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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: INCRETIN MIMENTICS
PRODUCTS LIABILITY LITIGATION

Case No. 3:13-md-02452-AJB-MDD

**JOINT MOTION FOR
DETERMINATION OF
DEPOSITION PROTOCOL
DISPUTES**

This Document Relates to All Cases

Hon. Mitchell D. Dembin

**JOINT MOTION FOR DETERMINATION OF
DEPOSITION PROTOCOL DISPUTES**

Pursuant to the Court’s November 19, 2013 Order Regarding Discovery Disputes Identified in Joint Submission Filed November 18, 2013 (Doc. No. 192) (the “Order”), undersigned counsel for the Plaintiffs, together with undersigned counsel for Defendants Amylin Pharmaceuticals, LLC (“Amylin”), Eli Lilly and Company (“Lilly”), Merck Sharp & Dohme Corp., and Novo Nordisk Inc., (collectively, the “Parties”) ask the Court to resolve

1 outstanding disputes related to the General Deposition Protocol and Plaintiffs'
2 requests to Lilly and Amylin for depositions pursuant to Fed. R. Civ. P.
3 30(b)(6).
4

5 **PLAINTIFFS' POSITION**

6 **I. Introduction**

7 The parties have reached impasse with respect to three issues within the
8 deposition protocol. Plaintiffs and Defendants Amylin and Lilly have also
9 reached impasse with respect to 30(b)(6) depositions requested by Plaintiffs in
10 this case.

11 These discovery disputes were identified in the joint Submission Filed
12 November 18, 2013 (ECF No. 186). On November 19, 2013, this Court entered
13 an Order Regarding Discovery Disputes Identified in Joint Submission Filed
14 November 18, 2013 (ECF No. 192). Paragraph 1 of that order stated the
15 following:

16 1. Deposition Protocol Disputes

17 There are two disputes regarding depositions. There is a dispute
18 regarding the "general deposition protocol" and a dispute regarding
19 depositions pursuant to Fed.R.Civ.P. 30(b)(6), including the use of
20 depositions taken in the related *Byetta Cases* litigation in state court
21 (JCCP No. 4574). The Court believes that these disputes can be
22 handled together. The parties are to file a joint motion identifying
23 the areas in which they are in dispute.
24

25
26 The parties have nearly reached an agreement with respect to deposition
27 protocol, but three issues remain outstanding as detailed in Section II, below.
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1 Plaintiffs continue to confer with Defendants Merck and Novo on 30(b)(6)
2 depositions. Plaintiffs have now taken one Merck 30(b)(6) deposition and have
3 another one set in January, 2014. Plaintiffs have also begun to schedule 30(b)(6)
4 depositions with Novo. The first two Novo 30(b)(6) depositions are also set in
5 January, 2014. In addition, Plaintiffs continue to confer with all the parties on
6 30(b)(6) depositions pertaining to issues of Pharmacovigilance and Adverse Event
7 Reporting in conjunction with which Plaintiffs also seek production of certain
8 documents.

9 Plaintiffs have been unable to come to an agreement on any 30(b)(6)
10 depositions with Defendants Amylin and Lilly. This submission seeks to address
11 pending issues regarding 30(b)(6) depositions between Plaintiffs and Defendants
12 Amylin and Lilly that have reached impasse.

13 **II. Statement of Issues to Be Decided**

14 The primary issues in dispute with respect to deposition protocol overlap
15 with the parties' disputes with respect to 30(b)(6) depositions. Namely, they are:
16 (1) whether depositions Plaintiffs seek in this MDL can be restricted by
17 depositions previously taken in other proceedings, and (2) whether Plaintiffs are
18 precluded from taking the deposition of a fact witness when a Defendant
19 previously elects to produce that witness to respond to matters sought in a
20 30(b)(6) deposition.

21 The remaining disputed issue with respect to deposition protocol involves
22 the duration of depositions. Plaintiffs, representing the interests of all plaintiffs in
23 the MDL, seek up to two days (7 hours each) to complete each deposition
24 regardless of whether the deposition has been cross noticed in other litigations.
25 Defendants, on the other hand, seek to limit depositions to 7 hours on one day and
26 require a ruling from Judge Dembin in advance of each deposition for which
27 Plaintiffs seek additional time.
28

1 Finally, Plaintiffs seek a commitment by Defendants Amylin and Lilly to
2 timely produce witnesses on the 30(b)(6) matters requested.

3 **III. Summary of Argument**

4 This is a new MDL proceeding encompassing multiple drugs manufactured
5 by multiple defendants focused on the injury of **pancreatic cancer**. This case has
6 *never* been litigated before. At the outset of the Byetta JCCP, pancreatic cancer
7 cases were not filed and likely not even contemplated. Indeed, the JCCP has its
8 roots in Byetta pancreatitis cases. That has always been its focus. To this day,
9 that is the JCCP's focus, with active bellwether cases and trial dates only
10 involving pancreatitis.

11 Plaintiffs discovery efforts in this MDL should not be artificially restricted
12 by Defendants trying to avoid their obligation in this litigation and in this Court.
13 Plaintiffs in this MDL should be allowed to discover the case at hand, and should
14 not be restricted by depositions that took place in the JCCP (often over three years
15 ago and that focused on a different injury) or for that matter, based on discovery
16 taken in any other litigations.

17 Plaintiffs should also be afforded a sufficient opportunity to conduct
18 discovery in a complex case involving multiple products like this. This includes
19 adequate time to conduct depositions and an opportunity to conduct depositions
20 pursuant to Fed.R.Civ.P. 30(b)(6).

21 **IV. Factual Background**

22 **A. Deposition Protocol**

23 The current draft of the disputed deposition protocol is attached hereto as
24 Exhibit A with the disputes highlighted in yellow.

25 **B. 30(b)(6) Depositions**

26 After numerous meet and confers, the 30(b)(6) deposition matters Plaintiffs
27 are seeking from Defendant Amylin at this time are attached as Exhibit B. The
28

1 30(b)(6) deposition matters Plaintiffs are currently seeking from Defendant Lilly
2 are attached as Exhibit C.

3 Plaintiffs originally served seven 30(b)(6) deposition notices on Defendants
4 Amylin and Lilly in April 2013. *See* E-mails from Ryan Thompson to each
5 Defendant attaching notices, attached hereto as Exhibit D. The seven notices
6 encompassed the following subject areas:

- 7 1. Adverse Event Reporting,
- 8 2. Records Management,
- 9 3. Corporate Structure and Organization,
- 10 4. Electronically Stored Information,
- 11 5. Outside Contractors/Consultants,
- 12 6. Regulatory, and
- 13 7. Study Management

14 At Defendants' request, Plaintiffs attempted to narrow the scope of the
15 30(b)(6) deposition notices they initially served, and reduced the number of
16 notices to five. *See* 10/8/2013 E-mail from T.J. Preuss to Defense counsel
17 attaching proposed amended notices, attached hereto as Exhibit E. These five
18 notices encompassed the following subject areas:

- 19 1. Adverse Event Reporting,
- 20 2. Records Management,
- 21 3. Corporate Structure and Organization,
- 22 4. Outside Contractors/Consultants,
- 23 5. Study Management

24 Not only did Plaintiffs limit the number of notices, but they also limited the
25 number of matters under each notice. Since reducing the matters, Plaintiffs have
26 continued to agree to narrow the focus of their requested 30(b)(6) topics with
27 respect to Amylin and Lilly in an attempt to begin taking these depositions. Aside
28

1 from Adverse Event Reporting, which is being handled separately, Plaintiffs focus
2 at the present is on two subject areas – Regulatory Corporate Structure and
3 Organization and Study Management.¹

4 Accordingly, the 30(b)(6) topics at issue are limited and narrow as to both
5 Lilly and Amylin. However, despite Plaintiffs attempts to cooperate with Amylin
6 and Lilly pertaining to the scope of these depositions, Plaintiffs have been
7 confronted by these Defendants with additional arguments as to why these
8 depositions should not go forward. Now, Defendants claim that these depositions
9 are inappropriate because of prior depositions taken years ago in the JCCP. Lilly
10 also claims that if they offer a witness for a 30(b)(6) deposition, it may preclude
11 Plaintiffs ability to depose that witness as a fact witness later in the litigation. The
12 only 30(b)(6) deposition Lilly has agreed to comes with these strings attached. To
13 date, Amylin has not agreed to a single deposition proposed by Plaintiffs.

14 **V. Argument**

15 **A. Depositions in this case should not be restricted by testimony**
16 **given in other cases.**

17 This is a new MDL. This MDL and its assigned Plaintiff Steering
18 Committee have been tasked with discovering this case for all federal litigants
19 across the nation. The PSC's discovery efforts should be unfettered by other
20 litigations before it. Particularly, the PSC efforts should not be restricted by
21 discovery conducted in the JCCP, which has not been focused on the injury this
22 MDL was assigned to handle. All of the depositions in the JCCP took place years

23 ¹Specifically, in an attempt to prioritize their tasks before Science Day, Plaintiffs have agreed to
24 table a deposition on the subject area of Records Management until after Science Day and focus
25 on regulatory aspects under the matters of Corporate Structure and Organization and Outside
26 Contractors/Consultants at this time. Also, Plaintiffs are not currently seeking a deposition on
27 Animal studies as to Lilly. Lilly claims that Amylin has the most information regarding Pre-
28 Clinical Animal Studies, and Plaintiffs have agreed to handle this issue through Amylin at this
point.

1 ago between October 2010 and May 2011. These depositions were focused on
2 pancreatitis and largely driven by one lawyer without the resources and
3 capabilities available in this litigation and without the stakes at issue here. For
4 these reasons, Plaintiffs should not be precluded from taking the deposition of a
5 witness in this MDL who was previously deposed in the JCCP, years ago, where
6 the focus was not the injury at issue here. As explained below, prior fact witness
7 depositions in the JCCP should also not impact Plaintiff's ability to take a
8 deposition pursuant to Fed.R.Civ.P. 30(b)(6) in this MDL.

9 **B. Plaintiffs should not be restricted from taking the deposition of a**
10 **fact witness when that witness is previously offered as a witness**
11 **to respond to matters contained in a FRCP 30(b)(6) deposition**
12 **notice.**

13 The Federal Rules of Civil Procedure offers a mechanism to name a
14 corporation as a deponent. Pursuant to Fed.R.Civ.P. 30(b)(6), "The named
15 organization must then designate one or more officers, directors, or managing
16 agents, or designate other persons who consent to testify on its behalf; and it may
17 set out the matters on which each person designated will testify...The persons
18 designated must testify about information known or reasonably available to the
19 organization." Importantly, the rule goes on to read that this deposition
20 mechanism "does not preclude a deposition by any other procedure allowed by
21 these rules."

22 Prior deposition testimony by a witness in his or her individual capacity
23 does not preclude a Rule 30(b)(6) deposition or vice versa. *AG-Innovations, Inc.*
24 *U.S.*, 82 Fed.Cl. 69, 81 (2008)(citations omitted). Rule 30(b)(6) depositions and
25 individual depositions have important distinguishing factors. Testimony obtained
26 in a 30(b)(6) deposition "represents the knowledge of the corporation, not of the
27 individual deponents." *Id; Great Am. Ins. Co. of New York v. Vegas Const. Co.*,
28

1 *Inc.* 251 F.R.D. 534 (D.Nev. 2008). In other words, a 30(b)(6) designee "does not
2 give his personal opinions," but instead "presents the corporation's 'position' on
3 the topic." *AG-Innovations, Inc. U.S.*, 82 Fed.Cl. at 81. Testimony obtained in an
4 individual fact witness deposition is limited to the individual's memory; whereas,
5 under Rule 30(b)(6) a corporation has the duty to present and prepare a designee
6 beyond matters personally known to the designee or matters in which the designee
7 was personally involved. *Id.*

8 In addition to the reasons stated above, no fact witness deposition taken in
9 any other case should prevent Plaintiffs from proceeding with a 30(b)(6)
10 deposition here because of the important distinguishing factors between an
11 individual fact witness deposition and a 30(b)(6) deposition. Plaintiffs are entitled
12 to the company's knowledge about the 30(b)(6) matters requested. An individual's
13 prior testimony on these matters and personal opinions does not present the
14 corporation's position on the topics.

15 Similarly, Defendants cannot be allowed to use a witness they designate to
16 testify on 30(b)(6) topics as a barrier to Plaintiffs taking the witness' individual
17 deposition later in the litigation. At this point in the litigation, Plaintiffs are
18 seeking to understand the Defendant companies' structures and positions on
19 certain, limited subject matters. Plaintiffs inevitably intend to use this information
20 to guide future discovery which is the reason for taking 30(b)(6) depositions in the
21 first place. Plaintiffs should be afforded this opportunity without the risk of being
22 precluded from taking a fact witness deposition in the future.

23 **C. Plaintiffs proposed deposition duration is appropriate and best**
24 **suited for this case.**

25 The parties expect cross notice depositions in this case with various state
26 court litigations. The state court lawyers deserve adequate time in these
27 depositions. Accordingly, Plaintiffs anticipate requiring more than seven hours
28

1 for some depositions in this case. Plaintiffs’ proposal with respect to deposition
2 duration of up to two days of 7 hours each is consistent with other pharmaceutical
3 MDL’s. *See In Re. Pradaxa (Dabigatran Etexilate) Products Liability Litigation*
4 Case Management Order Number 8 Regarding Deposition Protocol, Sec. D.2
5 (“Absent agreement of the parties or order of the Court, the presumption is that a
6 deposition shall not exceed two days or fourteen (14) hours of questioning by
7 Plaintiffs’ counsel. . . .”), attached hereto as Exhibit F. Plaintiffs’ proposal is
8 especially appropriate here with the multiple drugs at issue involving multiple
9 manufacturers.

10 **D. This Court should Compel the Deposition of the Amylin and**
11 **Lilly 30(b)(6) witnesses requested by Plaintiffs.**

12 Amylin has not yet agreed to a single 30(b)(6) deposition. Plaintiffs are
13 attempting to move this litigation forward expeditiously. At this juncture,
14 Plaintiffs are only seeking limited 30(b)(6) depositions from Amylin to determine
15 company knowledge on certain matters but have been met with recalcitrance.
16 Amylin has never provided a 30(b)(6) deposition in the JCCP or any other
17 litigation. Plaintiffs must be afforded the opportunity to conduct the depositions
18 they request.

19 Amylin has also claimed that witnesses with knowledge of some of the
20 30(b)(6) matters requested may no longer be employed at the company.
21 However, these problems do not relieve a corporation from preparing a Rule
22 30(b)(6) designee to testify on its behalf about all matters known or reasonably
23 available to it. *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

24 Eli Lilly has only offered a 30(b)(6) deposition on the topic of Clinical
25 Studies, but it comes with strings attached. Lilly has refused to offer a witness on
26 this topic unless Plaintiffs agree that the 30(b)(6) deposition will include the
27 substantive deposition of the fact witness offered on these topics – something that
28

1 is essentially impossible for the Plaintiffs to agree to at this early stage of the
2 proceedings. Plaintiffs should be afforded a 30(b)(6) deposition on this topic, and
3 any others proposed, without precluding them from taking the deposition of a fact
4 witness in the future. Not only do the depositions have distinct purposes, but
5 also given the early stage of this case, Plaintiffs are not in a position to take the
6 deposition of Lilly's fact witness at this time.

7 **VI. Conclusion**

8 For these reasons, Plaintiffs respectfully request this Court to enter the
9 Deposition Protocol proposed by Plaintiffs and compel the Rule 30(b)(6)
10 depositions Plaintiffs currently seek from Defendants Amylin and Eli Lilly.
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1 **DEFENDANTS' POSITION**

2 **DISPUTED PROVISIONS OF DEPOSITION PROTOCOL**

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4 The *Manual for Complex Litigation, Fourth* (2004) (“Manual”) recognizes
5 that “[d]epositions are often overused and conducted inefficiently, and thus
6 tend to be the most costly and time-consuming activity in complex litigation.”
7 Manual §11.45. The Manual urges judges to “avoid unnecessary depositions,
8 limit the number and length of those that are taken, and ensure that the process
9 of taking depositions is as fair and efficient as possible,” *id.*, and suggests that
10 courts enter deposition guidelines to limit needless duplication and
11 inefficiency.²
12

13
14 The Parties agree on most of the terms of a deposition protocol for this
15 MDL, but Plaintiffs oppose three provisions intended to ensure an efficient and
16 coordinated deposition process. First, Plaintiffs wish to circumvent Rule
17 30(d)’s presumptive time limit of seven hours per deposition. Second,
18 Plaintiffs wish to take multiple depositions of witnesses who are offered in
19 both a corporate representative and individual fact witness capacity, without
20 any obligation to proceed efficiently by conducting both types of questioning
21 on a single occasion, absent good cause to do otherwise. Third, Plaintiffs seek
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26 ²See Manual § 11.451 (“[S]ome judges issue guidelines covering the following matters: who
27 may attend depositions; where the depositions are to be taken; who may question the witness;
28 how the parties are to allocate the costs; and how the attorneys are to conduct themselves.”);
Manual § 40.29 (sample Deposition Guidelines).

1 the right to subject witnesses to questioning that is duplicative of questions the
2 witness has already answered in prior depositions, regardless of whether there
3 is good cause do so.
4

5 **Duration**

6 Depositions in this MDL should be governed by the seven-hour limit per
7 witness provided for in Rule 30(d)(1), absent good cause or agreement of
8 parties. *See* Fed. R. Civ. P. 30(b)(1); *see also id.*, Advisory Committee Note
9 (2000 Amendment) (stating that Rule 30(d)(1) requires either agreement or a
10 court order based on a showing of “good cause” to extend the presumptive
11 seven-hour limit).
12

13 Defendants agree that additional deposition time might be necessary for
14 some witnesses. But Plaintiffs’ proposal that they are entitled to twice the
15 amount of time for *every* deposition regardless of the subject matter goes too
16 far. Such a rule would invite Plaintiffs’ counsel to fill the two days allotted for
17 every deposition, needlessly running up costs and burdening the Defendants.
18 With adequate preparation and focus, most depositions can be completed in
19 seven hours.
20

21 Plaintiffs argue that two days (or 14 hours) are necessary because “state
22 court lawyers deserve adequate time” and because of “the multiple drugs at
23 issue involving multiple manufacturers.” Plaintiffs fail to note, however, that
24 nearly all relevant state court counsel are also members of the MDL PSC.
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1 Further, nothing in Plaintiffs’ proposal reserves this additional deposition time
2 for use by state court lawyers not members of the PSC nor does it make an
3 exception to the two-day rule when depositions are not cross-noticed. And
4 though there are multiple drugs and manufacturers in this MDL, these
5 complexities will not affect the majority of depositions of individual company
6 witnesses. Plaintiffs must be efficient and coordinate examination topics with
7 the state lawyers so as not to be duplicative, and cognizant that the witnesses’
8 time is valuable to them and their business.

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12 Rule 30(d)(1) recognizes and provides for an exception where more time is
13 needed. When the noticing party expects that seven hours will be insufficient,
14 Defendants’ proposed protocol provides a procedure for notifying opposing
15 counsel and negotiating a reasonable length of the deposition ahead of time.
16 Other MDLs have adopted similar provisions limiting depositions to seven
17 hours,³ and this Court should do the same.

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20 **Successive Depositions in this Proceeding**

21 Witnesses deposed in this MDL should not be re-deposed absent good
22 cause or mutual agreement of the Parties. Plaintiffs agree with this general
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25 ³See, e.g., *In re: Avandia Marketing, Sales Practices and Prods. Liab. Litig.*, MDL No. 1871,
26 Pretrial O. No. 38 (E.D. Pa. Nov. 11, 2008) at 4 (“Counsel are encouraged to limit the length of
27 depositions wherever practicable to no more than seven (7) hours . . .”); *In re: Fosamax Prods.*
28 *Liab. Litig.*, MDL No. 1789, Case Management Order No. 3 (S.D. NY. November 1, 2006) at
11-12 (“The examination by the party noticing the deposition shall be no more than seven (7)
hours of actual examination absent agreement or further order of this Court upon a showing of
good cause.”)

1 rule, but argue they should always be entitled to re-depose witnesses who are
2 first deposed pursuant to Rule 30(b)(6).

3
4 Defendants believe that whenever practicable, 30(b)(6) and fact depositions
5 of the same witness should be taken at the same time rather than months or
6 potentially years apart.⁴ The purpose of this default rule is to limit the
7
8 expensive duplication of witness preparation and the need to reconvene all the
9 parties a second time to depose the same witness. Plaintiffs' proposal raises
10 the possibility that each of these 30(b)(6) witnesses may be deposed once and
11 then ¶ when the Plaintiffs want another bite at the apple ¶ be forced to prepare
12 for and give another deposition on what undoubtedly will be similar topics. To
13 prevent needless waste, Plaintiffs should conduct a single, joint 30(b)(6) and
14 fact deposition, absent good cause or agreement from the Defendants to
15 proceed otherwise.
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18 Plaintiffs argue that depositions taken pursuant to Fed. R. Civ. P. 30(b)(6)
19 are distinct from fact depositions. Defendants agree. It does not follow from
20 this distinction, however, that Plaintiffs should be entitled to depose the same
21 witness in his or her different capacities on separate occasions when it would
22 be more efficient to schedule just one deposition. The Plaintiffs cite *AG-*
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26 _____
27 ⁴ Depending on the circumstances, a combined 30(b)(6) and fact deposition may present
28 circumstances where the parties would, upon a meet and confer, evaluate the need for a
deposition longer than seven hours.

1 *Innovations, Inc. v. United States* in support of their position,⁵ but that case is
2 inapplicable as it did not involve the issue of holding 30(b)(6) and fact
3 depositions jointly, which is the issue here.
4

5 Conducting 30(b)(6) and fact depositions at the same time will ensure an
6 efficient use of the witness' stime and the Defendants' resources without
7 prejudicing the Plaintiffs. Given the different states of document production
8 for the Defendants, Plaintiffs might have good cause to seek a later fact
9 deposition of a 30(b)(6) deponent in some cases. If that issue arises it can be
10 dealt with based on the specific facts and circumstances relevant to that
11 witness at time that Plaintiffs actually seek a second deposition. In other cases,
12 however, such as where Plaintiffs already have the witness' custodial
13 documents, there generally will be no reason to schedule two separate
14 depositions for the same witness. For example, Plaintiffs have had custodial
15 files for dozens of Lilly and Amylin witnesses as well as access to transcripts
16 of prior depositions for more than a year. The same is not yet true for the other
17 Defendants or for every witness that Lilly or Amylin may offer as a corporate
18 representative, and these exceptions are exactly the purpose of the "good
19 cause" or mutual agreement exception to the rule.
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25 Plaintiffs do not justify the need for a blanket rule permitting them to re-
26 depose every 30(b)(6) witness later in the litigation as a fact witness. When

27 ⁵ 82 Fed. Cl. 69, 93 (Fed. Cl. 2008).
28

1 Plaintiffs show good cause for why a fact deposition was not done jointly with
2 a 30(b)(6) deposition, then a second fact deposition will be permitted under
3 Defendants’ proposal. But absent such good cause or agreement from the
4 Defendants, duplicative second depositions should not be allowed.
5

6 **Depositions Taken in Other Proceedings**
7

8 Witnesses who are deposed in this MDL, and who have already been
9 deposed in the JCCP proceedings should not be subjected to questioning that is
10 duplicative of the questions in the witness’ prior deposition without good
11 cause. *See* Fed. R. Civ. P. 26(b)(2)(C) (providing for limitation of “cumulative
12 or duplicative” discovery). By definition, re-asking a witness questions that
13 the witness has already answered is duplicative, and should not be permitted
14 without good cause to cover the same ground twice.
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18 **DISPUTES RELATED TO 30(B)(6) DEPOSITION REQUESTS**
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20 Plaintiffs claim that the purpose of their proposed 30(b)(6) topics is “to
21 understand the Defendants’ companies’ structures and positions on certain,
22 limited subject matters” in order “to guide future discovery.” But where
23 Plaintiffs already have, or can easily learn, the information that they say they
24 are seeking by reading transcripts of existing depositions, then they do not
25 need a 30(b)(6) deposition to move ahead with other discovery. Under Fed. R.
26 Civ. P. 26(b)(2)(C)(i), “the court must limit the frequency or extent of
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1 discovery...if it determines that...the discovery sought is unreasonably
2 cumulative or duplicative, or can be obtained from some other source that is
3 more convenient, less burdensome, or less expensive.”
4

5 With respect to Amylin and Lilly, in particular, this is simply not a case in
6 which plaintiffs are starting from nothing and require a series of introductory
7 30(b)(6) depositions just to orient themselves to the defendants and decide
8 what “real” discovery they need. The PSC has at its disposal 25 depositions of
9 Amylin and Lilly personnel taken in the Byetta JCCP litigation. During these
10 depositions, Amylin and Lilly witnesses have described the structure of their
11 respective organizations, their companies’ policies and procedures, and the
12 history of Byetta’s development, regulatory approval, and marketing.
13

14 Plaintiffs’ arguments that the JCCP litigation was different and that these prior
15 depositions are outdated are unconvincing. The first pancreatic cancer case
16 was filed by current PSC member T.J. Preuss in the JCCP in 2009, well before
17 the depositions at issue, and nearly all of the JCCP depositions were taken by a
18 current member of the PSC in this MDL.
19

20 Instead of using these depositions to pursue more focused discovery for
21 MDL Plaintiffs’ pancreatic cancer claims, Plaintiffs seek duplicative
22 depositions to cover the same ground. In fact, members of the PSC have
23 expressly told counsel for Amylin and Lilly that they do not believe they need
24 to read this prior testimony before demanding that Amylin and Lilly put up
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1 witnesses to retread ground that has already been covered. Lilly and Amylin
2 have made clear that they are willing to provide information that was not
3 contained in the prior testimony, but Plaintiffs have repeatedly refused to say
4 what information they seek that is not provided in the prior testimony.
5

6 Unless Plaintiffs show gaps in the prior JCCP testimony, taking additional
7 depositions to obtain the same background information is duplicative and
8 inefficient. The most convenient, least burdensome, and least expensive way
9 to obtain the background information Plaintiffs seek is by reviewing the prior
10 JCCP depositions, not by re-taking them.
11

12
13 The Court has stated that coordinating state and federal proceedings will
14 “help [to] minimize cost” and “facilitate the forward movement” of the cases.⁶
15 This coordination begins by recognizing the work that has already been done
16 in state court and using it as a springboard to move these cases forward.
17

18
19 **Amylin’s Position As To Requested 30(b)(6) Topics**

20 The negotiations between Amylin and Plaintiffs on 30(b)(6) topics have
21 stalled due to Plaintiffs’ refusal to discuss these issues productively. Amylin
22 has avoided flyspecking Plaintiffs’ proposed deposition notices, taking instead
23 the practical approach of asking Plaintiffs to help Amylin identify the
24 information they feel they do not have, so that Amylin can provide Plaintiffs
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⁶ Order Following First Status Conference, ¶ 11(Dkt. 143).

1 that information as efficiently as possible.⁷ As Amylin has told Plaintiffs, Rule
2 30(b)(6) depositions are a particularly inefficient vehicle for exploring
3 Amylin’s historical structure and policies because Amylin has recently been
4 acquired and virtually none of its key employees prior to the 2013 acquisition
5 are within the existing corporate structure. So if Amylin is going to provide
6 additional information regarding historical corporate organization and policies,
7 it needs Plaintiffs to help identify the specific areas Plaintiffs feel have not
8 been covered so that those areas can be investigated.

11
12 To date, Plaintiffs have refused to review the existing record. Plaintiffs
13 offered only that their deposition questioners will read the earlier depositions
14 before taking the new depositions and try not to duplicate questioning. This
15 ignores Amylin’s burden in having to *prepare* witnesses under the Rule
16 30(b)(6) process, which will—in almost every instance—require Amylin to
17 educate a witness who lacks firsthand knowledge. Notably, Amylin has
18 shouldered the burden of identifying to Plaintiffs the prior testimony (by page
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23 ⁷ It bears noting that Plaintiffs’ deposition notices have been a moving target, and
24 are not simply the ones Plaintiffs have attached. Plaintiffs attach an email from
25 T.J. Preuss dated October 8, 2013, which attached notices. On October 16, Mr.
26 Preuss proposed a separate list of “General Topics” based on topics proposed by
27 Merck. These topics, which are attached as Exhibit G, have driven the
28 discussions between Amylin and Plaintiffs since then, except that Plaintiffs have,
over time, been slowly adding in topics—a process that has further complicated
Amylin’s ability to even understand what it is Plaintiffs want. Consistent with
this Court’s Chambers Rules, Amylin does not attach Mr. Preuss’s October 16
email.

1 and line number) that addresses the topics in Plaintiffs’ notices.⁸ To date,
2 Plaintiffs have not responded.

3
4 Plaintiffs object that “Amylin has never provided a 30(b)(6) deposition in
5 the JCCP or any other litigation.” If, as they assert, Plaintiffs only want “to
6 understand [Amylin’s] structures and positions,” then that distinction is
7 meaningless. Having a new witness become sufficiently educated to parrot
8 back testimony that Plaintiffs already have is wasteful, regardless of whether
9 the prior testimony was taken from a corporate designee or a knowledgeable
10 percipient witness. The Court should protect Amylin from having to undertake
11 that needless burden. *See* Fed. R. Civ. P. 26(b)(2)(C)(i) & (iii).

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16 **Lilly’s Position As To Requested 30(b)(6) Topics**

17 Lilly and Plaintiffs so far have reached agreement on two of the three
18 30(b)(6) areas of inquiry proposed by the Plaintiffs. Lilly has agreed to supply
19 a witness on the proposed topic related to clinical trial management⁹ and
20 Plaintiffs have agreed that the adverse event reporting topic is being handled
21 separately.
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25 ⁸*See* Exhibit H. Consistent with the Court’s Chambers Rules, Amylin has not provided the
26 cover email that accompanied this chart.

27 ⁹ To be clear, Lilly has not conditioned this deposition on Plaintiffs’ advance agreement that
28 they will not later seek a fact deposition of the witness, but has simply stated that it is not
agreeing in advance that Plaintiffs will be entitled to a second deposition of the witness. That
issue need not be decided unless and until Plaintiffs actually seek a second deposition.

1 With respect to regulatory affairs topics, however, the parties have not been
2 able to reach agreement. Under the Amylin-Lilly collaboration agreement,
3 Amylin was at all times the official holder of FDA approval to market Byetta,
4 and principally responsible for preparing and submitting regulatory materials
5 to the FDA. Amylin and Lilly's alliance terminated in November 2011. Less
6 than a year before this termination, Lilly's then-global regulatory lead for
7 Byetta, Dr. Kathryn Broderick, Pharm.D., was deposed in the JCCP by
8 attorney Keith Altman, who is a current member of the PSC in this MDL.
9 During this deposition, Dr. Broderick was asked about Lilly's policies,
10 regulatory structure and organization, personnel involved in Byetta regulatory
11 affairs, and Lilly's interactions with the FDA.
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16 Lilly has asked Plaintiffs to identify what additional background
17 information related to regulatory affairs they hope to obtain from a new
18 deposition on regulatory affairs, and has offered to fill gaps that might exist.
19 But Plaintiffs have refused to identify any.
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21 At this stage of the litigation, Plaintiffs claim only to be seeking
22 information to "guide future discovery." The prior testimony of Dr. Broderick
23 provides such a guide. Instead of using this testimony as a springboard for
24 more detailed inquiry, Plaintiffs propose to re-do the prior deposition to obtain
25 information that is already available to them. The Court should not allow this
26 waste.
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