UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH DEVICES LIABILITY LITIGATION	**Case No. 2:18-md-2846** **JUDGE EDMUND A. SARGUS, JR.** **Magistrate Judge Kimberly A. Jolson**

This document relates to:
ALL ACTIONS.

PLAINTIFFS' STEERING COMMITTEE'S REPLY BRIEF ON THE SELECTION OF THE INITIAL BELLWETHER TRIAL CASES

I. INTRODUCTION

The PSC and Defendants appear to agree that the initial bellwether trials should focus on devices that best represent the overall composition of this MDL. To effectuate this, the three initial bellwether trial cases should include a device that falls into each of the three primary "buckets" of devices in this MDL.[1] Further, for the bellwether trials to be most instructive, it is crucial that the three initial plaintiffs from each "bucket" be the relatively more representative plaintiff.

Notably, the PSC sees the wisdom in Defendants' proposal of the sequencing of cases and agrees that a Ventralight ST case should be tried first, followed by a Ventralex case, with an inguinal "all polypropylene" case being tried third.

In light of the Court's suggestion at the most recent Case Management Conference, and in the spirit of compromise, the PSC is willing to cede the first trial to the Ventralight ST case chosen by Defendants. *See Defs'. Br. Regarding Bellwether Trial Case Selection* (ECF No. 299) (recommending *Johns*). The PSC respectfully submits its selections should be tried second and

[1] The three primary buckets include: (1) The ST bucket; (2) the ePTFE bucket; and (3) the all-polypropylene bucket.

third (*Milanesi* and *Stinson*, respectively). The fourth case would then be chosen by Defendants—seeing as the fourth trial date is not yet set, this case selection protocol can be decided later.[2]

II. SELECTION OF REPRESENTATIVE CASES

Both sides agree that selecting the most representative cases will provide the parties—and the Court—with helpful information regarding the strengths and weaknesses of the claims and defenses, as well as case values. Keeping in mind this Court's guidance, the bellwether principles, and the device "bucket" of each eligible case, the PSC submits the following trial sequence:

- **First Trial**: Ventralight ST: Defense pick – *Johns v. CR Bard et al*., 2:18-cv-01509-EAS-KAJ.[3]
- **Second Trial**: Ventralex: Plaintiff pick – *Milanesi et al. v. CR Bard, Inc. et al*., 2:18-cv-01320-EAS-KAJ.[4]
- **Third Trial**: PerFix Plug: Plaintiff Pick – *Stinson v. Davol, Inc., et al.*, 2:18-cv-01022-EAS-KAJ.[5]
- **Fourth Trial**: Defense Pick – *To be determined.*

Trials in the above sequence will provide guidance to the parties in a logical manner, while addressing the devices that appear to impact the largest number of plaintiffs in this MDL.

A. Of the Two Ventralight ST Cases, *Johns* is More Representative than *McCourt*

The PSC reaffirms its position that Mr. McCourt's mesh-related injuries are representative of the types of injuries often associated with the ST cases. Specifically, where the resorbable ST coating fails to protect the viscera from the underlying polypropylene, causing the device to become adherent to major organs such as the bowel, which results in serious injuries (like bowel obstruction), that necessitate surgical intervention. However, excessive adhesions due to the

[2] Given the non-representativeness of the remaining three cases, selection of the fourth case from the larger Bellwether Discovery Pool (where discovery has been substantially completed) might better serve the goals of a bellwether trial.
[3] ST Bucket; Plaintiff's counsel: Robert J. DeBry & Associates.
[4] ePTFE Bucket: Plaintiff's counsel: Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.
[5] All Polypropylene Bucket; Plaintiff's counsel: Fleming, Nolen & Jez, L.L.P.

ineffective coating, resulting in the plastering of the omentum to the mesh, as seen in *Johns*, is also common.

Although Mr. Johns' injuries are not as extensive as those suffered by Mr. McCourt, the mechanism of failure (and resulting adhesions to the mesh device), is representative. As such, litigating *Johns*—the Defendants' pick—should be instructive. Indeed, a jury verdict rendered in this ST case will be instructive as to what values should be assigned to similar cases.

As noted in the PSC's opening brief, Mr. McCourt presents with a unique fact—namely, a prior liver transplant requiring life-long immunosuppressant therapy. Although McCourt's treating physician noted the liver transplant did not play a role in his mesh-related injuries, with which the PSC agrees, it is a plaintiff-specific fact that cannot be ignored when viewing the case through the lens of representativeness. Immunosuppression is not present in the vast majority of plaintiffs and litigating this issue at trial could confuse the jury, making it not instructive to this MDL. Conversely, litigating Mr. Johns' case will present less unique facts for the jury to consider, and will, therefore, be more instructive and applicable to a larger number of plaintiffs.

B. Of the Two Ventralex Cases, *Milanesi* is a More Representative than *Campos*

Campos is not representative for numerous reasons previously addressed in the PSC's opening brief. Similar to Mr. McCourt, the most atypical case-specific fact that makes *Campos* non-representative is his chronic steroid use, which left him immunocompromised. In their brief, Defendants specifically highlight that Mr. Campos was immunocompromised and could not be taken off his steroid therapy, and that this steroid use prevented Mr. Campos' device from properly incorporating—a unique fact specific to this plaintiff. For the same reasons that *McCourt* should be excluded, so too should *Campos.*

Moreover, Mr. Campos developed a mesh infection, which necessitated a surgical removal of the device *less than one year* after the implant, also a fact not common to most plaintiffs in this MDL (91% of plaintiffs had a mesh revision/removal surgery more than one year after implant). Two facts, among many, that make this case less representative than its counterpart, *Milanesi*.

Mr. Milanesi, on the other hand, was in relatively good health before and after his Ventralex implant. He did not suffer from any immunocompromising disorders that would render his case not representative. Further, Mr. Milanesi's mesh removal took place more than a year after the implant, which is comparable to similar cases at issue in the Bard MDL. As such, *Milanesi* is exponentially more representative than *Campos*. *Milanesi* should therefore be tried after *Johns*.

C. Of the Two Inguinal All Polypropylene Cases, *Stinson* is More Representative than *Miller*

As discussed in the PSC's opening brief, Mr. Stinson's device—the PerFix Plug—is the most common device at issue in this MDL. This fact alone should be sufficient to select *Stinson* for a bellwether trial over *Miller*. Beyond Mr. Stinson's device being the most representative in this MDL, his mesh-related injuries, and subsequent treatment, represent the injuries suffered (and treatments received) by a large number of plaintiffs in this MDL who underwent inguinal hernia repair. Specifically, Mr. Stinson suffered from chronic groin pain, which his treating physicians attempted to alleviate with nerve block injections. However, after more than 18 months of nerve block injections that failed to improve Mr. Stinson's symptoms, he was forced to have the PerFix surgically removed.

Perhaps most significant, especially when compared to *Miller*, Mr. Stinson does not suffer from any unique medical conditions. There is no fact that might confuse the jury as to what caused the chronic groin pain Stinson experienced after his implant surgery. As such, Mr. Stinson's general health, mesh implant, and injuries sustained are common to many plaintiffs in this MDL.

Therefore, litigating this case at trial will be extremely instructive and will provide valuable information, which can then be applied to a large number of similarly-situated plaintiffs.

Conversely, litigating Mr. Miller's case will unnecessarily waste the Court's resources and be far less instructive. Notably, Mr. Miller's mesh is still implanted in his body and will be removed in the near future. Therefore, Mr. Miller's injury is ongoing, unlike most plaintiffs in this MDL, who had their mesh removed or surgically revised. Additionally, Mr. Miller's medical history provides a particularly unique set of facts and presents case-specific issues that are not at issue in other cases. Consequently, *Miller* is not representative and should be excluded as a bellwether trial altogether.

III. CONCLUSION

Pursuant to the Court's suggestion, the PSC submits that Defendants be permitted to select the first and fourth bellwether plaintiffs with the PSC selecting the second and third bellwether plaintiffs. In accordance with this structure, the trials would be sequenced by the buckets Defendants propose in their opening brief: (1) Ventralight ST; (2) Ventralex; and (3) all polypropylene, inguinal devices. Accordingly, the three cases would be: *Johns*, (defense pick) *Milanesi*, (plaintiff pick), and *Stinson* (plaintiff pick), which would be tried in May, July, and September of 2020, respectively. The fourth trial should be selected by Defendants at a later date.

Finally, it is the PSC's position that the remaining three cases (*McCourt*, *Campos*, and *Miller*) are not representative, as their unique factual and legal issues are not representative of the majority of cases pending in this MDL. However, under this first and fourth versus second and third-construct proposed by the Court, Defendants will have the opportunity to select what they believe to be most the representative case as the fourth bellwether trial in this MDL at a later date.

Dated: January 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

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