

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE
HYDROCHLORIDE) PRODUCTS
LIABILITY LITIGATION

: MDL NO. 2342
: 12-MD-2342
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: HON. CYNTHIA M. RUFÉ
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THIS DOCUMENT RELATES TO
ALL ACTIONS

**SPECIAL DISCOVERY MASTER’S REPORT AND RECOMMENDATION NO. 4
(REGARDING TRIAL POOL SELECTION PROTOCOL)**

I. INTRODUCTION

On August 26, 2013, I filed Report and Recommendation No. 3 (Document 539), recommending a trial pool selection protocol. On September 9, 2013, plaintiffs filed an Objection and Request for Clarification. (Document 547) Pretrial Order No. 22 states that a Report and Recommendation of the Special Discovery Master shall be considered *de novo* by the Court upon the filing of an objection. The Court has referred the Objection and Request for Clarification to me so that I may state my views before the Court takes any action on Report and Recommendation No. 3.

Because the objection filed with the Court does not specify what aspect of Report and Recommendation No. 3 is objectionable or problematic to plaintiffs, I will restate what plaintiffs have submitted to me. It relates to how the Pfizer Defendants may strike cases from the Initial Discovery Pool under the protocol envisioned by Report and Recommendation No. 3.

Report and Recommendation No. 3 recommends that each side be able to strike two cases from the Initial Discovery Pool and from Trial Pool eligibility before a certain date. (Exhibit B to Report and Recommendation No. 3, Section II, paragraph 3) The Pfizer Defendants would be

able, under Report and Recommendation No. 3, to make additional strikes in the event that any plaintiff voluntarily dismisses an Initial Discovery Pool case after the PSC has exercised its first two strikes. (Id.)

After I made my recommendation, the Plaintiffs' Steering Committee asked that I modify the provision of my recommendation pertaining to the defendants' right to strike cases that are Plaintiff Selections. The PSC urges that the Pfizer Defendants should not be permitted to exercise two of their strikes against cases in which the same law firm is primary counsel for plaintiffs. For example, if Law Firm ABC is lead or primary counsel for plaintiffs DE and FG, the PSC urges that the Pfizer Defendants should not be able to strike both of those cases. This request for modification is the basis for the PSC's Objection and Request for Clarification.

II. DISCUSSION

The PSC points out that Pretrial Order No. 24 assures diversity of representation in the Initial Discovery Pool, consisting of up to 25 cases, by providing that the PSC must distribute its twelve selections for the Initial Discovery Pool so that no plaintiff's firm is primary counsel in more than two cases among the Plaintiff Selections. Similarly, the Pfizer Selections must be distributed so that no plaintiff's firm is primary counsel in more than two cases in the Pfizer Selections. (Pretrial Order No. 24, paragraphs 2 and 3)

The limits on the number of Initial Discovery Pool cases in which any one law firm may be primary counsel also assures that lawyers who are responsible for selecting the cases for that pool do not gain an inappropriate grip on representation in that pool. Even if a lawyer has, for example, a third of the cases in the MDL, that lawyer can only have a limited number of cases in the Initial Discovery Pool. Similarly, a lawyer who is taking a large part of the responsibility for management of the plaintiffs' activities in the MDL is limited from having a high proportion of

the number of cases in the Initial Discovery Pool. Plaintiffs point out that allowing the Pfizer Defendants the opportunity to strike two of any lawyer's cases that were PSC Selections from the Initial Discovery Pool could limit the ability of a lawyer to have any cases selected by plaintiffs in the Initial Discovery Pool. A lawyer with a large number of cases and much responsibility for management of plaintiffs' activities might not have any cases in the Initial Discovery Pool. Still, a lawyer in this situation would be able to continue to serve on the PSC or the PEC or to take assignments from those committees even without being primary counsel in any cases that are in the Initial Discovery Pool.

There is no reason why a leadership position on the PSC or a position on the Plaintiffs' Executive Committee should guaranty that a lawyer with that position will have a case in the Initial Discovery Pool. Similarly, being counsel in a lot of cases is not and should not be a guaranty that one of the cases will be in the Initial Discovery Pool. The winnowing process of selection for the Initial Discovery Pool and the Trial Pool is designed to find the most representative cases and the cases which will yield results in bellwether trials that are likely to inform settlement discussions that occur after the trials. The identity of the lawyer in a particular case—and the presence of the lawyer on a committee—is not necessarily a sign that the case is representative or a good candidate for the Trial Pool.

Appointment to a leadership position on one of the MDL committees is not ordinarily tied to whether that lawyer's cases are representative or more likely to succeed than other cases with which they have been consolidated. If there were such a link, the judge appointing members of the leadership teams would have to examine the merits of cases in which the applicants for leadership posts are counsel. There is no indication that the appointments to PSC or PEC were made on that basis in this case. Nor was there any indication that appointment to

such a committee was designed to assure that the appointee would try any of the representative cases. Pretrial Order No. 1 in this litigation invited lawyers to apply to be members of the Plaintiffs' Steering Committee and listed the main criteria for positions of membership or leadership of the PSC. The criteria did not include the number of clients that a lawyer represented or an assessment of whether that lawyer had cases that were suitable for the trial or initial discovery pools. Further, the responsibilities of the PSC and its leadership do not include the trial of cases that are ultimately placed in the Trial Pool. Pretrial Order No. 6 reaffirms that the members of the PSC shall perform the duties set forth in Pretrial Order No. 1. Pretrial Order No. 1 does not state that members of the PSC shall conduct trials.

The mathematics of the committee memberships and of the case selection process bear out that selection to a leadership position is not tied to the opportunity to have a case in the Initial Discovery Pool. In Pretrial Order No. 6, the Court appointed 16 lawyers to the Plaintiffs' Steering Committee. It appointed four of those lawyers to the Plaintiffs' Executive Committee and one more lawyer, who is Plaintiffs' Liaison Counsel, as an ex-officio member of the Executive Committee. It is impossible to distribute all of the selections in the Initial Discovery Pool to all of the law firms in the PSC, given that there are sixteen PSC members and only twelve slots for Plaintiffs' Selections. If any substantial number of lawyers on either committee is permitted to have up to two cases in the Initial Discovery Pool, it stands to reason that an even greater number of lawyers on the Plaintiffs' Steering Committee would not have any cases at all in that pool.

The PSC has proposed that the number of cases in the initial discovery pool be reduced from 25 to 16, so that each side selects only eight cases. (Transcript of Conference of July 13, 2013, at pages 27-28) That proposal is still under discussion, and has not been dealt with by way

of an agreed upon order or a motion. Nevertheless, if it is implemented, it will be even harder to distribute selections among law firms in a way that guarantees that a particular firm will have a case in the trial pool or the Initial Discovery Pool.¹

In the *Zyprexa* litigation, the chair of the PSC had no clients in the MDL, and therefore could not have been foreseen as having a case in the trial pool. Similarly, in the *Vioxx* litigation, one lawyer who was appointed to a series of responsible positions had only a small number of cases, and therefore probably did not have the best candidates for bellwether status. See Silver and Miller, The Quasi-Class Action Method of Managing Mutli-District Litigations: Problems and a Proposal, 63 Vanderbilt L. Rev. 107, 151 (2010), citing *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (E.D.N.Y. October 18, 2006)(discussing appointment in *Vioxx* litigation of member of PSC to Plaintiffs' Negotiating Committee and as Chair of Fee Allocation Committee even though lawyer had fewer signed clients than many other lawyers; and discussing Judge Weinstein's appointment as chair of PSC of lawyer who had no clients in the MDL in *Zyprexa* litigation).

Consistent with this, one of the members of the PEC has no cases in the Initial Discovery Pool. I believe that neither the Court nor the lawyers selected for leadership viewed the leadership positions as being a guarantee that the lawyers could choose their own cases for the trial or initial discovery pools.

The allocation of selections and strikes should not be written by the Court to guarantee that a particular firm will have a case in the Trial Pool, and it has not been written that way.

¹ It is agreed by the Parties that the Trial Pool will have only six cases. Obviously, representation of a cross-section of plaintiffs' lawyers is impossible when there are only six cases in the Trial Pool. No party has recommended that there be a limit on any one lawyer's cases in the Trial Pool. If representativeness of the cases includes the concept of distribution of cases among various lawyers, then a limit on the number of cases that a lawyer may have in the Trial Pool should be considered.

There is a committee that is charged with making selections on behalf of the plaintiffs' side, and presumably it picks cases based on likelihood of success and their usefulness as bellwether cases. Part of that selection may turn on who counsel is, but I do not believe that the process should be or was written in a way that promises to any particular member of the plaintiffs' leadership an opportunity to be the lead case.

III. CONCLUSION

If I were making recommendations about protocols for selection of and striking of cases in the Initial Discovery Pool at the outset of the litigation, I would probably not recommend any rules or methods that guaranteed that any particular law firm could have a case in the Initial Discovery Pool or the Trial Pool. The discussion above describes why. But the selection process has progressed to where it might be at an end, and the people on the plaintiffs' side with responsibility to make their selections have made them. They were given the right to select their own cases within limits, and allowing Pfizer to exercise its first two strikes to eliminate a lawyer from being able to represent any plaintiff in the Initial Discovery Pool would be in derogation of that right.

The strikes that I recommended in Report and Recommendation No. 3 were designed to give each side more flexibility and, after the first two strikes, to impose consequences if the plaintiffs voluntarily withdraw or dismiss even more cases. Those goals are advanced by providing that: (1) the Pfizer Defendants may not exercise its first two strikes as of right by striking cases in which the same lawyer is plaintiffs' primary counsel; and (2) if the Pfizer

Defendants are authorized to make any strikes after the PSC has exercised its first two strikes as of right, then this limitation will not apply.²

For these reasons, I modify the recommendation set out in Report and Recommendation No. 3. In Exhibit B of that Report and Recommendation, I included a provision about the striking of cases from the Initial Discovery Pool. I now recommend that Section II, paragraph 3 of the draft Trial Pool Selection Protocol that is Exhibit B of Report and Recommendation No. 3 read as follows:

3. a. On or before March 17, 2014, up to two cases chosen for the Initial Discovery Pool by the Pfizer Defendants may be stricken from the Initial Discovery Pool and from Trial Pool eligibility by the PSC, and up to two cases chosen for the Initial Discovery Pool by the PSC may be stricken from the Initial Discovery Pool and from Trial Pool eligibility by the Pfizer Defendants. In the case of exercise by the Pfizer Defendants of the opportunity to strike two cases chosen by the PSC pursuant to this subparagraph, the Pfizer Defendants may not strike two cases in which the same firm is plaintiffs' primary counsel. Voluntary dismissal of a case by a plaintiff shall be considered one of the PSC's strikes for the purposes of this paragraph.

b. If any plaintiff voluntarily dismisses any case or cases selected by the Pfizer Defendants in the Initial Discovery Pool after the PSC has exercised its two strikes as permitted by subparagraph 3.a above, then the Pfizer Defendants may identify and strike an equal number of cases selected by the PSC for the Initial Discovery Pool, thereby making them ineligible for the Trial

² Even a strike that eliminates a lawyer from being primary counsel in a Trial Pool case does not necessarily prevent that lawyer from participating in trial preparation and presentation. In *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977), the Fifth Circuit Court of Appeals discussed the district court's appointment of members of the plaintiffs' committee to both prepare and conduct the bellwether trials. *Id.*, at 1009-10. The court also described the appointment of lead counsel in a consolidated case to try the matter on behalf of all plaintiffs in *Farber v. Riker-Maxson Corp.*, 442 F.2d 457 (2d Cir. 1971), and the approval of that approach by the Second Circuit. *Id.*, 549 F.2d at 1015. As in those cases, the PSC will be able to work with primary counsel for any plaintiff whose case becomes the bellwether trial, and may ask the Court for authority to appoint a particular lawyer to do so as trial approaches.

Pool. In this situation, the Pfizer Defendants may strike any case without regard to who is plaintiffs' primary counsel.

c. If either side does not exercise one or both of its strikes pursuant to subparagraph 3.a by March 17, 2014, then they are forfeited.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. Chirls", written over a horizontal line.

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