

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC.,
POLYPROPYLENE HERNIA MESH
PRODUCTS LIABILITY LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:

Johns v. C.R. Bard, et al.

Case No. 2:18-cv-01509

CASE MANAGEMENT ORDER NO. 23-D

Pretrial and Trial Schedule for First Bellwether Trial Case

On January 24, 2020, the Court selected *Johns v. C.R. Bard et al.*, Case No. 2:18-cv-01509 as the first Bellwether Trial Case that will be tried in this multidistrict litigation (“MDL”). Due to the impact of the coronavirus (COVID-19) outbreak, this trial has been tentatively rescheduled to Monday, April 19, 2021. This amended CMO supersedes the deadlines in CMOs 23, 23-A, 23-B and 23-C as set forth below. The deadlines set forth in CMOs 28-A and 29 (related to *Milanesi*) are hereby vacated and that trial will be rescheduled at a later date.

I. TRIAL AND FINAL PRETRIAL CONFERENCES

A. Trial

1. The first Bellwether Trial Case is scheduled for trial on April 19, 2021 at 9:00 a.m. in Courtroom 2.
2. Trial counsel shall meet in the chambers of Judge Sargus at 8:30 a.m. on each day of the trial.

B. Final Pretrial Conferences

1. The first final pretrial conference shall be held on **March 24, 2021** at 9:00 a.m. in the chambers of Judge Sargus. All trial counsel must appear.

2. The second final pretrial conference shall be held on **April 1, 2021** at 9:00 a.m. in the chambers of Judge Sargus.
 - a. The Court will resolve the objections to the deposition designations and objections to the exhibits.
 - b. All trial counsel must appear.
 - c. Attached to this CMO is the Court's Final Pretrial Order ("CMO 23-E"). The parties shall jointly submit CMO 23-E on or before **March 29, 2020**.

II. DEPOSITION DESIGNATIONS

A. Deadlines

1. For depositions completed or to be completed¹ **after March 6, 2020**, the parties shall follow the following protocol: (1) the parties shall order an expedited transcript; (2) A party wishing to designate from the transcript ("Designating Party") shall serve page/line designations of deposition testimony **7 days after receipt of the transcript**; (3) the Non-Designating Party shall serve (a) page/line counter-designations of deposition testimony; and (b) objections to the Designating Party's page/line deposition designations **7 days** after receipt of the Designating Party's designations; (4) the Designating Party shall serve (a) objections to the Non-Designating Party's page/line deposition counter-designations; and (b) page/line counter-counter designations in support of its own designations **3 days** after receipt of the Non-Designating Party's counter-designations; and (4) the Non-Designating Party objections to the Designating Party's counter-counter designations **3 days** after receipt. If a deposition is not completed by **March 15, 2021**, then the parties will apply the Court's rulings on other designations to narrow any objections.
2. All page/line designations, counter-designations, counter-counter designations, and objections shall be exchanged by the parties in an Excel format to be agreed on by the parties.
3. The Parties shall reassess their designations to conform with the Court's rulings after they have the benefit of all of the Court's rulings on dispositive, *Daubert*² and *in limine* motions that are pending as of the date of the entry of this Order ("Date of Last Order"). The Parties shall follow the following schedule:
 - a. For Plaintiff's Affirmative Designations: (a) Plaintiff shall reassess affirmative designations and exchange modified designations **21**

¹ A deposition that has been adjourned is not deemed completed for purposes of this protocol.

² While the majority of *Daubert* briefing is complete, there remain some outstanding expert depositions/supplemental depositions after which the Parties may file *Daubert* motions, including the motion to exclude Dr. Badylak, which Plaintiff has selected as one of two *Daubert* motions to be argued.

days after the Date of Last Order; (b) Defendants shall reassess and exchange modified counter-designations **10 days** after Plaintiff's reassessment pursuant to (a); (c) Plaintiff shall reassess any counter-counter designations and exchange modified designations **10 days** after Defendants' reassessment pursuant to (b).

- b. For Defendants' Affirmative Designations: (a) Defendants shall reassess affirmative designations and exchange modified designations **28 days after the Date of Last Order;** (b) Plaintiff shall reassess and exchange modified counter-designations **10 days** after Defendants' reassessment pursuant to (a); (c) Defendants shall reassess any counter-counter designations and exchange modified designations **10 days** after Plaintiff's reassessment pursuant to (b).

B. Due to Court

All unresolved objections must be submitted to the Court by **Monday, March 1, 2021, or 10 days after the Date of Last Order, whichever is later,** at 9:00 a.m., along with copies of the deposition transcripts to which there are unresolved objections. However, the parties will not be permitted to submit any counter-counter designations and objection to the Court without leave, and only then for good cause.

III. EXHIBIT LISTS

A. Deadlines

1. The Parties shall reassess their exhibit lists to conform with the Court's rulings after they have the benefit of all of the Court's rulings on dispositive, *Daubert* and *in limine* motions that are pending as of the date of the entry of this Order ("Date of Last Order"). The Parties shall follow the following schedule: (a) Plaintiff shall reassess and exchange a modified exhibit list **21 days after the Date of Last Order;** (b) Defendants shall reassess and exchange a modified exhibit list **28 days after the Date of Last Order.**
2. The Parties may supplement their exhibit lists with evidence discovered or depositions taken after August 26, 2020 by **February 15, 2021.** The Parties shall serve any objections to the supplemental exhibit lists by **February 22, 2021.**
3. The parties shall have the right to supplement their exhibit list(s) in light of any and all ongoing discovery.

B. Due to Court

All unresolved objections must be submitted to the Court by **Monday, March 1, 2021, or 10 days after the Date of Last Order, whichever is later,** at 9:00 a.m., along with copies of the exhibits to which there are unresolved objections in a three-ringed, tabbed notebook.

The Court strongly encourages the parties to utilize the electronic courtroom technology for presentation of evidence. The parties shall report to the Court, by joint submission, on or before the date of the first final pretrial conference, their intent to use the technology. If the parties are not utilizing the Court's complete electronic technology, they shall present their exhibits by using the document cameras (ELMOs) located at counsel tables. The parties shall provide copies of the exhibits to the Court as used during trial, and are not required to submit copies to the Court before trial, other than the exhibits to which there are unresolved objections.

IV. MOTIONS *IN LIMINE*

A. Deadlines

1. The Parties may file by **February 15, 2021** additional motions *in limine* limited only to evidence discovered or depositions taken after August 4, 2020. Responses in opposition to the additional motions *in limine* shall be filed by **March 1, 2021.**

B. Procedures

1. The following apply to all *in limine* motions:
 - a. Index to motions *in limine*: If filing more than one *in limine* motion, the party shall submit to the Court and to the opposing party an "Index to Motions *in Limine*."
 - b. Attachments to motions *in limine*: If filing an *in limine* motion seeking an evidentiary ruling on a category of documents, testimony, or argument the party shall attach to the *in limine* motion document(s) or testimony on which it seeks a pre-trial ruling. A party responding shall attach any document or testimony

that it deems is necessary for the Court to fully consider the evidentiary issue presented.

- c. Page Limitation: Individual *in limine* motions and responses shall be limited to 10 double-spaced pages; replies shall be limited to 6 double-spaced pages absent agreement of the parties or leave of Court.
2. The parties shall indicate in any *in limine* motion and response their position on whether the Court ruled on the issue previously in this case or another case in this MDL, whether they are moving to preserve, or whether they are asking for reconsideration because of new or different circumstances or other good cause.

V. VOIR DIRE

The parties shall exchange proposed voir dire questions on **February 26, 2021**. The parties shall submit their proposed voir dire questions to the Court by **March 8, 2021**.

The whole panel of prospective jurors (i.e., those in the jury box and those seated in the rear of the courtroom) will be examined collectively. The Court will conduct some of the voir dire examination.

After voir dire, the Court will consider challenges for cause and peremptory challenges. Each prospective juror is assigned a number by the Clerk's Office. A list of the jurors' names and numbers is available to counsel prior to the commencement of trial. When challenging a juror, counsel should refer to the juror by name and number.

Counsel will not be permitted to question jurors individually regarding background information. This information is contained in juror questionnaires which will be on file in the Clerk's Office. Counsel should examine these forms prior to the commencement of trial. Counsel should contact the Court's Law Clerk, Katie Brown, who can be reached at (614) 719-3253 or Katie_Brown@ohsd.uscourts.gov, to arrange access to juror questionnaires.

Because of the estimated length of this trial, the parties shall meet and confer and submit to the Court by **June 10, 2020**, an additional questionnaire to be sent to the jury pool. The main question in this questionnaire will be whether the juror can serve for the length of the trial. The

Court will entertain additional questions the parties propose to be included in the questionnaire.

VI. JURY INSTRUCTIONS

A. Jury Instructions from the Court

The Court will prepare preliminary and general jury instructions. The parties may obtain an example of the Court's general instructions from the Court's Law Clerk, Katie Brown. The parties shall concentrate their efforts on the case-specific instructions.

B. Proposed Jury Instructions from the Parties

The parties shall submit jointly one set of proposed jury instructions which contains the parties agreed upon case-specific instructions, and, in the event the parties cannot agree on an instruction, each party's own individual proposed case-specific instruction. To this end, counsel shall adhere to the following procedures:

1. The parties shall serve their proposed jury instructions on each other on or before **February 26, 2020**.
2. Counsel then shall meet, confer and agree on proposed case-specific jury instructions.
3. If, after concerted good faith effort, the parties are unable to agree upon a particular case-specific instruction, each party shall propose its own version. Plaintiff's version shall be presented first, immediately followed by Defendant's version of the jury instruction, complete with pinpoint citations to binding authority. Each version, Plaintiff's and Defendant's, shall appear together on one page for ready comparison. Versions of longer instructions (over one page) shall appear one after another. A party may indicate its general objection to the giving of the proposed instruction.
4. Proposed case-specific jury instructions shall be submitted to the Court on or before **March 8, 2021**.

All instructions shall be concise, understandable and neutral. Further, counsel shall at a minimum agree on a common index and the proposed instructions from all parties shall correspond to the index.

VII. MODIFICATION

The parties may by agreement modify the dates within this CMO that affect only the parties. All deadlines established for submissions to the Court may only be modified for good cause and with the permission of the Court.

VIII. ADDITIONAL GUIDELINES

A. Jury

Any prospective juror may be challenged for cause. Each party shall be entitled to three (3) peremptory challenges. 28 U.S.C. § 1870. The parties will exercise their peremptory challenges alternately with the plaintiff exercising the first challenge. If either party “passes,” that challenge will be counted as used.

In most civil cases the Court will seat a jury of eight (8) members. In accordance with Federal Rule of Civil Procedure 48, all jurors shall participate in the verdict unless excused pursuant to Rule 47(c). Unless the parties otherwise stipulate, the verdict shall be unanimous.

B. Trial Procedure

Trial will commence every day at 9:00 a.m. The Court will take one mid-morning break, one lunch break, and one mid-afternoon break each day.

C. Disclosure of Live Witnesses

Unless the parties agree otherwise, given the nature of this trial, including the extraordinary amount of documents and preparation, disclosure of live witnesses to be called to testify, and expected order, shall be made 24 hours in advance of the witness testifying. Any new witness for a Monday shall be disclosed on Friday before 9:00 p.m. (Eastern Standard Time). The parties shall use good faith efforts to notify opposing counsel of witnesses to be presented by deposition designations 24 hours in advance of their use at trial, but the intent of this is not to preclude a party from utilizing a deposition designation if time allows for such use during

the natural progression of the trial.

D. Other Matters

This Order supersedes all previous orders in this case to the extent previous orders are inconsistent with this Order.

The parties shall address questions about this Order to the Court's Law Clerk, Katie Brown. When calling or emailing, please have counsel for all parties participating or with fewer than all counsel participating with express permission of non-participating counsel.

IT IS SO ORDERED.

SIGNED 23rd day of November 2020.

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

s/Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

_____ ,

Plaintiff,

-V-

Case No.
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge

_____ ,

Defendants.

FINAL PRETRIAL ORDER (REQUIRED FORM)

The Court held a final pretrial conference in this case on _____ at ____ a.m.,
pursuant to Fed. R. Civ. P. 16.

I. APPEARANCES:

For Plaintiff:

For Defendant:

II. NATURE OF ACTION

A. This is an action for

B. The jurisdiction of the Court is invoked under Title _____, United States Code,
Section _____.

C. The jurisdiction of the Court (is) (is not) disputed.

III. TRIAL LENGTH: The estimated length of trial is ____ days.

IV. AGREED STATEMENTS AND LISTS:

A. General Nature of the Claims of the Parties

1. Plaintiffs' Claims: Set out brief summary without detail; an itemized statement of special damages should be included.
2. Defendants' Claims: Set out brief summary without detail.

B. Uncontroverted Facts

Suggested language: The following facts are established by admissions in the pleadings or by stipulations of counsel. Set out uncontroverted or uncontested facts in chronological order.

C. Contested Issues of Fact and Law

1. Contested Issues of Fact.

Suggested language: The contested issues of fact remaining for decision are . . . Set out a brief statement of the remaining contested issues of fact.

2. Contested Issues of Law.

Suggested language: The contested issues of law in addition to those implicit in the foregoing issues of fact, are . . . Set out a brief statement of the remaining contested issues of law.

OR There are no special issues of law reserved other than those implicit in the foregoing issues of fact.

D. Witnesses

1. Suggested language: In the absence of reasonable notice to opposing counsel to the contrary, plaintiff will call, or will have available at the trial:

OR Plaintiff may call: Provide a brief synopsis of each witness' testimony.

2. Suggested language: In the absence of reasonable notice to opposing counsel to the contrary, defendant will call, or will have available at the trial:

OR Defendant may call: Provide a brief synopsis of each witness' testimony.

3. Suggested language: In the absence of reasonable notice to opposing counsel to the contrary, _____ will call:

OR _____ may call: (provide a brief synopsis of each witness' testimony; use for third parties).

4. In the event other witnesses are to be called at the trial, a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least five (5) days prior to trial.

5. There is reserved to each of the parties the right to call such rebuttal witnesses as may be necessary, without prior notice to the other party. Questions frequently arise as to whether a witness will offer rebuttal testimony or is more appropriately designated as part of the case-in-chief. If questions arise as to the nature of a witness' testimony, the Court will err on the side of required disclosure five (5) days prior to trial of rebuttal witnesses. If no disclosure is made, the Court shall not permit such witness to testify.

Note: Only witnesses listed in the Final Pretrial Order will be permitted to testify at the trial, except witnesses called solely for the purpose of impeachment or for good cause shown.

E. Expert Witnesses

Suggested language: Parties are limited to the following number of expert witnesses, including treating physicians, whose names have been disclosed to the other side.

1. Plaintiff: List all expert witnesses plaintiff intends to call at trial.
2. Defendant: List all expert witnesses defendant intends to call at trial.

Counsel have attached a resume or curriculum vitae of each expert's qualifications as a part of Exhibit A herein.

F. Depositions

During trial, reading of depositions frequently presents problems that can be eliminated by advance discussion and preparation. The pretrial order shall list depositions to be read into evidence and any objections thereto identifying the objecting party, portions objected to, and the basis for the objections. All irrelevant and redundant matter and all colloquy between counsel in the deposition must be eliminated when the deposition is read. See also the requirements of Fed. R. Civ. P. 26(a)(3)(B).

Suggested language: Testimony of the following witnesses will be offered by deposition/videotape. List all witnesses whose testimony will be offered by deposition or videotape. If none, so state.

G. Exhibits

Needless Court time is taken up in the marking of exhibits during trial. Accordingly, the exhibit list should be prepared prior to trial and set forth in the pretrial order. Exhibits that are to be admitted without objection should be listed first, then followed by a listing of exhibits to which there may be objections, noting by whom the objection is made (if there are multiple adverse parties), the nature of the objection, and the authority

supporting the objection.

Exhibit markers should be attached to all exhibits at the time they are shown to opposing counsel during the preparation of the pretrial order. A supply of marking tags for exhibits may be obtained from the courtroom deputy clerk. They should be attached to the lower right-hand corner whenever possible. See also the requirements of Fed. R. Civ. P. 26(a)(3)(C).

Except for good cause shown, the Court will not permit the introduction of any exhibits unless they have been listed in the pretrial order, with the exception of exhibits to be used solely for the purpose of impeachment.

Exhibit lists should be attached as appendices to the pretrial order as follows:

- Appendix B Joint Exhibits
- Appendix C Plaintiff Exhibits
- Appendix D Defendant Exhibits
- Appendix E Third-Party Exhibits

H. Stipulations

Counsel have fully complied with the **Stipulations** section of the Court's Order Setting Trial Date and Settlement Conference.

I. Completion of Discovery

Except for good cause, all discovery shall be completed before the Final Pretrial Order is signed by the Court. If discovery has not been completed, the proposed pretrial order shall state what discovery is yet to be done by each side, when it is scheduled, when it will be completed, and whether any problems (e.g., objections or motions) are likely with respect to the uncompleted discovery.

Suggested language:

- * Discovery has been completed.
- * Discovery is to be completed by _____, 20__.
- * Further discovery is limited to _____.
- * The following provisions were made for discovery:
Specify all such provisions.

V. MODIFICATION

The Final Pretrial Order may be modified at or prior to the trial of this action to prevent manifest injustice. Such modification may be made by application of counsel or on motion of the Court.

VI. JURY INSTRUCTIONS

Counsel have complied with the Jury Instructions section of the Court's Order Setting Trial Date and Settlement Conference.

VII. REMAINING ISSUES AND OTHER MATTERS

The following legal issues must be resolved before the beginning of trial:

Counsel bring the following additional matters to the Court's attention:

EDMUND A. SARGUS, JR.
Chief United States District Judge

Counsel for Plaintiff

Counsel for Defendant