

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE: INCRETIN-BASED
THERAPIES PRODUCTS LIABILITY
LITIGATION

CASE NO. 13-md-02452 AJB (MDD)

**JOINT MOTION FOR ENTRY OF
ORDER REGARDING
DEPOSITION PROTOCOL**

As to All Related and Member Cases

Judge: Hon. Anthony J. Battaglia

The parties, through their undersigned counsel of record, jointly request that the Court enter the attached proposed Order Regarding Deposition Protocol.

Respectfully submitted:

Dated: July 29, 2014

NINA M. GUSSACK
KENNETH J. KING
PEPPER HAMILTON LLP

STEPHEN P. SWINTON
LATHAM & WATKINS LLP

By: /s/ Stephen P. Swinton

Attorneys for Defendant
Eli Lilly and Company, a corporation

1 Dated: July 29, 2014

RICHARD B. GOETZ
AMY J. LAURENDEAU
O'MELVENY & MYERS LLP

2
3 By: /s/ Amy J. Laurendeau

4 Attorneys for Defendant
Amylin Pharmaceuticals, LLC

5 Dated: July 29, 2014

6 DOUGLAS MARVIN
EVA ESBER
7 PAUL BOEHM
WILLIAMS & CONNOLLY LLP

8 By: /s/ Paul Boehm

9 Attorneys for Defendant
Merck Sharp & Dohme Corp.

10 Dated: July 29, 2014

11 LOREN BROWN
HEIDI LEVINE
12 RAYMOND WILLIAMS
DLA PIPER

13 By: /s/ Heidi Levine

14 Attorneys for Defendant
Novo Nordisk Inc.

15 Dated: July 29, 2014

16 CASEY GERRY SCHENK
FRANCAVILLA BLATT &
PENFIELD, LLP

17 By: /s/ Gayle M. Blatt

18 Plaintiffs' Co-Liaison Counsel

19 Dated: July 29, 2014

20 RYAN L. THOMPSON
WATTS GUERRA LLP

21 By: /s/ Ryan L. Thompson

22 Plaintiffs' Counsel

23 Dated: July 29, 2014

24 HUNTER J. SHKOLNIK
NAPOLI BERN RIPKA SHKOLNIK

25 By: /s/ Hunter J. Shkolnik

26 Plaintiffs' Counsel

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 29, 2014

MICHAEL S. BERG
LAW OFFICES OF MICHAEL S. BERG

By: /s/ Michael S. Berg

Plaintiffs' Counsel

Dated: July 29, 2014

TOR A. HOERMAN
JACOB W. PLATTENBERGER
TORHOERMAN LAW LLC

By: /s/ Tor A. Hoerman

Plaintiffs' Counsel

SIGNATURE ATTESTATION

Pursuant to Section 2.f.4 of the Court's CM/ECF Administrative Policies, I hereby certify that authorization for the filing of this document has been obtained from each of the other signatories shown above and that all signatories have authorized placement of their electronic signature on this document.

s/ Stephen P. Swinton

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On July 29, 2014, I served the following document described as:

JOINT MOTION FOR ENTRY OF ORDER REGARDING DEPOSITION PROTOCOL

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC FILING

I am familiar with the United States District Court, Southern District of California's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the court. The court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the court's transmission facilities. Under said practice, all parties to this case have been served electronically.

I declare that I am employed in the office of a member of the Bar of California, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 29, 2014, at San Diego, California

/s/ Stephen P. Swinton

ATTACHMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**IN RE: INCRETIN-BASED
THERAPIES PRODUCTS LIABILITY
LITIGATION**

As to All Related and Member Cases

CASE NO. 13-md-02452 AJB (MDD)

**ORDER GRANTING JOINT
MOTION FOR ENTRY OF ORDER
REGARDING DEPOSITION
PROTOCOL**

1 This Order applies to all cases in this MDL, and to all counsel and law firms
2 that have appeared in this MDL. In any deposition that is cross-noticed between
3 this MDL and any other jurisdiction, counsel and law firms that have appeared in
4 this MDL, shall be bound by this Order throughout the deposition.

5 **I. GENERAL PROVISIONS**

6 **A. Lead Deposition Counsel**

7 Depositions and matters related to depositions shall be coordinated by a
8 Lead Deposition Counsel for plaintiffs and Lead Deposition Counsel for
9 defendants. Lead Deposition Counsel for plaintiffs shall be Michael Johnson or his
10 designee.

11 Lead Deposition Counsel for defendants shall be Richard Goetz or his
12 designee for Amylin Pharmaceuticals, LLC (“Amylin”), Nina Gussack or her
13 designee for Eli Lilly and Company (“Lilly”), Doug Marvin or his designee for
14 Merck Sharp & Dohme Corp. (“Merck”), and Loren Brown or his designee for
15 Novo Nordisk, Inc. (“Novo”). The name and contact information for any designee
16 shall be promptly communicated to the other parties in writing.

17 **B. Deposition Notices**

18 **1. Notice of Deposition Procedures.** A copy of this Order shall be
19 attached to each non-party subpoena issued or served in these MDL proceedings.

20 **2. Contents of Notice.** All deposition notices shall comply with
21 the requirements of Fed. R. Civ. P. 30(b), and where cross-noticed the rules of
22 that jurisdiction.

23 **C. Cooperation**

24 Counsel are expected to cooperate with and be courteous to each other and
25 deponents in both scheduling and conducting depositions.

26 **D. Attendance**

27 **1. Who May Be Present.** Unless otherwise ordered under Fed. R.
28 Civ. P.26(c) and subject to the terms of the Protective Order, depositions may be

1 attended by counsel of record, members and employees of their firms, attorneys
2 specially engaged by a party for purposes of the deposition, the parties or the
3 representative of a party, court reporters, videographers, the deponent, and counsel
4 for the deponent. Under no circumstances shall a person attend the deposition in
5 any manner remotely without being identified, this shall include by telephone,
6 internet link-up of any kind or remote access communication.

7 **2. Unnecessary Attendance.** Unnecessary attendance by counsel
8 is discouraged. Counsel who have only marginal interest in a proposed deposition
9 or who expect their interests to be adequately represented by other counsel should
10 elect not to attend. No attorney who attends, participates in or uses a deposition in
11 these proceedings shall be entitled or subject to any assessment, fee or tax merely
12 by reason of such attendance, participation or use.

13 **3. Notice of Intent to Attend a Deposition.** In order for counsel to
14 make arrangements for adequate deposition space, counsel who intends to attend a
15 deposition noticed in this MDL should advise Lead Deposition Counsel for
16 plaintiffs and defendants not fewer than three (3) business days prior to the
17 deposition, whenever feasible. The notification should include the names of all
18 attendees appearing at the deposition.

19 **II. CONDUCT OF DEPOSITIONS**

20 **A. Examination**

21 Questioning should ordinarily be conducted by no more than two attorneys
22 for all plaintiffs. Once the witness has fully answered a question, that same
23 question or substantially the same question shall not be asked again. Three (3)
24 business days before the date of the deposition Lead Deposition Counsel for the
25 noticing party shall give Lead Deposition Counsel for the other side notice of the
26 identity of the lead attorney(s) who will examine the deponent.

27 Counsel should cooperate in the allocation of time in order to comply with
28 the time limits set by the Court.

1 **1. *Production of Documents.*** Third-party witnesses subpoenaed
2 to produce documents shall, to the extent possible, be served with the document
3 subpoena at least fifteen (15) calendar days before a scheduled deposition.
4 Depending upon the quantity of documents to be produced, some time may be
5 needed for inspection of the documents before the examination commences.

6 **2. *Copies.*** Extra copies of documents about which deposing
7 counsel expects to examine a deponent should be provided to primary counsel for
8 the parties and the deponent during the course of the deposition.

9 **3. *Objections to Documents.*** Objections to the relevance or
10 admissibility of documents used as deposition exhibits are not waived, and are
11 preserved for later ruling by the Court or by the trial judge. All parties shall
12 cooperate as necessary so that the Court may issue a ruling on any objection to a
13 document prior to trial or prior to any remand of cases for trial in the transferor
14 courts.

15 **B. Duration**

16 Counsel should consult prior to a deposition to agree upon the time required
17 to depose a particular witness. Counsel are encouraged to limit the length of
18 depositions wherever practicable to no more than seven (7) hours, as provided by
19 Rule 30 (d)(1) of the Federal Rules of Civil Procedure and pursuant to Magistrate
20 Dembin’s ruling dated January 7 2014 (Document 250). In the event either party
21 anticipates any deposition to exceed seven (7) hours, such party shall notify
22 opposing counsel no less than fifteen days (15) prior to the deposition absent a
23 good-faith basis for a shorter period of notice. If the parties cannot agree, the
24 Court will decide on a deposition-by-deposition basis whether additional time is
25 needed. The parties may expect that rather than rule prospectively, the Court may
26 permit the deposition to go forward and decide after-the-fact whether additional
27 time is needed. In that way, the Court can determine whether the questioning was
28 properly focused by the party taking the deposition and whether the party

1 defending the deposition caused unnecessary delay during the deposition.

2 **C. Deposition Day**

3 Subject to the time limits set forth above, it is anticipated that a deposition
4 day typically shall commence at 9:00 a.m. and last typically no more than eight
5 and one-half (8.5) hours, including lunch and breaks. There shall be one fifteen
6 (15) minute morning break and two fifteen (15) minute afternoon breaks, with one
7 (1) hour for lunch. Variations in this schedule may be made by agreement of
8 counsel who noticed the deposition and counsel for the deponent. Nothing herein
9 shall prevent a witness from requesting a break at any time except while a question
10 is pending, nor prevent any counsel from requesting a short break for personal
11 reasons.

12 **D. Scheduling**

13 Absent extraordinary circumstances, counsel should consult in advance with
14 opposing counsel and counsel for proposed deponents in an effort to schedule
15 depositions at mutually convenient times and locations. Counsel are expected to
16 cooperate and coordinate the scheduling of depositions. After counsel have arrived
17 on a mutually acceptable date and location for a deposition, each side, including
18 other defendants, shall be notified of the scheduled deposition at least ten (10) days
19 in advance.

20 **E. Location for Depositions**

21 **1.** Unless otherwise agreed, depositions of plaintiffs will take
22 place in each plaintiff's home district.

23 **2.** Unless otherwise agreed by the parties prior to the noticing of
24 an expert deposition, the deposition of an expert witness shall take place in the
25 expert witness' home district.

26 **3.** To the extent reasonably possible, depositions of current and
27 former employees of each defendant shall take place as determined by each
28 defendant.

1 **F. Coordination with State and Federal Court Actions, Cross**
2 **Noticing and Avoidance of Duplicative Depositions**

3 **1. *Coordination with State and Federal Court Actions.*** In order to
4 avoid duplicative discovery, minimize the number of times that a witness shall
5 appear for a deposition, and to prevent the unnecessary expenditure of judicial
6 resources and the resources of parties, counsel for plaintiffs in the MDL shall use
7 their best efforts to coordinate the scheduling of depositions with counsel for state
8 and federal court plaintiffs. In a coordinated deposition, this Court expects counsel
9 for plaintiffs in the MDL and counsel for state and federal court plaintiffs to
10 cooperate in selecting the primary examiners described in section II.A., above.
11 Regardless of which counsel conducts the initial examination of the deponent,
12 subsequent questioning shall not be redundant or repetitive, although clarification
13 of prior testimony may be sought if reasonably calculated to elicit testimony that
14 adds to the substance of prior testimony.

15 **2. *Cross-Noticing.*** Any deposition in this MDL may be cross-
16 noticed by any party in any Byetta, Januvia, Janumet, or Victoza-related action
17 pending in state or federal court, and any deposition in any Byetta, Januvia,
18 Janumet, or Victoza -related action pending in state or federal court may be cross-
19 noticed by any party in this MDL. Each deposition notice shall include the
20 information described in section I.B.2., supra. If a state or federal court deposition
21 has been cross-noticed in this MDL, then state or federal court plaintiffs
22 represented by counsel with actions filed in this MDL may not take a subsequent
23 deposition of that witness except for good cause shown as determined by
24 Magistrate Judge Dembin and, in that case, any subsequent deposition shall be
25 restricted to such additional inquiry permitted by Magistrate Judge Dembin.

26 **3. *Depositions Taken in Other Proceedings*** Defendants shall
27 advise plaintiffs' Lead Deposition Counsel of all depositions that have been taken
28 by plaintiffs in other Byetta-related proceedings (other than depositions of case-

1 specific witnesses) and shall assist in arranging for the plaintiffs' Lead Deposition
2 Counsel to obtain copies of transcripts of those depositions. If counsel for
3 plaintiffs in this MDL proceeding, re-notices the depositions of witnesses who
4 already have been deposed in related litigation, counsel for defendants may object
5 on the grounds that the witness previously was deposed in related litigation. Such
6 objection must be made within ten (10) days of the notice and Lead Deposition
7 Counsel shall meet and confer within five (5) days of the objection to attempt to
8 resolve the dispute. If no agreement can be reached, the matter shall be brought to
9 Magistrate Judge Dembin for resolution at the earliest possible time and without
10 undue delay to avoid postponement of the deposition. In bringing the matter to
11 Magistrate Judge Dembin, Plaintiffs shall identify the areas for questioning of the
12 witness and, to the extent that these areas previously were covered, provide good
13 cause for the re-examination. Defendants shall specifically respond to the good
14 cause proffered by plaintiffs.

15 **4. *Successive Depositions in this Proceeding.***

16 The parties should endeavor to have a deponent appear for deposition just
17 one time, even if the deponent is both a fact witness and a corporate designee. A
18 party who elects to produce a witness pursuant to Rule 30(b)(6) of the Federal
19 Rules of Civil Procedure and also as a fact witness shall provide written notice of
20 that intention, within 5 days of service of the Notice of Deposition. The parties
21 will comply with the requirement in the applicable Procedures for Production of
22 Electronically Stored Information that they will notify opposing counsel when their
23 production of a custodial file is substantially complete. Where the parties cannot
24 agree on a single deposition of a deponent who is both a corporate designee and a
25 fact witness, the dispute shall be submitted promptly to Magistrate Judge Dembin
26 for resolution in advance of the scheduled deposition. The burden will be on the
27 plaintiffs to demonstrate that a single deposition of the witness is not appropriate.

28

1 **G. Early Depositions**

2 Subject to any other order regarding *in extremis situations* if the parties
3 become aware of persons who possess relevant information but who by reason of
4 age or ill health may become unavailable for deposition, the deposition may be
5 taken as soon as practicable in accordance with the terms and conditions agreed-to
6 by the parties or ordered by the Court.

7 **H. Objections and Directions Not to Answer**

8 **1.** Counsel shall comply with the FRCP and Local Rules of the
9 Southern District of California. Any objection by a party at a deposition shall be
10 deemed to have been made on behalf of all other parties. All objections, except
11 those as to form and privilege, are reserved until trial or other use of the
12 depositions.

13 **2.** Counsel shall refrain from engaging in colloquy during
14 deposition. The phrase “objection as to form” or similar language in accordance
15 with applicable law shall be sufficient to preserve all objections as to form until the
16 deposition is sought to be used. If requested, the objecting party shall provide a
17 sufficient explanation for the objection to allow the deposing party to rephrase the
18 question. For depositions cross-noticed with any state-court proceeding, nothing in
19 this paragraph prohibits counsel for parties to the state-court proceeding from
20 specifying the bases for objections to the form of questions if and to the extent
21 required under the relevant state’s law. No speaking objections are allowed and
22 professionalism is to be maintained by all counsel at all times. Counsel shall not
23 make objections or statements that might suggest an answer to a witness.

24 **I. Telephonic Depositions and Participation**

25 By indicating in its notice of deposition that it wishes to conduct the
26 deposition by telephone, a party shall be deemed to have moved for such an order
27 under Fed. R. Civ. P. 30(b)(4). Unless an objection is filed and served within ten
28 (10) calendar days after such notice is received, Magistrate Judge Dembin shall be

1 deemed to have granted the motion. Non-examining counsel may attend
2 depositions telephonically but are not permitted to participate absent extenuating
3 circumstances, such as weather delay or physical restriction on travel.

4 **J. Disputes During Depositions**

5 Disputes between the parties should be addressed to this Court rather than
6 the District Court in the District in which the deposition is being conducted.

7 Disputes arising during depositions that cannot be resolved by agreement
8 and that, if not immediately resolved, will significantly disrupt the discovery
9 schedule or require rescheduling of the deposition, or might result in the need to
10 conduct a supplemental deposition, shall be presented to Magistrate Judge Dembin
11 by telephone (619-446-3972). If the Magistrate Judge is not available, or to the
12 extent the parties are still unable to resolve the dispute, the deposition shall
13 continue with full reservation of rights for a ruling at the earliest possible time.

14 If the nature of the dispute would not stop the deposition from going
15 forward, the parties may elect to either present the matter to Magistrate Judge
16 Dembin by telephone, or to present the dispute to Magistrate Judge Dembin in
17 writing. Magistrate Judge Dembin will issue a prompt ruling, as his schedule
18 permits.

19 In the event Magistrate Judge Dembin is unavailable by telephone to resolve
20 disputes arising during the course of the deposition, the deposition shall
21 nevertheless continue to be taken as to matters not in dispute. Nothing in this
22 Order shall deny counsel the right to 1) suspend a deposition pursuant to Fed. R.
23 Civ. P. 30(d)(3); 2) file an appropriate motion with Magistrate Judge Dembin after
24 the deposition, and appear personally before Magistrate Judge Dembin, or 3) file a
25 motion to prevent any decision or recommendation of Magistrate Judge Dembin
26 from taking effect as may be otherwise permitted.

27 **K. Video Depositions**

28 By so indicating in its notice of a deposition, a party, at its expense, may

1 record a deposition by videotape or digitally-recorded video pursuant to Fed. R.
2 Civ. P. 30(b)(3) subject to the following rules:

3 **1. Real-time Feed.** All video depositions will be stenographically
4 recorded by a court reporter with “real-time feed” transcription capabilities if
5 available.

6 **2. Video Operator.** The operator(s) of the video recording
7 equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the
8 commencement of the deposition, the operator(s) shall swear or affirm to record
9 the proceedings fairly and accurately.

10 **3. Attendance.** Each witness, attorney and other person attending
11 the deposition shall be identified on the record at the commencement of the
12 deposition. Under no circumstances shall a person attend the deposition in any
13 manner remotely without being identified, this shall include by telephone, internet
14 link up of any kind or remote access communication.

15 **4. Standards.** Unless physically incapacitated, the deponent and
16 examiner shall be seated at a table except when reviewing or presenting
17 demonstrative materials for which a change in position is needed. To the extent
18 practicable, the deposition will be videotaped against a solid background with only
19 such lighting as is required for accurate video recording. Lighting, camera angle,
20 lens setting and field of view shall be non-obtrusive to the deponent, and will be
21 changed only as necessary to record accurately the natural body movements of the
22 deponent. Only the deponent and any exhibits or demonstrative aids used in the
23 examination will be video recorded. Sound levels will be altered only as necessary
24 to record satisfactorily the voices of counsel and the deponent. The witness shall
25 appear in ordinary business attire (as opposed to, for instance, a lab coat) and
26 without objects such as a Bible, medical equipment, or other props, except to the
27 extent that the prop is used as an aide in order to demonstrate and/or explain the
28 witness’ testimony.

1 **III. FEDERAL RULES OF CIVIL PROCEDURE APPLICABLE**

2 Unless specifically modified herein, nothing in this order shall be construed
3 to abrogate the Federal Rules of Civil Procedure or the Local Rules of this Court.

4

5 **IT IS SO ORDERED** this ___ day of _____, 2014.

6

7

8

HON. ANTHONY J. BATTAGLIA
UNITED STATES DISTRICT JUDGE

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28