ALLERGAN

2525 Dupont Drive, P.O. Box 19534, Irvine, California, USA 92623-9534 Telephone: (714) 246-4500 Website: www.allergan.com

January 22, 2014

VIA ELECTRONIC SUBMISSION

Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Suite 7-240
One Columbus Circle, NE
Washington, DC 20544

Re: Public Comment of Allergan, Inc. Concerning the Proposed Amendments to the Federal Rules of Civil Procedure

Dear Members of the Committee:

Allergan, Inc. ("Allergan") appreciates the opportunity to comment on the proposed amendments to the Federal Rules of Civil Procedure (the "Rules") being considered by the Advisory Committee on Civil Rules (the "Committee"). Allergan is in favor of the proposed amendments.

I. Introduction And Allergan's Position

Allergan is a multi-specialty health care company focused on discovering, developing, and commercializing innovative pharmaceuticals, biologics, and medical devices that enable people to live life to its greatest potential – to see more clearly, move more freely, express themselves more fully. Allergan's diverse range of products cover the ophthalmic, neurological, medical aesthetics, medical dermatology, breast aesthetics, urological, and other specialty markets in more than 100 countries around the world.

Allergan, like all other large corporations, is involved in civil litigation in both federal and state courts. Allergan's litigation runs the gamut of substantive areas of law, from patent, securities, and contract to product liability, consumer class action, and employment. In most instances, Allergan is the defendant and, thus, keenly aware of the discovery burdens defendants face. But importantly, Allergan is also a plaintiff in numerous matters, most commonly patent lawsuits in U.S. District Courts. These matters tend to be some of Allergan's most commercially sensitive and important. Therefore, Allergan respects discovery's vital role in protecting and vindicating legal rights and does not seek amendments that unfairly impact plaintiffs.

It is with that perspective, both plaintiff and defendant, that Allergan applauds the Committee's efforts to reform discovery in the civil justice system. Allergan strongly believes that the proposed amendments to the Rules, subject to some additional considerations, are paramount to achieving increased fairness for all parties in federal courts. Accordingly, Allergan supports the proposed amendments to the Rules.[1]

II. Comments On The Proposed Amendments To Rule 26(b)

Allergan supports the proposed amendments to Rule 26(b). Set forth below are examples from Allergan litigation that demonstrate change to the scope of discovery, including a critical and routine analysis of proportionality, is gravely needed.

For a product liability trial in 2010, Allergan collected 232.69 gigabytes of electronically-stored information, of which 26.63 gigabytes were produced to the plaintiff. That amounts to approximately 1,163,450 documents collected and 133,150 documents produced.[2] Plaintiff's exhibit list, however, included only 89 of the 133,150 documents produced by Allergan. That is 0.067% of Allergan's production. And only 0.0077% of the documents collected by Allergan.

In 2011, Allergan tried a product liability case in federal court. Allergan collected about 895,350 documents and produced about 51,136. But only 100 of the 51,000-plus were on plaintiff's exhibit list. That is just 0.19% of the production and 0.01% of the collection.

Allergan tried another product liability case in federal court last year. Allergan collected around 636,600 documents, with around 7,394 being produced. Just 2.5% of plaintiff's exhibit list was from Allergan's production. Put differently, plaintiff believed she needed only 188 of Allergan's 7,394 documents to try her case.

And the results are no different for innovative pharmaceutical companies, like Allergan, that find themselves as plaintiffs in U.S. District Courts in Hatch-Waxman ANDA litigation. For a patent trial in federal court in 2013, Allergan collected about 1,025,000 documents and produced to defendants about 391,000 of them. The defendants' trial exhibits only included 805 Allergan documents, of which less than a quarter (146) were admitted. In other words, 0.08% of the documents collected and 0.2% of the documents produced were listed as exhibits. And looking

[1] Allergan endorses many of the comments submitted in support of the proposed amendments, including specifically, those submitted by Lawyers for Civil Justice ("LCJ"), Bayer Corporation, Ford Motor Company, and Pfizer Inc. For the sake of brevity and to ease the burden on the Committee, Allergan tried not to reiterate supportive comments that were submitted by others.

[2] Allergan conservatively estimated that the number of documents per gigabyte of electronically-stored information is 5,000. Allergan's estimate is based, in part, upon David Degan, *Accounting for the Costs of Electronic Discovery*, Minnesota Journal of Law, Science & Technology (2011). Mr. Degan asserts that "industry standard" is 10,000 documents per gigabyte, with the low range of 5,000, medium of 15,000, and high of 25,000.

at the number of documents admitted, the U.S. District Court Judge deciding the case considered only 0.01% of the documents collected and 0.03% of those produced.

While putting a quantitative benchmark on discovery, i.e. some percentage of documents collected or produced as trial exhibits, would be difficult and may not even be practical, the statistics are none-the-less shocking. Indeed, it is hard to argue that our discovery system is efficient or successful when these percentages are routinely less than 1%. Allergan believes that the proposed amendments are a step in the right direction.

III. Comments On The Proposed Amendments To Rule 26(c)

The proposed amendment to Rule 26(c) – cost-allocation – may be the most important and have the greatest impact of all the proposed amendments to the Rules. Indeed, if properly and routinely applied by courts, the amended rule should focus discovery on information critical to the parties' claims and defenses. That should, in turn, eliminate the proverbial "fishing expedition" and reduce discovery disputes and litigation expenses. In other words, it could signal the return of litigation focused on the merits of the case.

But the key is the application of the proposed amendment. The power to allocate expenses is nothing new. The U.S. Supreme Court, in *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978), recognized such authority over 35 years ago. Unfortunately, it does not appear that the authority is routinely exercised. For example, at a recent e-discovery conference, an Allergan lawyer was part of a group of about 200 outside and in-house counsel who were asked how many had been involved in a litigation where costs were reallocated. Less than half-a-dozen lawyers raised their hand. So while change to the text of the rule is important, change must also encompass the consistent application of the rule.

IV. Comments On The Proposed Amendments To Rule 37(e)

Allergan's discovery efforts are of the highest priority, well-staffed, and well-funded. But with over 11,000 employees around the world, record retention, legal holds, and document collections and productions are complicated, time consuming, and expensive. And varying data privacy laws and information systems do not make the tasks any easier.

For example, as part of a product liability trial in 2012, Allergan preserved and collected approximately 10,116,450 documents. But only 4,106, or 0.04%, needed to be produced to plaintiff. Allergan's costs, including processing, filtering, and hosting this data, but excluding attorney fees for review, was over $275,000. Yet plaintiff's exhibit list included only 178 Allergan documents.

Allergan is in favor of the proposed amendments to Rule 37(e) because it believes they will clarify litigants' obligations and ease some of their burdens. Allergan would also support an

amended rule that is stronger than what has been proposed. Specifically, Allergan believes that sanctions should be applied only if a party can show both willfulness *and* bad faith. As drafted, the proposal fails to limit sanctions to intentionally harmful misconduct.

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Allergan thanks the Committee for the opportunity to share its views. Allergan believes that the proposals are an important step in the right direction – increased fairness and a refocus on the merits of litigation.

Respectfully submitted,

William N. Scarff, Jr., Esq.
Vice President, Associate General Counsel
Chief Litigation Counsel

Donald P. Bunnin, Esq.
Senior Litigation Counsel