UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: XARELTO (RIVAROXABAN)
PRODUCTS LIABILITY LITIGATION

CIVIL DOCKET NO. 14-MD-2592
SECTION L
NEW ORLEANS, LOUISIANA
Friday, November 20, 2015
1:00 P.M.

THIS DOCUMENT RELATES TO
ALL CASES

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TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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P-R-O-C-E-E-D-I-N-G-S

November 20, 2015

(COURT CALLED TO ORDER)

THE CASE MANAGER: All rise.

THE COURT: Be seated, please.

Good afternoon, ladies and gentlemen.

Let's call the case.

THE CASE MANAGER: *MDL No. 2592, In re: Xarelto Products Liability Litigation*.

THE COURT: Counsel, make your appearance for the record, please.

MR. MEUNIER: Gerry Meunier, co-liaison counsel for plaintiffs.

MR. IRWIN: Good afternoon, Your Honor, Jim Irwin for defendants.

THE COURT: Okay. I met a moment ago with the liaison lead counsel and discussed the proposed agenda.

We will take it in the order proposed. Pretrial orders, anything?

MR. MEUNIER: Nothing new to report on pretrial orders, Your Honor.

THE COURT: Okay. Case Management Order 2.

MR. MEUNIER: Case Management Order 2 was entered setting dates for a bellwether trial starting in February

of 2017.

The next prong of that approach will be the issues raised in Case Management Order No. 3, which is to be argued before the Court following this conference.

THE COURT: Okay. Counsel, contact information?

MR. MEUNIER: We continue to be pleased to receive the information called for under PTO4-A, and we appreciate counsel doing that with respect to liaison counsel.

MDL centrality, Judge, you know, this is a new program that the Court encouraged to be adopted. And we believe after a few kinks being worked out, it has become an effective tool in the case.

We have heard, as Your Honor heard this morning from Jake Woody on what the centrality program reveals in terms of the number of fact sheets, and I will be happy to state those numbers for the record.

THE COURT: Let me hear from him. Jake, are you on the line?

MR. WOODY: Yes, Your Honor.

THE COURT: Do you want to speak up and give us a report on what your figures are?

MR. WOODY: Yes, certainly, Your Honor.

To date we have 2,357 plaintiff fact sheets submitted through MDL centrality.

The last month at the last status conference we had

1870. That is an increase of 487 fact sheets since the last status conference.

There are 1,257 fact sheets in progress. That brings us to a total number of fact sheets in the system to 3,614.

I should also mention that 750 plaintiffs have been able to amend their fact sheets after submitting an original.

You can amend a fact sheet as many times as necessary to get the information that you want on the fact sheet.

Whenever there is an amendment, we retitle the document and save all previous fact sheets in the system.

For instance, if you submitted a second amended fact sheet, we would call it "second amended fact sheet" so it is clear what happened with that fact sheet.

The defendants are also submitting defendant fact sheets through MDL centrality. To date we have 1,198 defendant fact sheets submitted through the system. That is the combined total from both defendants.

We do also have fact sheets submitted from every state, including Washington D.C., and Puerto Rico.

The state with the most fact sheets is Louisiana, with 203. Texas has 190, and that is the second largest submission. We do have 51 fact sheets from Mississippi, which I mentioned, for purposes of the bellwether selection that the parties are working through now.

We also, I do want to mention that the defendants

review each fact sheet, through MDL centrality. They review the answers and the supporting documents to make a determination as to whether there are any petition fees.

The defendants do that through the system. We are not involved with it other than to engineer the system to allow them to do these reviews.

And if they do find deficiencies on the fact sheet, they submit weekly e-mails to plaintiff and the plaintiffs' counsel to notify them that there is deficiency, and also tell them exactly what the deficiency is, along with the instructions on how to cure that deficiency.

Any time that a new document is uploaded by a plaintiff in response to a deficiency notice or otherwise, or they amend a plaintiff fact sheet, we send that new information to the defendant.

So to respond to a deficiency notice, all of that needs to happen is that you either upload a new document or you amend the fact sheet with new information. There is no need to independently notify us or the defendants that you have attempted to secure the deficiency, because we automatically route that fact sheet to the defendants to review those changes.

So, we have been working closely with both sides to make all necessary information available. We will continue to do that going forward.

THE COURT: Okay. Just let me reinforce the importance of fact sheets in this type of litigation; we don't have the time and it's not efficient to go back and forth with interrogatories.

We ask the parties to meet and confer about what type of information they need, and then they prepare a fact sheet and submit it to each side.

But it's important, from the plaintiffs' standpoint, that they fill out the fact sheets. The fact sheets are important, not only for the purpose of getting information to the defendant, but also getting on the bellwether discovery, as well as the trial part of the case. Also, it's an opportunity for the Court to see who is serious about pursuing their claims.

If the claims are not going to be filled out, if the fact sheets are not going to be filled out, then I will be dismissing the cases. I will dismiss the case.

My intent is to dismiss the cases with prejudice, not without prejudice. I'm not going to do that Willy-nilly. I'm going to give everybody an opportunity to fill in the fact sheets or explain why they haven't filled in the fact sheet, if they haven't. If they have a good reason, I will listen to it. But if they just don't have that on their radar screen and they are too busy with other things or something else, then I'm going to have to dismiss the case.

Also, with the fact sheets, we find in some of these types of cases, particularly with the pharmaceutical drug cases, there are individuals who have made claims, but they haven't taken the drug. They may have taken another drug, and they may be entitled to be in another MDL proceeding, but not in this proceeding, and the fact sheets are helpful in determining that aspect of the situation, so that those cases can be moved out of the system.

The important thing that I want everybody to know is it's important to fill out the fact sheets. If you can't fill them out, if you can't totally fill it out, fill out what you can. If you can't complete it, the parties will work with you on completing it. But we have got to get you into the system. If not, you will have to leave this litigation.

MR. MEUNIER: Thank you, Your Honor.

And under the discussion of the joint report, dealing with plaintiff facts sheets in paragraph 6, we mentioned that the defendants have submitted to us for consideration proposed forms of orders to show cause in cases where the fact sheet has not been timely submitted and in cases where the proof of use of the product is not sufficiently documented by the fact sheet.

We share the Court's concern, and certainly the interest in having these fact sheets done properly and on time.

We simply ask that we be given some meet-and-confer

opportunity with defendants to perhaps shake those protocols so that they allow for some opportunity for PSC to interface with the plaintiffs' counsel and see if we can't fix whatever the problem is.

So I think Mr. Davis and Ms. Sharko will be having followup discussions about that.

THE COURT: Good.

MR. MEUNIER: It's also mentioned in this section on fact sheets, Your Honor, that medical records in some cases are obtained by the defendant using the authorizations provided with a plaintiff fact sheet. It may be in some of those cases the plaintiffs' counsel themselves don't have those records or have not ordered them.

So we're talking to the defendants about a suitable way in which to get through their vendor, medical records they obtain, simultaneously on it being received by defendants, and we will continue to work on that. I'm sure we will work something out.

We also mentioned in the report that an issue has come up about the appropriate deadline for the submission of the defendant fact sheet, which is a deadline that depends on the submission of plaintiff facts sheet.

In those cases, specifically where there is an amendment or supplementation of plaintiff fact sheet, the question is, is the clock still running from the original date

from the DFS or is there a new clock running?

I think, from our view, I think we have some agreement on this, it may well depend on the nature of the amendment. If it's a technical amendment, or even an erroneous amendment, that there shouldn't be any later deadline for the DFS.

On the other hand, if it's a substantive amendment, it would make sense that the DFS not be done twice.

So we will again continue meet-and-confer discussions and work something out on that.

There is nothing new to report on the defendant fact sheets.

With respect to the bundling of complaints in paragraph 8 of the report, just to report to the Court that according to the Clerk's Office, 3,124 complaints have been filed or transferred into the MDL as of this time.

There are pretrial orders now dealing with the voluntary dismissal of complaints, and we encourage plaintiffs' counsel to become familiar with those pretrial orders to the extent that there are standards and protocols for plaintiffs' counsel to follow in regard to the voluntary dismissal of actions.

Under paragraph 9, Judge, there is reference to the preservation orders. And as you know, we have the modifications of PTO-15 in that regard, dealing with electronic information through the entry of PTO-15(b), which specifies and

addresses voicemail, instant messaging, and text messages.

There is an obligation here on the part of both defendants and plaintiffs, and so I want to encourage plaintiffs' counsel who may be monitoring today, to make sure they become familiar with PTO-15 and 15(b), and that they make appropriate contacts with their plaintiffs in order to know that the right thing is being done under those preservation orders.

Paragraph 10 deals with a proposal, a proposed order we received November 15th from the defendants dealing with the issue of plaintiff attorneys, having an opportunity to communicate with a treating or prescribing physician in advance of that physician's deposition, and to do so privately pursuant to the waiver of the HIPPA privilege by the client.

I believe, where we stand on this is that there will be competing versions of that protocol submitted to the Court.

I believe we will need your assistance, based on your earlier experience with that issue.

THE COURT: Yes. Take a look at my orders in other cases because I have dealt with that before. I'm familiar with the problem, but look at it.

It doesn't mean I have written it in stone, but at least you will get some idea of the approach that I have used in other cases.

MR. MEUNIER: Thank you, Judge.

On discovery, we do continue to have our bi-weekly telephone conferences with the Court. I believe, since the next conference, though, was scheduled next Tuesday morning, that the parties feel that it's not necessary, since we have been able to go over some things with you today, and we can consider that it's postponed or canceled.

THE COURT: Okay.

MR. MEUNIER: On discovery, Judge, again, this is paragraph 11 of the report, we report that the 30(b)(6) depositions of both the defendants, both J&J and Bayer have now been calendered. This is on corporate structure.

The 30(b)(6) deposition of Janssen and J&J will take place in Princeton, New Jersey, on December 11th, 2015.

The 30(b)(6) deposition for corporate structure purposes of Bayer, the Bayer defendants will take place on December 15th, in Pittsburgh, Pennsylvania.

THE COURT: Right. We already know that so that I can put that in my website. I have got a little portion of the website that has a calendar on it, so that people, at least, know that that's been happening or will be happening.

MR. MEUNIER: Judge, there is one other thing mentioned in the joint report on the subject of discovery, and that is so-called "dear doctor letters."

Again, I think we have had some meaningful meet-and-confer discussions with the defendants and will

continue to do so, and hopefully work that out.

It has to do with the plaintiffs' ability to get the dear doctor letters that may have been sent to a given prescribing physician or treating physician.

THE COURT: Yes. Back in the day it was very hard to get a hold on those, but with computers now, that information is readily available, and it sometimes can be produced in a format. It's the same letter that is sent to a thousand doctors, so that if you only have a thousand, you just need to have that letter and an indication that these doctors received it on such and such a date.

MR. MEUNIER: On paragraph 12 of the report, this references deposition guidelines. There is still an effort being made by the parties to come up with a joint order for the Court that sets forth the protocol for the taking of depositions.

At the same time, we have taken deposition testimony already in the case and will in December, as I mentioned, with the corporate structure. We don't think those have been impacted by there not being such an order.

We do perceive that there are several issues, though, that may need the Court to attend to in order to get us through to an order for the protocol.

And I believe Mr. Barr on our side, and Susan Sharko -- Susan?

MS. SHARKO: Deirdre Kole.

MR. MEUNIER: Deirdre Kole is on the defense side.

I think we will work on that. I don't know that we have any specific idea when we will be at a point to submit competing orders but I sense it will be soon.

THE COURT: Yes. Keep a flexible view of that, because you are going to find as you proceed with depositions, some other issues come up that need to be solved in some protocol fashion.

Some things that you thought needed to be solved in protocol fashion, really they don't need to be. So, some of that may have to be amended as you move on, but let's try to get one so that we all know the rules.

MR. MEUNIER: Paragraph 13 deals with discovery to third parties, Your Honor.

As you know, we have issued subpoenas to the FDA. We have issued one as well to Duke Clinical Research Institute.

We continue to have communication with the FDA about the return on that subpoena. We have received information from the FDA under the subpoena, but there are internal communications which we have yet to receive from the FDA, and we are in contact with the agency and continue to work with them on getting a full return as to that material.

I believe the same is true with respect to Duke. We have a subpoena issued. We have been in communication with

them. I think Mr. Davis has been active in that, and continues to have discussion with them.

We have received some documents from Duke, but we don't believe we have received all of the documents that are to be produced under that subpoena.

The next item is state/federal coordination and Ms. Barrios is here to report on that.

THE COURT: Right. Dawn, I sent you a copy of a letter that I just roughed out, and if you have any input or suggestions on it, someone mentioned that I should put the website in and also in another area that --

MS. BARRIOS: Yes, Your Honor. Thank you for doing that. I think it's going to be very helpful.

I assume your stationary has your phone number on it, so they know how to get in touch with you.

THE COURT: Right.

MS. BARRIOS: This might be a very picky point, but you say that the cases here are for personal injury and wrongful death.

I believe, but I'm not positive, there could be some consumer class here as well.

THE COURT: Okay. I will make sure I put that in there.

MS. BARRIOS: Your Honor, I handed your law clerk the Xarelto state court stats as of today. I thank Ms. Sharko for

getting me that.

You will see from last time we were here, there were 55 more cases filed, but 77 more plaintiffs -- Xarelto users, and there are 484 cases presently in state court.

THE COURT: Where are the most in state court?

MS. BARRIOS: Pennsylvania.

THE COURT: Pennsylvania.

MS. BARRIOS: The report from Pennsylvania, neither lead counsel for the Pennsylvania action could be here today, but he e-mailed me to tell me that the only thing that has happened since last status conference was the judge denied the defendant's form of non-*conveniens* motion.

THE COURT: Okay. Thank you very much, Dawn.

MR. MEUNIER: Your Honor, the only remaining item on today's agenda, Your Honor, is the next status conference.

THE COURT: What is the one in December?

MR. MEUNIER: December 21st at 9:00 a.m. is the next conference.

THE COURT: Okay. The one in January is?

MR. MEUNIER: January 22nd --

THE COURT: 22nd, I think you said?

THE LAW CLERK: 21st.

THE COURT: 21st or 22nd, what is it?

THE CASE MANAGER: The 22nd.

MR. IRWIN: I think it's December 21?

MR. MEUNIER: December 21.

MR. IRWIN: And January 22, 2016.

THE COURT: Right, 2016, at nine o'clock. So it will be 8:30 for the pre-meeting and nine o'clock for the conference.

MR. MEUNIER: Thank you, Judge.

THE COURT: Okay. Anything else from anybody?

Steve?

MR. GLICKSTEIN: Your Honor, I just want to wish my good friend, Gerry Meunier, a happy birthday.

THE COURT: Good. Well, okay, happy birthday, Gerry. We are all happy for you.

MR. MEUNIER: Thank you. That is not the most boisterous birthday party I have had, but it is certainly one of the better attended birthday parties.

MR. GLICKSTEIN: You don't want us to sing.

THE COURT: We have the other matter to discuss, and that is proposed Case Management Order 3.

Are you all ready to talk about that?

MR. BIRCHFIELD: Yes, Your Honor.

THE COURT: Okay. Andy, do you want to lead off?

MR. BIRCHFIELD: Yes. Andy Birchfield on behalf of the PSC.

Your Honor, we want to thank you for the opportunity to be heard on this issue of critical importance, not only to the

potential success of this MDL, but to future MDLs of similar magnitude.

Before the Court are two competing case management orders. These case management orders address the bellwether trial selection process.

In order to determine which of these orders is more fitting, it's critical that we keep the purpose of bellwether trials in focus.

The purpose of bellwether trials is to provide meaningful information to the parties and to the Court. The twin goals of bellwether trials is to provide informative indicators of future trends and to serve as catalysts for ultimate resolution.

So when we look at these competing orders, we see that it's important that the cases that are selected must be done in a careful and deliberate manner.

Unless the cases are appropriately selected, the benefit of the bellwether trials is lost.

Yes, there would remain, you know, some advantage to going through the trial process and seeing how witnesses perform under trial, and perhaps working up, you know, a trial package, to some extent. But if that is done in the context of an ill-fitting plaintiff's case, the vast majority of the benefits of those trials is forfeited. They are forfeited at great cost to both parties.

You know, before the Court, these competing orders are the second prong of the bellwether process.

CMO-2 is the first prong, and that order has already -- has already been entered.

In the plaintiffs' view, CMO-2 took a major step backwards from the goal of bellwether trials, the twin goals of bellwether trials. CMO-2 takes us a giant step away from that goal.

THE COURT: Two or three?

MR. BIRCHFIELD: Two. The CMO-2 that has already been entered, we say has taken us a long way backwards from the goals.

The competing orders, the plaintiffs' order, seeks to ameliorate that damage to some measure.

The defendants' proposed order seeks to compound that injury.

Before I move forward in supporting that position, I want to be clear on one point: The PSC today -- we are not here asking the Court to vacate CMO-2. We are not asking the Court to strike the random selection provision.

The random selection that is included in CMO-2, it is a knife wound to the heart of bellwether trials. But we have taken that wound, and we are moving forward.

We're still -- the defendants portray the -- this PSC as having willingly agreed to, negotiated for, and stipulated

to this random selection provision.

That heightens the distrust that the many plaintiffs' lawyers harbor toward MDL lawyers.

Yes, the random selection is a bitter pill, but we have swallowed it, and we are not asking the Court to strike that provision or to back away from it.

We are asking the Court not to compound that injury further by adopting the defendants' proposed CMO-3.

In order for us to have a meaningful bellwether trial, there are a large number of factors that must be -- that must be considered -- that must be weighed; the proof of use, for one.

You know, yes, you know, through the MDL centrality, plaintiffs submit their fact sheets and they submit proof of use.

They meet the minimum requirements, but what do we know, you know, in working, you know, working these cases, trying to select a meaningful case?

If a plaintiff submits three months of Xarelto proof of use, but the month before the injury, he has moved to another town, and that last month before the injury, we don't have a proof of use yet. And maybe, you know, the intake records at the hospital just list an anticoagulant, it doesn't list Xarelto. So what happens?

That case is in the mix. But if that case is selected

in a bellwether trial, then the focus becomes not on the merits of the case, but it becomes whether or not this plaintiff actually took the drug or not.

Well, the parties know that random selection does not account for that. The proof of use is one factor. The plaintiffs' counsel -- that is another factor.

Is the lawyer that actually represents the claim, you know, the claimant, is that someone that will work with the PSC? Is it someone that will allow the PSC to try the case? Is a trial lawyer who really knows how to work up a case or is it a real estate lawyer who really couldn't even find his way into a deposition room?

Yes, he may be the king of the real estate world, but he's not really any help here. The parties know that. Random selection doesn't account for that.

You look at the plaintiff, himself. Is he a likable plaintiff? I mean, if we have got Pope Francis or Drew Brees as a plaintiff, then what is going to happen? The personality is going to overwhelm the other issues in the case.

What if it's a four-time felon? Then that is going to overwhelm the issues of the case. Those are extremes, and, yes, they can be cut out at the end, but the party's involvement in developing the pool should sift through those issues. And it's more than just those extremes.

We know that there are -- there are some people that

are very likable and there are other people that even their mama doesn't love them. They may love them, she has to do that, but may not like them -- may not like the way he walks, the way he holds his head, you know, just walking into the room, people don't like him.

That takes away from the meaningfulness of a bellwether trial.

What about the prescribing physician? The prescribing physician, I mean, if it's the highest prescriber of Xarelto in the country and the highest-paid consultant for the defendants, that is an important factor.

If it's the rare breed of a prescribing doctor that will not even see a sales rep, that is an important factor that the parties know. The parties can learn that, but random selection doesn't account for that.

What about the sales rep? I mean, the sales rep, is he one that knows this doctor, is in there every week, you know, what are the messages that he is conveying? Is he available? Is he no longer with the company? You know, all of those are factors that play into whether or not you have a meaningful bellwether trial or not.

Those factors are notable by the parties, but they are not accounted for in random selection.

In order for -- in order for us to have a meaningful bellwether case, we have to take all of these factors, you

know, into consideration plus about a half dozen more, and we need to weigh those.

With a pool, and right now we're looking at a pool of potentially 2200 cases, and that will be divided -- it will be divided into four to six categories, based on injuries, and so that pool shrinks there.

You weigh in each of these factors, if you look at that size of pool. If you are looking at a pool for each of those categories of 400 to 600 cases, can you walk through all of these factors? You are not going to find one that meets them all, but can you weigh each of those and reach a bellwether plaintiff that will provide a meaningful result.

But the defendants -- the defendants do not want us -- their proposal does not allow us to look at that size of pool. The defendants' proposal takes that pool and it reduces it to 15 percent of that -- 15 percent. Fifteen percent of the cases are the cases that are currently filed with fact sheets in Louisiana and Mississippi and Texas.

It is important that we look at these categories. I mean, the MDL centrality, and the plaintiffs' fact sheets, those are effective tools in helping us to identify those categories, but they should not drive -- beyond developing and establishing the categories -- they should not drive the selection of the discovery pool cases and ultimately the bellwether trials.

Another, you know, very important factor that the parties should weigh in finding a meaningful bellwether case is state law. How does the state law apply, you know, in this case?

Is it -- what is the state law on the learning intermediary? What does directive consumer advertising -- how does that play into this case?

There are a number of factors of state court law that will impact the meaningfulness of the case.

Are there certain, you know, marketing messages that will not come into play based on the facts of a particular plaintiff's case? Those are factors that the parties in a deliberative process can sift through.

But, random selection wipes that all away.

But here is the worst part, and the factor of state law is a good pivot point for us to shift from CMO-2 and the random selection, because random selection just takes all of those factors away. You know, for half of our pool, we don't even get the benefit of going through that process because half of the cases, 20 of the 40, are selected by random selection under CMO-2.

But the worst part of the state law is what would be, as the defendants include in their proposed CMO-3, is that the only cases that would be tried are cases from Louisiana, Mississippi, and Texas.

Well, Louisiana law -- Louisiana law does not allow for punitive damages. In all of the pharmaceutical cases that I have been a part of, this case is chief among them in warranting punitive damages. It's a major coup for the defendants that half of the bellwether trials, the two in Louisiana, will not be exposed to punitive damages.

Then Mississippi: Mississippi has a cap on noneconomic damages. The patient population for Xarelto is an elderly population. You are dealing mostly with retired people, and they suffer a catastrophic injury, many of them have, but they -- but they don't have economic damages. The economic damages are just a small part. The real injury is the noneconomic damages.

So the defendants, by limiting the cases, the trial to Mississippi, say, you know, that is off the table.

And then Texas, you know, Texas, the current state of the law, Texas does not allow a failure to warrant a claim.

Yes, in these drug cases there are, you know, there are other claims, but the heart and soul of a pharmaceutical case is the failure to warrant claim. Well, that is off the table for any of the Texas cases.

So the defendants' plan by, you know, one limiting the pool, the trial pool, to these three states, shrinks the pie. It slices that pie so thin that we cannot get a meaningful bite. We cannot -- the chances of getting a meaningful

bellwether case from the plan that the defendants have proposed is near nil. So, that is where we are.

So what we would propose, Your Honor, we have taken the core CMO-2, and we see that the first two trials are going to be in Louisiana.

The Court says that the next two cases will be in Texas and Mississippi, unless there are good reasons otherwise. So what we would ask the Court to do is open up the pool.

The plaintiffs, in order to get -- in order to get four bellwether cases, we only get ten picks. We get ten picks. So we can do a very careful vetting through all of those factors that I have described and a bunch more, and we can come up with ones that we believe would provide meaningful results.

And we know from experience, that as we go through the discovery process, and we take depositions that some of us -- we're going to find out things that would make those cases inappropriate.

So, if we open it up, if we open up the selection process to the universe -- to the universe of the 2200 or 2300 cases that are currently eligible, and by the way, Your Honor, that is still just a small slice. I mean, by our rough survey of cases that are currently represented by lawyers but are unfiled, that is about 80 percent. So only 20 percent of the cases are on file, to start with.

So we got a significant number of cases that are yet to

come in, that they will not be eligible for this. So, we're fishing in a smaller pool to start with.

The defendants want to reduce that pool even further to 15 percent of its current size, and say find a bellwether case, because they know it's next to impossible that we will be able to do that, certainly with those three states.

We have heard the Court -- we have heard the Court that the Court wants to try cases in Mississippi and Texas. We do think -- we agree that there is a tremendous benefit from having cases with different jury pools.

And so, trying the cases in Texas and Mississippi, that is fine. We hope that those cases would not be limited to Texas or Mississippi plaintiffs. But we understand the Court's position.

So, we understand that if we go forward, and we only put up, you know, if we pick out of our ten picks, if we only pick one Mississippi or one Texas, or if we don't pick any, then it's certain the defendants' pick is going to be chosen.

So, we have -- we're in a place where the only way -- the only way for us to have even a semblance of a meaningful bellwether process, is to open the pool up to all eligible candidates.

Let us come forward. We will certainly look at Texas and Mississippi cases, but at the end of the day, if we come forward, you know, and say, Judge, these are the best that we

have got, these are the best bellwether -- these are the only ones that will provide us meaningful information, and we're committed -- we are committed to finding meaningful plaintiffs.

There are serious injury cases out there. You know, a number of these cases that we have looked at, we say are outliers. A 50 year-old goes in for a hip implant. He is put on Xarelto for prophylactic purposes following the surgery. He has a major bleed, and as a result of that bleed, the doctor gives him an experimental antidote that he has a catastrophic reaction to.

The injuries there -- the injuries there are enormous. But that would not be a meaningful case. It would be a good case for the plaintiffs, but it's not meaningful.

We are committed to providing the Court with meaningful selections.

The defendants have stated in their papers, that they will likely present the ten weakest cases. But, we're not. We're not going out to find the ten strongest, we're going to offer the Court the ten most meaningful.

Allow us -- allow us the opportunity to find those ten most meaningful, among the entire population.

It's like a baseball arbitration. We know that if we come forward with, you know, with an outlier case, that it's going to be rejected by the Court. So we have that protection in place.

THE COURT: All right.

MR. BIRCHFIELD: Your Honor, we believe that the advent of bellwether trials in MDLs was a giant step forward in the evolution of MDLs. We are committed to try MDL cases, if they're meaningful. That is what we are after. That's what we are pursuing.

THE COURT: Okay.

MR. BIRCHFIELD. But if the playing field is tilted so heavily in the defendants' favor that the bellwether trials cannot be meaningful, then perhaps the Court should abandon the bellwether trial process and just focus on the pretrial process, allow the PSC and others to get the data points in state court venues.

We don't want that. We want a meaningful process, but it takes cooperation from both sides.

THE COURT: Yes.

MR. BIRCHFIELD: If we don't have that, then we're afraid it will be meaningless.

THE COURT: I hear you. Let me tell you this: Nationwide, the biggest criticism with bellwethers is that the plaintiffs pick their best cases and the defendants pick their best cases.

When plaintiffs win, the defendants say, what did you expect, you picked the five cases that there are only five in it, and you picked the best five in the whole 3,000 or 4,000.

When the defense wins, you say you picked the worst cases. It's the ugliest goat in the island, and you picked them. And that is a big criticism.

The other criticism is that the defendants don't know the cases as well as the plaintiffs know them.

Therefore, the defendants are at a disadvantage because they don't know which cases to pick. They haven't discovered anything.

So what I have tried to do in this case is to create a discovery pool which takes into consideration that the plaintiffs ought to pick their best cases, and will pick their best cases.

The defendants will pick their best cases, and then there are some just other cases that are picked randomly to offset those two parts.

I can't expect the plaintiff to pick the worst case that they have. It just doesn't happen. It's not realistic.

I can't expect the defendants to pick the worst case that they have. That is just not realistic. Even if they say, well, we want to see what the juries are going to say, they are never going to pick the worst case. You are never going to pick the worst case.

So I tried to balance that with some random selection. But the random selection is an attempt to get a census of the whole litigation, a grouping that mimics the whole litigation,

and it's a better chance to get that than it is by having each side pick their best cases.

If there are five bellwether cases, and each of you all pick -- or six bellwether cases, and each of you pick three, and you have got 3,000 cases out there, that may not give you anything about the whole census of the litigation.

And when you get down to looking at it, if you are going to just focus on what juries are giving you or have deprived you of, it's not going to be helpful at all to you, because it's not representative of the whole group.

So I have tried to create the discovery pool by some method which takes into consideration those biases and neutralizes the biases by having random selection.

Now, I assume the random selection is going to pick some that are your best cases and some that are the defendants' best cases. That's what random does, generally. It randomly selects them. It doesn't mean it's not going to be representative.

It's more -- this way of selecting it, is going to be when you come down to the discovery pool, that's going to be more realistic of what that out there -- the whole census of the litigation looks like, than if you give each side an opportunity to pick their best cases.

So, but the point is, is that you have a discovery pool. The discovery pool is 40 cases. Each side gets to drill

down that discovery pool to find out the best they can about those cases.

And then you pick your -- we haven't decided the method of going about picking bellwethers, but from that discovery pool, you get to pick your best cases or a representative case or something of that sort.

Now from the standpoint of where you pick them, we have got a situation with *Lexecon*. *Lexecon*, the Supreme Court said, a transferee judge cannot try cases that are not directly filed in the transferee court, unless the parties agree.

If they don't agree, it doesn't matter whether or not you should try a case filed in New York or whatever. The truth of the matter is I'm going to send them up there.

After I'm finished with my discovery responsibilities, I think a transferee judge ought to be able to give you all an opportunity to see what the discovered case looks like, and then what the trial case looks like.

But after I'm finished with that, I'm not going to hold these cases. I don't believe in that. I'm going to just send them back to wherever they came from, and let you try them.

But before I send them back, I feel obligated to give you an opportunity, both sides, to discover it, to look at the cases. This is an opportunity to do it efficiently, so that you don't have to do it in 50 states. Every state in the union is represented in this litigation.

If you start taking depositions in state court, the transactional costs for both sides is going to just -- and the efficiency, it's going to take a couple of decades to do what we can do in about two years here or three years at the most to discover the case to give you some idea of what the case -- what the census of the case is there and the issues.

And then if you try several of those cases, you will get some idea as to how the witnesses perform; you will get some idea as to the costs; you will get some idea of logistics; you will get some idea about how to try the case; and you will also get some input from juries.

I'm not quite sure the latter is the most significant. It may well be the least significant of the whole thing, because in the past, or in many instances, people have picked the best cases and the other side has said, well, what do you expect?

You have got your best case out of the whole 3,000 or 4,000, and you picked the one case that is on all fours, so it has no meaning; we discount it.

And, the same way with the loss, you picked the worst case. The guy was in jail 20 years. Nobody likes him, and he lost the case.

So, you know, I hear you, but I think we have to be realistic on it, and from the standpoint of whether or not we ought to try cases in other places, I think *Lexecon* has done

that.

Now the defendants say, they are agreeable to trying them not only in Louisiana cases, but also Mississippi cases and Texas cases. They don't have to do that. They could say, I just want to try Louisiana cases; otherwise, send them back, and then you are stuck with just Louisiana cases.

So, at least this gives you something -- the discovery pool, I think, the defendants ought to take the opportunity in the discovery pool to discover cases that are outside the Fifth Circuit, because this is an opportunity for them to do so.

And I think that their program allows that, but, you know, you have talked to me.

Let me hear from the defendants. Any response from defendants?

MR. BIRCHFIELD: Your Honor, may I address something?

THE COURT: Sure, yeah.

MR. BIRCHFIELD: The plaintiffs' plan addresses your chief concern about the plaintiffs picking their best and the defendants picking the worst.

We have been in that place and that is a plan that is offered, where the first pick goes to the plaintiff, the second pick goes to the defendant. But, that is not the system that we have proposed in our order.

Our order that we have proposed would say, we will offer to the Court the cases that we say are most meaningful.

So we put out the best case, then you are going to say, that's not typical because we have MDL centrality that gives us a picture of the universe, you know, what is the average, you know, stay in the hospital. What is the average type injury.

So the Court has that tool to look at and say, you are putting up a 60-day hospitalization case, that is an outlier, so the Court doesn't pick that.

So the parties, you know, are not in a place where it would be wise to pick their best cases. That is what -- the key difference here, is the defendants want to take the pool that we could select from and slice it up into such fine parts that we can't really look for the most meaningful cases. That is the key difference.

THE COURT: Well, the whole purpose of the pool is to design some method of creating that pool which replicates -- images the whole litigation.

And the way to do that, is to pick -- have plaintiffs pick, defendants pick, and random pick. And then hopefully, in that method, that discovery pool will be more representative of the entire litigation.

You drill down in that discovery pool, and from that discovery pool, then you make your picks as to the bellwether trials.

But the only way to find out the whole discovery pool is to take every case, discover every case, and then you would

know, but that is not really realistic in many cases.

Now maybe in 2,000 or 3,000 cases, maybe you can do it that way, but it will take you ten years to do it.

So what I'm trying to do is to create that -- the litigation census in microcosm, so that we can get a smaller group that represents the big group.

It will have in it the best cases for the plaintiff, and the best cases for the defendant, and a random sample that will have all over the place, some for plaintiffs, some for defendants, some not representative at all.

And then you will have a bellwether of 40 -- then you will have a discovery pool of 40 cases. From that 40 cases, you pick four.

I don't know of a better way of doing it.

MR. BIRCHFIELD: It's a critical issue, Your Honor, and we thank you for opportunity to be heard.

THE COURT: Sure, I appreciate it.

Steve?

MR. GLICKSTEIN: Good afternoon, Your Honor. Steve Glickstein for the defendants.

I think any discussion of CMO-3 has to start with CMO-2. And we heard Mr. Birchfield say that from the plaintiffs' perspective, CMO-2 was a major step backward.

That took me a little bit aback because I spent weeks, if not months, negotiating CMO-2 with the plaintiffs' side and

we came up with the stipulated order.

And as happens with all stipulations, you get some that things you like, and you have to give up some things that you wish you could have had, but you can't, in order to reach an agreement.

And, the fact that 20 of the 40 discovery pool plaintiffs would be randomly selected, was a compromise between the party's conflicting positions.

You know, in June -- June 22nd of this year, it's Document 1035 in this MDL, Your Honor's initial ruling was that there were going to be 50 discovery pool plaintiffs, and all of them were going to be randomly selected.

And over the course of negotiations between the parties, some in-chamber conferences with Your Honor, the party's positions became refined.

The plaintiffs, I'm sure, would have preferred no random. We would have preferred all random, but we settled on half, and that is the deal.

Since it's in CMO-2, then CMO-3 has to operate in good faith to implement that provision, not marginalize the agreement that the parties had reached.

Similarly, you know, the parties had concerns about where the cases were going to be tried, but we reached the stipulation.

The stipulation was the first two trials are going to

be in the Eastern District of Louisiana with no right to seek a change of venue with respect to those first two trials.

The third and fourth trial, were going to be in Mississippi and Texas, respectively, with a limited right under certain circumstances to seek a change of venue upon a showing that there is good reason to do so.

But we're not at that point yet.

So, the parties have an obligation to propose a case management order which gives CMO-2 some possibility of success.

That means providing the Court with sufficient choices in Louisiana, so that it can find representative plaintiffs to try the first two cases in -- providing enough choices in Mississippi so that the third trial, if it stays there, the Court will have sufficient choices to pick a representative case there, and the same with respect to Texas.

So we're not -- we do not disagree with the plaintiffs that the goal here is to get a good cross-section and representative fact patterns.

The question is what is the best way to go about doing that. And, I don't think that as Your Honor has indicated in his comments to Mr. Birchfield, I don't think you can do that by limiting narrowly, as the plaintiffs propose to do, the choices that are available in the trial venues.

It's hard to see how you are going to come up with better plaintiffs for the first two trials, or more

representative plaintiffs for the first two trials, if you have got four picks from Louisiana as the plaintiffs propose, or 20 picks as the defendants propose, which was an adoption of a suggestion that Your Honor made in chambers on September 17th.

Similarly, it's hard to see how Your Honor is going to have adequate choice in Mississippi or Texas, if the plaintiffs propose none of the party's selections have to be from those states and there is no requirement that any random selection be in those states.

So our goal is, in fact, to provide the Court with more choices, it is to find the best four cases to try, but the way to do that is to provide the Court with more choices in the trial venues that the parties have stipulated to.

We recognize, of course, the value in having a discovery pool that is broader than those three states.

And the compromise that Your Honor initially proposed on September 17th was that there ought to be 12 plaintiffs from other states, six chosen -- six from states chosen by plaintiffs, six from states chosen by defendants.

You are going to get 15 states under the defendants' proposal, the three trial venues, plus 12 others.

And so you are going to get a fair cross-section geographically of the country of various state laws without overly inhibiting Your Honor's choices for actually trying the cases.

You know, as I'm listening to Mr. Birchfield describe, you know, what goes in to making a good case, well, you know, you want the perfect testimony on proof of use, and, you know, the best counsel, and, you know, a plaintiff who is not too likable and too unlikable, and a prescribing physician who is somewhere in the middle of the road, and sales reps who are somewhere the middle of the road.

I mean, that is not really how cases work. As Your Honor indicated, there is a variety.

THE COURT: Yes.

MR. GLICKSTEIN: There is a cross-section. Some cases -- and the idea is to get enough different fact patterns so that counsel can intelligently evaluate all the combinations and permutations. And Your Honor can evaluate all the combinations and permutations and see how different fact patterns impact the strength or weakness of a case.

It's also very important to remember, and I think Your Honor made this distinction as well, that we're talking about now picking the discovery pool. We're not talking about picking the four bellwether plaintiffs.

The defendants' and the plaintiffs' proposal are actually identical with respect to how you are going to get down from 40 to four, which that the parties are going to propose a mechanism to give Your Honor choices, and then Your Honor is going to select who are going to be the trial

plaintiffs.

The only difference is we want Your Honor to have more choices in the trial venues, because that's going to assist both the parties and courts to make sure that the trials are truly representative.

THE COURT: Okay. All right. I understand the issue.

I appreciate both of you all.

I will put out my order probably today or Monday, as soon as I can, because we have got to get on with this, folks.

We have got to know what the discovery pool is going to be made of, so you can deal with the selection process.

As I'm saying, what I'm trying to do here, we have got right now about 3,000 cases. There maybe 6,000 cases when all of them come in.

What I'm trying to do is to see whether or not we can create a microcosm of that census, and how you do that.

One way of doing it is to have the parties pick the cases.

What happens in the real world is that they pick their best cases. They don't pick the worst cases; they pick the best cases.

From the defendants' standpoint they don't know what cases to pick because it's not -- that is not their clients; they haven't taken any depositions yet.

So you have to have some mechanism for getting a

bellwether discovery pool so that each side has an opportunity to discover that pool.

But that pool has to represent the entire census, otherwise, it's of no value.

So you can't have that discovery pool created by the parties because you are going to only have the five -- the ten best cases or 20 best cases for the plaintiffs, and the 20 best cases for the defendants.

And when you get down to picking them, it's not going to be representative of the 3,000 cases. The 40 cases will only be the best cases that each side has picked.

So from that bellwether pool of discovery pool, you are going to be picking your bellwether cases and you are going to replicate that.

So the bellwether cases are going to be meaningless because every time the plaintiff wins, the defendants are going to say, you picked the best case. Every time the defendant wins, the plaintiff is going to say, you picked the best case, so it's not as helpful.

So I'm trying to create a discovery pool that replicates the whole litigation.

The way of doing it is either do all random selection, but that doesn't -- that's not the best way, I don't believe. I think you have to have plaintiff input, defendant input, and random selection. That's what I have tried to do in this case.

The problem that we have is with *Lexecon*, and *Lexecon* says, okay, that is fine, do whatever you want to do with bellwether pools, but when you get down to selecting cases, the parties have to -- well, that's a problem.

So we're trying to struggle with that problem, and the defendants have agreed to do three states rather than one state.

But that doesn't mean that you won't have an opportunity to try cases in other places, because I'm going to be sending them back after the bellwether system.

If it works, fine, if it doesn't, you all will be dealing with this in other jurisdictions, not mine.

But I appreciate your views, and thank you for your comments.

MR. BIRCHFIELD: Thank you, Judge.

MR. GLICKSTEIN: Thank you, Your Honor.

THE COURT: We will be in recess.

THE CASE MANAGER: All rise.

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REPORTER'S CERTIFICATE

I, Terri A. Hourigan, Certified Realtime Reporter, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript to the best of my ability and understanding from the record of the proceedings in the above-entitled and numbered matter.

s/Terri A. Hourigan

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