present.

Re items 2-9, I think you're generally correct

Re item 10, my recollection is that the cases to be tried would be picked by the Court.

With regard to your counter proposal, as you recall, we were not happy with the Court's proposal but we accepted it on the spot so that we could get this process moving. The entire MDL is being held hostage to your collective decision on whether to waive Lexicon. Frankly, we don't care if you do or don't. We made it clear at that time, however, that we were not open to further negotiation. From our perspective it was a yes or no to the Court's proposal.

Accordingly, we're rejecting your counter proposal. We will not agree to more than 4 strikes per side no matter how many cases are in the larger pool. I'd say I'd be happy to discuss this further but that wouldn't be true. So, that's where we are. Are you folks taking the Court's proposal or not?

From: "Brown, Arthur E." <Arthur.Brown@arnoldporter.com>

Date: Wednesday, September 4, 2019 at 8:54 PM

To: Christopher Seeger <CSeeger@seegerweiss.com>, David Buchanan <DBuchanan@seegerweiss.com>

Cc: "ZZ-Thompson, Craig" <cathompson@venable.com>, Matt Holian <matt.holian@dlapiper.com>, "kcgreen@ulmer.com" <kcgreen@ulmer.com>, "McConnell, Stephen J." <SMcConnell@ReedSmith.com>, "Brown, Arthur E." <Arthur.Brown@arnoldporter.com>

Subject: Bellwethers

Chris -- we are amenable to the Court's bellwether plan, with one point of clarification and one counter-proposal. Here is the plan that we heard from Judge Cecchi:

- 1 -- Eligible Cases would be determined using a cutoff date of roughly May 1st (which would capture approximately 1,000 - 1,050 cases);
- 2 -- From the Eligible Cases, a random pool of 150 cases would be generated;
- 3 -- From the Eligible Cases, each side would supplement that list of randomly generated cases with 10 picks -- 10 for plaintiffs and 10 for defendants;
- 4 -- That would give us a total pool of 170 total cases;

- 5 -- Each side would pick 15 cases from the 170 cases, and each side would have 4 strikes;
- 6 -- There would be a replenishment procedure but the Court provided almost no guidance that I recall -- we will need to reach agreement on this;
- 7 -- That would leave a bellwether pool of 22 total cases;
- 8 -- A New Jersey trial would be second;
- 9 -- The parties would all have to commit to waive Lexecon for trials 1 and 3-6 at the beginning of the process; and
- 10 -- The 6 cases to be tried would be picked from the pool of 22 via a process to be determined later.

The one point of clarification is in number 1 above: the Eligible Cases/May 1st cut off date is for cases that are stage 1 and substantially complete as to all defendants (which captures about 1,000-1,050 cases). We would agree to exchange lists in advance, as Dave suggested.

The defendants counter proposal relates to items 5 and 7 -- it is our collective view that each side pick 20 cases, and each side have 10 strikes from the pool of 170, leaving a total pool of 20 cases to be worked up.

Thanks.

Arthur

Arthur E. Brown
Partner

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