IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE DEPAKOTE:	)	
	)	
RHEALYN ALEXANDER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 12-CV-52-NJR-SCW**
	)	
ABBOTT LABORATORIES, INC., and ABBVIE, INC.,	)	**LEAD CONSOLIDATED CASE**
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

The Court held a telephonic status conference on June 30, 2017. This Order memorializes the Court's findings and rulings at that hearing and sets additional deadlines.

A. Parents as Plaintiffs

A large number of complaints have the minor child's parent listed as: "next friend" and "individually." Drafting the complaint in this way suggests that parents are making their own claim for damages and not merely serving as the representative of the claim of the minor. This uncertainty created a small dispute during *voir dire* in the *Raquel* case. Accordingly, the parties are directed to meet and confer regarding whether the parents are acting simply in a representative capacity or whether they are seeking their own claim for individual damages in addition to their role as the representative of the minor child. The parties shall file a joint brief clarifying their positions on this subject on

or before **August 22, 2017**.

B. Dr. Cunniff's Scheduling Issues

Plaintiffs provided an email submission to the Court in advance of the June 30 hearing suggesting that Plaintiffs' causation expert in the *Pyszkowski* cases, Dr. Cunniff, was "unavailable for the September 25, 2017 trial." No further explanation was provided concerning his alleged unavailability. The Court inquired into Dr. Cunniff's scheduling issues at the status conference, but no further clarification could be provided by the lead attorney on the case.

The Court selected the trial dates and Plaintiffs for the next two Depakote trials based upon the parties' representation regarding witness availability. The Court has already lost six full weeks of trial to expert issues in this mass action. Accordingly, the cases previously selected for the September 25, 2017 and November 28, 2017 trial dates will not be continued or vacated based on scheduling conflicts. If needed, a video trial deposition may be taken to play at trial.[1]

C. Dr. Olaf Bodamer

Plaintiffs indicated that their causation expert in *Sifuentes* and *Dotegowski*, Dr. Olaf Bodamer, voluntary accepted additional work responsibilities and no longer wishes to participate as an expert in the mass action. (Doc. 1011, pp. 8-9). Plaintiffs filed a motion to substitute only in the *Dotegowski* case, as Dr. Bodamer indicated he was willing to continue as an expert in the *Sifuentes* case. (Case No. 16-CV-432, Doc. 16).

Dr. Bodamer claims that he has "taken on another major role at Boston Children's

[1] In the event that the parties wish to conduct a video deposition of an expert witness, the Special Master can be utilized to referee the deposition.

Hospital….[and this] new role leave[s] me with very little time to pursue outside projects or litigation related activities." (Case No. 16-CV-432, Doc. 16-1). Plaintiffs fail to adequately support their motion to substitute for two primary reasons.

First, the vast majority of the expert's work, e.g., reviewing records, formulating opinions, drafting reports, drafting rebuttal reports, and sitting for discovery depositions, has already occurred in *Sifuentes* and *Dotegowski*. Second, Dr. Bodamer fails to provide any further explanation for how his new role impacts his ability to participate in this trial beyond: "The new role leaves me with very little time…." Expert discovery cannot be reopened this late in the litigation predicated on such a vague and undescriptive statement. Dr. Bodamer's assertion that he is "unable to… prepare and present deposition and/or present [himself] for trial" further undercuts his Declaration, because a trial date in *Dotegowski* has not been set.[2]

This Court has repeatedly demonstrated a willingness to work with the parties to find trial dates that work with the schedules of everyone involved, including expert witnesses. If taken to its logical conclusion, Dr. Bodamer's Declaration would imply that despite this flexibility, he is so busy that there will *never* be a time when he can come and present testimony in this trial. Such a sweeping unsupported assertion cannot meet the standards of Rule 16 or Rule 37, warranting reopening of expert discovery. Therefore, Plaintiffs' motion for leave to designate a substitute expert is **DENIED**. (Case No. 16-CV-432, Doc. 16). The Court will make every reasonable effort to work around Dr.

[2] In the event that Plaintiffs choose to take a video trial deposition, Defendants have additionally offered to travel to Dr. Bodamer's office at a date and time that is convenient for him. In light of this offer of flexibility and accommodation, it is difficult to understand how Dr. Bodamer can declare that he will never have time for a deposition.

Bodamer's unspecified "major role" to facilitate his participation in the *Dotegowski* trial.

D. Dr. Cheryl Blume

Plaintiffs indicated in their pre-status conference submission that Dr. Blume has a conflict for the November trial slot. At the June 30 conference Plaintiffs provided further clarification indicating that Dr. Blume would be available for the November trial. (Doc. 1011). The Court will not postpone or continue the September or November trials absent unforeseeable extraordinary events.

E. Motion to Amend and Sever

Plaintiffs filed a motion to amend and sever the claims of the *Erpelding* Plaintiffs from the rest of the overarching complaint and then file an amended complaint specific to their cases. (Case No. 13-CV-134, Doc. 178). Plaintiffs A.E. and G.E. are twins, while C.E. is another *Erpelding* sibling. Abbott does not oppose the motion to amend but does not want all three claims consolidated for trial. (Case No. 13-CV-134, Doc. 179). Plaintiffs' motion to sever the *Erpelding* Plaintiffs is **GRANTED**. (Case No. 13-CV-134, Doc. 178). For docket control purposes, the Clerk of Court is directed to open a new case number and assign Amanda Erpelding, A.E., G.E., and C.E. to the new case number. All future pleadings relating to these Plaintiffs shall be filed in the new case number. The Court does not intend to try the claims of C.E. with the claims of A.E. and G.E.

F. Motion to Extend Expert Deadlines

The parties field a joint motion to extend the expert discovery deadlines in the *Pursley* case (former known as "*Fragnoli*"). (Case No. 13-CV-324, Doc. 166). The continuance request is **GRANTED**; the Court will set new deadlines in accordance with the proposed schedule provided to the Court in advance of the status conference.

G. Motions to Dismiss

Plaintiffs filed two motions to dismiss in Case Nos. 13-CV-134 and 13-CV-890. (Case No. 13-CV-134, Doc. 172; 13-CV-890, Doc. 33). Plaintiffs seek a dismissal without prejudice on behalf of Jaclyn Langner, individually and on behalf of her minor child L.L., and Jessica Yoder, individually and on behalf of her minor child B.W. Abbott seeks a dismissal with prejudice of these claims. At the recent status conference Plaintiffs were informed of the Court's intention to dismiss the cases without prejudice subject to the same conditions previously imposed in other similar cases. *See* e.g., (Case No. 14-CV-1062, Doc. 17). Plaintiffs had no objection to this proposal. Accordingly, the motion is **GRANTED**, and the claims of Jaclyn Langner, individually and on behalf of her minor child L.L., and Jessica Yoder, individually and on behalf of her minor child B.W. are **DISMISSED** without prejudice subject to the following two conditions:

> (1) If Plaintiffs seek to reinitiate this legal action in connection with or involving *in utero* exposure to Depakote, the action must be filed in the United States District Court for the Southern District of Illinois; and (2) in the refiled action, the parties will make use of the discovery undertaken thus far to the greatest extent reasonably possible and shall strive not to duplicate in any subsequent action any discovery already undertaken as part of the Depakote proceedings consolidated under Case No. 12-CV-52.

The Clerk of Court is **DIRECTED** to terminate these plaintiffs from their associated cases and from the lead Depakote case (Case No. 12-CV-52).

H. Motion for Reconsideration

Plaintiffs seek reconsideration of the Court's April 12, 2017 Order concerning the Indiana statute of repose. (Doc. 945; Case No. 12-CV-54, Doc. 114). Specifically, Plaintiffs assert that they "recently" discovered that Plaintiffs Denise Estes and minor L.E. have never been residents of the state of Indiana and that all of Ms. Estes's prenatal care,

Depakote use, and prescribing conversations occurred in Illinois. Abbott does not oppose the motion so long as they have leave to refile a motion for summary judgment after the conclusion of discovery in this case.

The Court directed the lead trial counsel for the Estes case to appear in person at the telephonic status conference to ascertain additional details as to how this magnitude of error occurred without detection. At the hearing counsel for Ms. Estes provided the following explanation:

> Your Honor, it happened, in part, because it was based on the analysis that we did in 2016, the state law choice of law analysis. And when we were putting together the charts on hundreds of clients and looking through the records we had. At that time, Ms. Estes's case was coded as an Indiana case because the records that we had for the mom are almost all from her OB and the birth records we have, and she gave birth to the child and all of her children, I believe, in Indiana. She lived in Illinois at that time and somehow that did not get caught, and so she was coded as an Indiana plaintiff at that time.
>
> And then we fast-forward into this February, when Abbott files its motion for summary judgment. We did go back and look at our records again, and that's how we found the Page case, which they moved for summary judgment on, and found out that that one actually had ties in Maryland, and Abbott withdrew their motion on that case in the reply. But, again, we did not catch the Estes facts, that the mom lived in Illinois throughout her pregnancy with the child.
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> And, you know, these are based on records that we had and records that we had, you know, produced to Abbott a couple of years prior. And both sides missed it. I'm not excusing us and not blaming them. But, you know, the records that we had, again, showed that the child was born in Indiana, and for some reason that is how the case got coded.
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> When your Honor's order came out on the Indiana repose motion, we went back again trying to find—to make sure we had all the facts. And that's when we saw that the mom lived in Illinois throughout the pregnancy. We went back to Abbott on that. And when we filed the joint statement on your Honor's ability to enter an order, we noted that we agreed procedurally, and it was the right thing to do, but that we intended to move for reconsideration. We got that information to Abbott late. And so they considered it and have come on the motion for reconsideration that they're unopposed to that motion.

> So I don't have the exact specifics, other than it was originally coded wrongly in 2016 as an Indiana case; and that, you know, despite looking through the records multiple times, we finally found it when we did and brought it to Abbott's and your Honor's attention as fast as we could, and seek reconsideration and seek for the order not to apply. You know, we did find the facts and bring them up before an order dismissing the case or a judgment against the client and would ask that the ruling be reconsidered.

Doc. 1011, pp. 20-22. Counsel's explanation reflects a systemic lack of communication between counsel and the client, an extremely thin pre-filing investigation, and/or some other sloppiness that continues to permeate these cases.[3] Nevertheless, the Court **GRANTS** the motion to reconsider (Doc. 945; Case No. 12-CV-54, Doc. 114) and **DENIES** the motion for summary judgment (Case No. 12-CV-54, Doc. 96) with leave to refile, as to Plaintiffs Denise Estes and minor L.E. only.

I. Motions to Amend

Plaintiffs filed various motions to amend in the lead consolidated case, as well as the applicable component cases. (Docs. 976-978); (Case No. 12-CV-53, Docs. 123; 124); (Case No. 12-CV-57, Doc. 147); (Case No. 12-CV-163, Doc. 106); (Case No. 12-CV-694, Doc. 77); (Case No. 13-CV-324, Docs. 165; 166); (Case No. 13-CV-326, Doc. 228); (Case No. 13-CV-890, Doc. 34); (Case No. 15-CV-702, Doc. 298); (Case 16-CV-432, Doc. 15). The three motions filed in the lead consolidated cases are identical to those motions filed in the component case numbers. *Compare* (Doc. 977) *with* (Case No. 12-CV-163, Doc. 106).

Plaintiffs seek to amend the complaints in a variety of cases to more closely

[3] This Court has already spent a considerable amount of time cleaning up major substantive errors committed by certain Plaintiffs, or more specifically their counsel, in this mass action, and yet they persist. *See e.g.*, Doc. 709 (noting that a small number of counsels' errors were monopolizing a disproportionate amount of the Court's time). While the Court recognizes and sincerely appreciates the exceptional level of civility and professionalism demonstrated by the *vast majority* of counsel in this mass action, counsel who continue to absorb resources and add further delay to the mass action will quickly find the limits of the Court's patience.

conform to the amended complaint in the *Kaleta* trial. Defendants oppose the motion because (a) it would be a violation of due process to grant a blanket approval; (b) authorizing a blanket amendment will preclude Abbott from effectively arguing cases where they have grounds to challenge the motion; and (c) not all states allow punitive damages and it would be futile to plead them into a new complaint.

It appears that part of the dispute stems from an effort by Plaintiffs to streamline the motions so the Court could address this issue with minimum effort, coupled with the structure of the mass action. After discussing the issue with the parties, there appears to be some agreement concerning the motions to amend in certain cases. Accordingly, the following motions are **DENIED** with leave to refile: (Docs. 976-978); (Case No. 12-CV-53, Docs. 123; 124); (Case No. 12-CV-57, Doc. 147); (Case No. 12-CV-163, Doc. 106); (Case No. 12-CV-694, Doc. 77); (Case No. 13-CV-324, Docs. 165; 166); (Case No. 13-CV-326, Doc. 228); (Case No. 13-CV-890, Doc. 34); (Case No. 15-CV-702, Doc. 298); (Case 16-CV-432, Doc. 15).

When the mass action was originally removed to this Court, many were batched together in large groups and given a single case number. This original decision created a scenario where 600 individual claims were contained in 127 case numbers. The cumbersome nature of the current structure has become painfully apparent over the past three years of managing the mass action. To simplify the current system, the Court intends to break out claims selected for trial tracks, into unique case numbers. Accordingly, the Clerk of Court is **DIRECTED** to open a new case number for each of the Plaintiffs listed in Exhibit 1. All future filings for these cases shall be in the newly

assigned case number.

Additionally, before refiling any motions to amend, the parties are **DIRECTED** to meet and confer in an effort to resolve as many uncontested issues as possible concerning these motions. For cases not on a trial track, motions to amend will be handled in the Court's regular practice (i.e., by Magistrate Judge Williams). For disputed motions to amend in the trial track cases, the parties shall file their motions only after the Clerk of Court has opened and assigned the new case numbers.

J. September and November Trials

At the June 30 conference the Court advised the parties of the ongoing effort to secure additional District Judges to try the alternate Depakote cases for the September and November trial slots. Chief Judge Reagan has agreed to try a Depakote case in the September 25, 2017 trial slot. Accordingly, the Court intends to assign both *Pyszkowski* cases for trial with Chief Judge Reagan.[4] Likewise, Judge Yandle is available to try a Depakote case in the November 28, 2017 trial slot. The Court intends to assign the *Bartolini* case for trial with Judge Yandle. A written Order assigning the cases will soon follow with additional information.

K. 2018 Trial Slots

After reviewing the parties' submissions concerning their availability in 2018, the Court has selected the next trial slots for the first-half of following year. The following dates have been selected for the next Depakote trials:

[4] The Chief Judge has also indicated that he intends to try both *Pyszkowski* cases back-to-back, however, he has not yet reached a final decision on his September trial calendar.

1. **January 16 - 29, 2018**
2. **February 5 - 16, 2018**
3. **February 26 – March 9, 2018**
4. **March 20 – April 2, 2018**
5. **April 9 – April 20, 2018**
6. **May 29 – June 19, 2018 (Joint Trial)**
7. **June 25 – July 18, 2018 (Joint Trial)**

The Court is confident that the standard Depakote case can be resolved inside of ten court days. Additionally, the first five trials will be standard single claim cases, however, for the May and June trials, the Court will begin implementing joint trials. The Court is sympathetic to conflicts and vacation planning but given the volume of cases on the docket and the failed settlement efforts, the Court sees no other alternative to trying as many cases as possible.

The Court welcomes the parties' input into selecting the primary and alternate cases for these trial slots at the telephonic status conference next week. Unless an extraordinary circumstance arises, the Court intends to pull from the group of approximately twenty-five cases previously slated for full discovery. The Court recognizes that for any cases selected for the January and February trial slots, discovery will need to be expedited this fall to allow sufficient time to complete the final phase of pretrial litigation.

L. Selecting Additional Cases for Trial Tracks

In the coming months the Court will be selecting the next batch of cases to be worked up for full discovery. Given the probability that other judges in the District will

continue to try Depakote cases (along with the undersigned), the Court intends to select an additional twenty-five to fifty cases to be worked up for trial. While the Court has an internal process for screening and selecting cases, if the parties desire to provide additional input into the selection process, briefs may be filed on or before **September 1, 2017**.

IT IS SO ORDERED.

DATED: July 21, 2017

NANCY J. ROSENSTENGEL
United States District Judge