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Melissa A. Geist
Direct Phone: +1 609 514 5978
Email: mgeist@reedsmith.com

Reed Smith LLP
506 Carnegie Center
Suite 300
Princeton, NJ 08540-7839
Tel +1 609 987 0050
Fax +1 609 951 0824
reedsmith.com

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VIA ECF ONLY

Hon. Brian R. Martinotti, U.S.D.J.
Hon. Lois H. Goodman, U.S.M.J.
Clarkson S. Fisher Building & U.S. Courthouse
402 East State Street
Trenton, New Jersey 08609

Re: *In re Insulin Pricing Litigation*, No. 3:17-cv-699
Defendants' Response to Plaintiffs' Bellwether Proposal (Dkt. 330)[1]

Dear Judge Martinotti and Judge Goodman:

Plaintiffs' request for a "three-state bellwether for discovery, class certification, and trial" should be denied. Dkt. 330 at 1. Although plaintiffs offer their three-state bellwether proposal under the guise of a "case management issue" (*id.*), it has nothing to do with managing discovery in an efficient and expeditious manner. Rather, plaintiffs' proposal appears designed to restructure how the Court will adjudicate class certification by splitting up a single nationwide, putative class action into a number of separate, state-specific tracks. Such an approach is an unprecedented circumvention of Rule 23's procedure and requirements for class actions. To defendants' knowledge, it has never been adopted by a federal court in a case like this one. And it is contrary to how courts in this Circuit adjudicate class certification.

Moreover, even if there were precedent for plaintiffs' proposal, it would needlessly *create* inefficiencies and inject significant delay into this case. Proceeding with three states—and deferring proceedings on the remaining states indefinitely—would mean deliberately commencing piecemeal litigation and would mire the Court in years of recurring discovery disputes, class certification briefing, *Daubert* motions, and trials. And there is nothing on the other side of the ledger that could make up for these substantial costs, as plaintiffs' proposal would do nothing to alleviate short-term discovery burdens or accelerate the schedule that the parties have already agreed to.

Defendants also note that plaintiffs did not notify defendants that they intended to file their letter, made no attempt to confer with defendants about their three-state proposal,[2] and never discussed with

[1] This letter response is submitted on behalf of all defendants, Eli Lilly and Company, Novo Nordisk Inc., and Sanofi-Aventis U.S. LLC.

[2] During the parties' initial discussions regarding a proposed schedule, plaintiffs raised the idea of a six-state bellwether with each side selecting three states. However, the parties submitted a joint proposed schedule on March 23, 2020 that contained

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defendants their public health concerns about plaintiffs appearing for depositions early next year. It is especially perplexing that plaintiffs are now asking the Court to fundamentally alter how this case should proceed, purportedly in the interest of "efficiency," when the parties just negotiated and submitted a joint proposed discovery schedule on April 13, 2020 that did not reflect a bellwether approach and that all parties agreed "strikes an appropriate balance between proceeding expeditiously and the efficient administration of discovery in this action." Dkt. 326 at 1.

I. Plaintiffs' Bellwether Proposal Is Inconsistent With Rule 23's Procedure For Class Actions.

Plaintiffs filed a single nationwide, putative class action complaint with this Court. In fact, the Complaint boldly asserts that a nationwide class of purchasers of defendants' insulins can be certified under New Jersey law, to the exclusion of all other states' laws. But now, apparently sensing the hurdles to nationwide and multi-state certification, they propose to split this single case into a dozen different tracks, with the parties conducting discovery, class certification, and trial a few states at a time. As explained below, neither Rule 23 nor any other Rule permits this type of claim splitting for the purpose of litigating serial motions for class certification. Plaintiffs' proposed plan has no support in case law and would impermissibly sidestep Rule 23's requirements for class certification, all without any attendant benefits.

A. Plaintiffs' bellwether proposal is unprecedented in class actions like this one.

Plaintiffs' bellwether proposal—to sever the very case that they filed into dozens of slivers—distorts the class certification process through piecemeal litigation. The purpose of the class action device is to allow representative plaintiffs to bring claims on behalf of similarly situated individuals and to have a single proceeding bind all putative class members. Because class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," federal courts must conduct a "rigorous analysis" to determine whether plaintiffs' claims are sufficiently similar and cohesive to proceed as a single case under Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 350–51 (2011).

Bellwether procedures are a stark alternative to class actions. As the lead case cited by plaintiffs makes clear, the purpose of a bellwether is to streamline adjudication of *individual claims* that plaintiffs do *not* seek to resolve on a class-wide basis. *See Morgan v. Ford Motor Co.*, 2007 WL 1456154, at *9 (D.N.J. May 17, 2007) (holding that the "use of bellwether plaintiffs will be helpful" because "*[t]his case is not a class action*, but rather a number *of consolidated cases* against Defendants") (emphasis added) (cited in Dkt. 330 at 1 n.1). That is why bellwethers are commonly used in mass tort multi-district litigations ("MDLs"), where hundreds and even thousands of different personal injury actions are centralized in a single court.[3] In those situations, unlike here, the plaintiffs are not pursuing their claims

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no mention of a bellwether. *See* Dkt. 316-1. The parties submitted a revised joint proposed schedule on April 13, 2020 that likewise contained no mention of a bellwether. *See* Dkt. 326-1.

[3] *See* HON. BRIAN R. MARTINOTTI, COMPLEX LITIGATION IN NEW JERSEY AND FEDERAL COURTS: AN OVERVIEW 29 (2015) ("[B]ellwether trials become an important case management tool often used in mass tort and MDL cases."); BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL, GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 18 (2d ed. 2018) (purpose of bellwether is to "obtain[] a sufficient number of [trial] outcomes to provide guidance, given the variety of fact

on a representative basis; the results of their cases cannot bind others; different plaintiffs may have different evidence that entitles them each to their own day in court; and different plaintiffs' counsel may have different preferred strategies. A bellwether procedure is thus used to adjudicate a limited number of test cases to generate information about how the remaining individual cases might be resolved, without having to try hundreds or thousands of individual actions—which is, as a legal matter, how those cases would *have to be resolved*. *See* MANUAL FOR COMPLEX LITIGATION (Fourth) § 22.315 (2004) ("bellwether trials or test cases" are intended "to produce reliable information about other mass tort cases"); MELISSA J. WHITNEY, FED. JUDICIAL CTR. & JUDICIAL PANEL ON MULTIDISTRICT LITIG., BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 6 (2019) ("[B]ellwether trials do not have a preclusive effect on other cases in an MDL proceeding.").

Given the primary purpose of bellwethers, it is unsurprising that plaintiffs cannot cite a single instance in which any judge of this Court has adopted a bellwether for a case like this: a single putative, nationwide class action. To the contrary, courts in this District consistently adjudicate similar class actions—including those asserting claims under state consumer fraud statutes—in a single proceeding. *See Maloney v. Microsoft Corp.*, 2011 WL 5864064, at *10 (D.N.J. Nov. 21, 2011) (considering class certification of all 50 state consumer fraud laws simultaneously); *Payne v. FujiFilm U.S.A., Inc.*, 2010 WL 2342388, at *9 (D.N.J. May 28, 2010) (considering class certification of multiple state consumer fraud laws simultaneously); *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 351 (D.N.J. 1997) (considering class certification of all 50 state consumer fraud laws simultaneously).

Plaintiffs point to certain cases from outside this Circuit to argue that courts have adopted bellwethers in "very similar circumstances" (Dkt. 330 at 4), but that is incorrect. None of the cases plaintiffs cite used a bellwether procedure to split up a single putative, nationwide class action into separate, state-specific tracks. Rather, the cases were either (i) not class actions at all, or (ii) complex MDL proceedings where a host of individual class actions were transferred for pretrial proceedings or where there was no bellwether discovery or class certification at all.

- Plaintiffs cite *Morgan v. Ford Motor Company* and *In re Methyl Tertiary Butyl Ether (MTBE) Product Liability Litigation*, but neither was a class action. Both were mass toxic torts involving thousands of disparate individual personal injury and property damage claims based on the release of hazardous materials. *See Morgan*, 2007 WL 1456154, at *1; *In re Methyl Tertiary Butyl Ether (MTBE) Prod.*, 2007 WL 1791258, at *1 (S.D.N.Y. June 15, 2007).

- Plaintiffs also cite *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Product Liability Litigation* ("*Toyota*"), but that matter involved 188 different putative class actions that had been centralized in a single MDL for pre-trial proceedings. The 188 cases, which involved hundreds of named plaintiffs and 55 different vehicles, were separately brought on behalf of multiple different classes asserting claims based on varying legal

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patterns, claims, and defenses anticipated"); Loren H. Brown, Matthew A. Holian & Arindam Ghosh, *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 667 (2014) (noting that bellwether trials were developed as a means to efficiently resolve mass tort claims unsuitable for class action).

theories.[4] The court adopted a bellwether to manage these complex pre-trial proceedings before the different cases had to be remanded for trial in their home jurisdictions. Unlike *Toyota*, plaintiffs are not proposing a method to manage pre-trial proceedings for several *different* class actions that will be remanded to various other courts for trial. Rather, plaintiffs are proposing to fracture a single nationwide class action filed in one court into state-by-state pieces—thereby creating needless inefficiencies instead of ameliorating them.

- Plaintiffs' reliance on *In re Pharmaceutical Industry Average Wholesale Price Litigation* ("*AWP*") is even more puzzling. There, the plaintiffs conducted discovery in a single proceeding and moved, unsuccessfully, for certification of a nationwide class. That is the opposite of plaintiffs' proposed bellwether. In *AWP*, the court denied certification of a nationwide class, but certified and proceeded to trial on Massachusetts-only classes. *See AWP*, 230 F.R.D. 61, 90–91 (D. Mass. 2005); *AWP*, 233 F.R.D. 229, 232 (D. Mass. 2006). After the Massachusetts trial was completed, the court considered a renewed motion to certify a single class across more than 30 states. While the court colloquially referred to the Massachusetts trial as a "bellwether," that was an artifact of the court's prior decision denying certification of a nationwide class. Contrary to plaintiffs' proposal, the *AWP* court did not split the case into state-specific bellwethers for purposes of discovery or before considering whether a nationwide class could be certified.[5]

In sum, plaintiffs can point to no case that supports their proposal to fracture this case into bellwethers for purposes of discovery, class certification, and trial.

B. Plaintiffs' bellwether proposal would circumvent Rule 23's class certification requirements.

Given the absence of any authority supporting plaintiffs' three-state bellwether proposal, it should be seen for what it is: a transparent attempt to sidestep Rule 23's class certification requirements.

Here, plaintiffs assert claims under 37 state consumer fraud statutes on behalf of a putative nationwide class. *See* Dkt. 255, ¶¶ 378, 443–875.[6] That is a daunting task. Courts in this District routinely deny class certification of nationwide classes because "substantial variations" among state laws preclude a finding of predominance under Rule 23. *See, e.g., In re Thalamoid & Revlimid Antitrust*

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[4] *Toyota*, No. 8:10-ml-02151 (C.D. Cal.), Dkt. 80 (alleging, *inter alia*, breach of contract, breach of warranty, misrepresentation and fraud, negligence, strict liability, wrongful death, UCC claims, equitable relief, various state statute violations, and various federal law violations); *id.*, Dkt. 1797 (listing as relevant 55 different vehicles); *id.*, Dkt. 1814 (noting the consolidation of 188 cases in the MDL).

[5] *AWP* also involved at least 35 individual cases, with three nationwide classes alleging a price inflation scheme by 42 drug manufacturers with respect to 321 different drugs. By contrast, plaintiffs have filed a single complaint with a single putative class against three defendants, and all claims relate to analog insulin.

[6] The putative class is defined as follows: "All individual persons in the United States and its territories who paid any portion of the purchase price for a prescription of Apidra, Basaglar, Fiasp, Humalog, Lantus, Levemir, Novolog, Tresiba, and/or Toujeo at a price calculated by reference to a benchmark price, AWP (Average Wholesale Price), or WAC (Wholesale Acquisition Price) for purposes other than resale." Dkt. 255, ¶ 366.

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Litig., 2018 WL 6573118, at *17–18 (D.N.J. Oct. 30, 2018); *see also BMW of North America, Inc., v. Gore*, 517 U.S. 559, 568–69 (1996) ("the States need not, and in fact do not, provide such [consumer] protection in a uniform manner"); *Maloney*, 2011 WL 5864064, at *10 (denying nationwide class certification because the "laws of all 50 states apply to the Plaintiffs' consumer-fraud claims" and "Plaintiffs have suggested no workable means by which to conduct a manageable trial—let alone the 'extensive analysis' required of them"); *Gray v. Bayer Corp.*, 2011 WL 2975768, at *7 (D.N.J. July 21, 2011) (denying class certification because "significant variation exists among the consumer fraud laws of the various states"); *Agostino v. Quest Diagnostics Inc*., 256 F.R.D. 437, 465–66 (D.N.J. Feb. 11, 2009) ("state law variations create overwhelming obstacles to certification").

Plaintiffs' proposal attempts to circumvent those cases by asking the Court to consider class certification of a handful of state-law claims at a time through an inefficient, costly, and protracted process. Such an approach is contrary to how courts in this Circuit have adjudicated class certification. To allow it would enable plaintiffs to artificially strengthen their argument for predominance under Rule 23(b)(3) by taking the putative class defined in the complaint and carving it up under the guise of a bellwether procedure. The proposal also would needlessly create conflicts among the putative nationwide class plaintiffs purport to represent, forcing most class members to wait in line to litigate their claims. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 n.17 (5th Cir. 1998) ("piecemeal certification of a class action . . . distorts the certification process and ultimately results in unfairness to all").

If plaintiffs had filed individual cases and did not seek to proceed on a class-wide basis, a bellwether procedure may well have been appropriate. But having chosen to pursue their claims as a putative class action, it would be improper and illogical to splinter this case and the Court's class certification decision into "bellwethers."

II. Plaintiffs' Bellwether Approach Injects Needless Inefficiencies Into This Case.

A. A bellwether guarantees years of piecemeal litigation.

Even if plaintiffs' proposal were not an impermissible attempt to sidestep class certification requirements, the Court should reject it because it would result in significant delay and inefficiencies. As noted above, the parties recently submitted a proposed schedule that would allow them to complete discovery by July 2021 and class certification briefing by December 2021. *See* Dkt. 326-1. Plaintiffs represented to the Court that the proposed schedule "strikes an appropriate balance between proceeding expeditiously and the efficient administration of discovery in this action." Dkt. 326 at 1. Now, only a handful of days later, plaintiffs appear to be suggesting an alternative process that would result in years—or even a decade—of piecemeal litigation.

Indeed, while plaintiffs strangely fret that this litigation may "take years to complete" without this bellwether approach (Dkt. 330 at 3), their proposal would guarantee drawing this litigation out far longer than provided for under the parties' agreed-upon schedule. Plaintiffs propose that the parties would "proceed with discovery, class certification, dispositive motions, and trial under the laws of three states: California, New Jersey, and Massachusetts." *Id.* at 2. If after adjudication of a class certification motion (and any Rule 23(f) appeal) a class were certified with respect to three states, the parties would

then proceed to conduct merits expert discovery and brief summary judgment and *Daubert* motions with respect to those states. If summary judgment is denied, the Court would then hold a trial limited to claims by consumers in those three states. Once that trial is fully resolved, plaintiffs would propose that the parties *return* to fact discovery and start at square one on another set of states. The parties would then re-litigate the issue of class certification and proceed to trial in *seriatim* fashion until all 37 states' laws have been fully adjudicated. Taking each of the foregoing steps a few states at a time—each with extensive discovery, briefing, expert reports, hearings, trials, and appeals—ensures years of litigation. *See* Fed. R. Civ. P. 1 (federal rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action").

Plaintiffs' only defense of this endless cycle of litigation is to say that the resolution of the first bellwether trial may enhance the prospect of settling the remaining states. As an initial matter, this argument is circular: there is no need to have a test case to inform settlement for other states unless the Court accepts plaintiffs' proposal to fracture this litigation into state-specific tracks in the first place. Moreover, plaintiffs' piecemeal approach is more likely to lead to endlessly protracted litigation than to any efficient resolution. As plaintiffs acknowledge, the first bellwether case under the laws of California, New Jersey, and Massachusetts has zero preclusive effect on the remaining state-law claims. Dkt. 330 at 3; *supra* at 3. Accordingly, the parties will be incentivized to continue litigating additional states until they are able to achieve a favorable result. For example, if the court denies class certification on the first three state laws, plaintiffs will likely try again with other state laws. Conversely, if defendants are found liable under the first three states' laws, there is no reason to believe that defendants will not seek to prevail on other state laws that are materially different. *Supra* at 5; *see also In re Ford Motor Co.*, 174 F.R.D. at 351 (noting the "multitude of different standards and burdens of proof with regard to plaintiffs' warranty, fraud and consumer protection claims" among "the laws of fifty states").

B. A bellwether will not result in any discovery efficiency in this litigation.

The primary rationale that plaintiffs offer for their novel proposal is that it will purportedly reduce the "amount of discovery" in this case and thus accelerate the pace of the litigation. Dkt. 330 at 3. Plaintiffs are wrong. The bulk of the discovery burdens in this case fall on defendants, and nothing in plaintiffs' proposal would limit this burden or otherwise allow defendants to fulfill their discovery obligations more expeditiously. To date, plaintiffs have sought document discovery from 61 different employees of defendants, demanded that defendants search for documents from 1999 to the present, and proclaimed that a reasonable production from defendants will entail *tens of millions of documents.* Those remarkable demands—not discovery sought from individual plaintiffs—are the drivers of discovery in this case.[7]

As for plaintiff depositions, defendants are puzzled by plaintiffs' suggestion that their proposal alleviates "the unprecedented safety risk the COVID-19 pandemic poses to the class." Dkt. 330 at 5.

[7] If plaintiffs truly wished to introduce efficiency into this process, they would agree to narrow and tailor their document requests to defendants and place reasonable limits on depositions of defendants' personnel. Instead, in the weeks leading up to their submission, plaintiffs *expanded* what they claim is the relevant time period for discovery of the defendants. Defendants do not through their letter seek the Court's intervention in the ongoing meet-and-confer process regarding discovery. Defendants simply note that plaintiffs' claimed concerns with streamlined discovery and efficiency are entirely asymmetric and largely within plaintiffs' control.

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Under the parties' proposed schedule, depositions are not set to begin until February 2021. Dkt. 326-1 at 3. If the pandemic remains an issue for in-person depositions next year, defendants are amenable to discussing options that would reduce any public health risk. Moreover, defendants previously proposed to reduce the burden of plaintiff depositions by staggering and limiting the number of depositions taken. Plaintiffs rejected that offer and, instead, selected three states—California, New Jersey, and Massachusetts—where the most plaintiffs reside and that, ironically, have some of the highest reported rates of confirmed COVID-19 cases in the country.[8]

* * *

In sum, plaintiffs' three-state bellwether proposal is an unprecedented attempt to evade Rule 23's requirements. It will also ensure protracted litigation for years to come. Defendants respectfully request that the Court reject plaintiffs' proposal and enter the joint proposed schedule the parties previously submitted. If the Court is inclined to consider plaintiffs' proposal on the merits, defendants respectfully request the opportunity to fully brief the issue.

We appreciate the Court's attention to this matter and look forward to speaking with Your Honors on April 30, 2020.

Respectfully submitted,

/s/ Melissa A. Geist

Melissa A. Geist
REED SMITH LLP
506 Carnegie Center
Suite 300
Princeton, NJ 08540
Tel.: (609) 514-5978

Shankar Duraiswamy
Mark Lynch (admitted *pro hac vice*)
Henry Liu (admitted *pro hac vice*)
COVINGTON & BURLING LLP
One CityCenter
850 10th Street NW
Washington, D.C. 20001
Tel.: (202) 662-6000

Attorneys for Defendant
Eli Lilly and Company

[8] Centers for Disease Control and Prevention COVID-19 Response Team, *Geographic Differences in COVID-19 Cases, Deaths, and Incidence — United States, February 12–April 7, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 465 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6915e4-H.pdf. ("Two thirds of all COVID-19 cases (66.7%) were reported by eight jurisdictions: NYC (76,876), New York (61,897), New Jersey (44,416), Michigan (18,970), Louisiana (16,284), California (15,865), Massachusetts (15,202), and Pennsylvania (14,559) (Figure 1).").

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Michael R. Griffinger, Esq.
Christopher Walsh, Esq.
Calvin K. May, Esq.
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102-5310
Tel.: (973) 596-4500

James P. Rouhandeh, Esq.
(admitted *pro hac vice*)
David B. Toscano, Esq.
(admitted *pro hac vice*)
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
Tel.: (212) 450-4000

Neal A. Potischman, Esq.
(admitted *pro hac vice*)
Andrew Yaphe, Esq.
(admitted *pro hac vice*)
DAVIS POLK & WARDWELL LLP
1600 El Camino Real
Menlo Park, CA 94025
Tel.: (650) 752-2000

Attorneys for Defendant
Novo Nordisk Inc.

ReedSmith

Liza M. Walsh, Esq.
WALSH PIZZI O'REILLY FALANGA LLP
1037 Raymond Blvd, Suite 600
Newark, NJ 07102
Tel.: (973) 757-1100

Michael R. Shumaker, Esq.
(admitted *pro hac vice*)
Julie E. McEvoy, Esq.
(admitted *pro hac vice*)
William D. Coglianese, Esq.
(admitted *pro hac vice*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel.: (202) 879-3939

Attorneys for Defendant
Sanofi-Aventis U.S. LLC

cc: All attorneys of record (via ECF only)