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

IN RE: TESTOSTERONE REPLACEMENT THERAPY PRODUCTS LIABILITY LITIGATION	**)** **)** **)**	**MDL No. 2545** **Case No. 14 C 1748**

CASE MANAGEMENT ORDER NO. 72
(Allocation of trial time for first Auxilium bellwether trial)

MATTHEW F. KENNELLY, District Judge:

The first Auxilium-only bellwether trial in this MDL proceeding is set for November 6, 2017. The Court has determined, and has previously advised counsel, that it will set reasonable limits on the amount of time for the parties to present their claims and defenses at trial, to prevent delay, ensure efficient presentation of the evidence and arguments, avoid unnecessary, cumulative, and repetitive evidence and arguments, and minimize undue burden on the jurors. It is well-established that a court has the authority to impose reasonable time limits on the parties at trial. *See* Fed. R. Civ. P. 16(c)(4) & (15); Fed. R. Evid. 611(a).

The bellwether trial cases involve several claims and are very expert witness-intensive. The Court has developed a good deal of familiarity with the cases from presiding over extended pretrial proceedings and, in particular, from trying several AbbVie-only bellwether cases. For the most recent AbbVie bellwether trial, the Court allocated a total of 70 hours, and the parties came right about that figure. The Court has less knowledge regarding potential differences between the Auxilium cases and the AbbVie cases and thus reserves the right to adjust the time allocation established in the present order upward or downward after it reviews the extensive materials submitted in

connection with defendants' motions for summary judgment and the parties' *Daubert* motions regarding expert witnesses and other trial preparation materials.

The parties have estimated that the bellwether trials should take approximately three weeks. Based on the Court's experience in presiding over several bellwether trials to date, this is an overly generous estimate that essentially assumes unnecessary repetition of points and presentation of unnecessarily cumulative evidence. The Court believes that the cases reasonably can and should be tried in a two-week period but will allow a bit more than this because the MDL is still in the relatively early stages of the bellwether trial process.

The length of an average trial day in this courthouse is, and long has been, five hours. Thus a two and one-half week (twelve or thirteen day) trial typically would involve no more than sixty or sixty-five hours.

The Court allocates a total of seventy hours to the first Auxilium bellwether trial, not counting jury selection. Given the ordinary allocation of five hours per trial day, this would amount to fourteen full trial days (three and one-half weeks), not including jury selection. Because, however, the Court will set a longer-than-normal trial day, fewer than fourteen days will be required.

The Court sets aside the following dates for trial to the extent necessary: November 6-9 (November 10 is a court holiday), November 13-17, November 20-22 (likely a half day on November 22, as November 23-24 are court holidays), and November 27-28, 2017, plus further dates after November 28 as necessary. The trial day typically will extend from 9:30 or 9:45 a.m. to 12:30 p.m. and from 1:30 p.m. to 5:00 p.m., with mid-morning and mid-afternoon breaks. The Court notes that this is longer

than its typical trial day and will result in a trial day of six or almost six hours. The Court reserves the right to extend any given trial day to 5:15 or 5:30 if warranted in order to complete the trial within the dates set aside.

The Court will allocate half of the trial time to plaintiff and half to defendant. Time will count against a side's allocation whenever it is questioning a witness, arguing an objection or other matters to the Court, making an opening statement or closing argument, or otherwise presenting its case. Time spent arguing evidentiary or other *in limine* matters, as well as matters relating to jury instructions, will count against a side's allocation. Time used for questions to witnesses by jurors will not be allocated to either side.

If a party intends to read or play deposition testimony before the jury, this may require the Court to rule on objections to designated testimony. The reading of deposition testimony will, of course, constitute trial time. Time will count against a side's allocation for all testimony that side has designated to be read. The parties are directed to confer prior to the presentation of any deposition testimony to attempt to agree upon how the time spent reading the deposition should be allocated. In this regard, the Court encourages the parties to do their best to pare down deposition testimony to significant and non-repetitive matters. In addition, the time the Court spends before or during trial considering each party's objections to deposition testimony is time that would be spent in court were the witnesses being presented live. For this reason, that time will count against the side making the objection, unless and to the extent that the Court determines that the party designating the objected-to testimony has designated testimony of limited probative value or that is otherwise unduly repetitive or cumulative.

The allocation of seventy hours is subject to reduction based on rulings barring or limiting claims, precluding expert witness testimony, and excluding evidence via *in limine* rulings. The Court also reserves the right to impose specific limitations on particular phases of the trial, e.g., opening statements and closing arguments. In addition, the Court reserves the right to adjust the total time and each side's allocation upward or downward for good cause. Good cause to adjust an allocation downward may include, among other things, presenting unduly cumulative testimony or evidence, unduly presenting evidence of minimal probative value, or making unwarranted objections to testimony or exhibits. With regard to exhibits, consistent with the Court's earlier comments, the Court directs the parties to confer promptly to attempt to pare down their exhibit lists, resolve foundational objections to exhibits by stipulation or otherwise, and attempt to narrow objections to exhibits to the extent reasonably possible.

Further particulars of the rules for time allocation may be addressed at or before the trial.

In addition, the Court will exercise its authority pursuant to Federal Rule of Evidence 611 to require that each witness will be called only once and will not be recalled later in the case, except to rebut evidence offered later that the party wishing to recall the witness could not reasonably have anticipated. Consistent with this directive, there will be no restriction on the scope of cross-examination of a witness called by an adverse party.

The Court also advises that to minimize interruptions in the jury's receipt of evidence, it intends to keep sidebar conferences at a minimum. If a party anticipates

that a matter may come up during a witness's testimony that will require discussion outside the jury's presence, the party should raise the matter beforehand at a break. Where this does not occur, and discussion outside the jury's presence is requested or is necessary, the Court may require the testimony to proceed while holding the issue to be discussed until the following break.

Finally, the Court reminds the parties that it expects and directs counsel for both sides to advise witnesses in advance of their testimony of *in limine* rulings that may impact the witness's testimony – in particular, rulings that preclude or limit admission of evidence about which the witness might otherwise testify.

MATTHEW F. KENNELLY
United States District Judge

Date: October 6, 2017