

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:  
ALL ACTIONS.

**CASE MANAGEMENT ORDER NO. 23-A**

**Amended 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 rescheduled to Monday, July 13, 2020. This amended CMO supersedes the deadlines in CMO 23 as set forth below.

**I. TRIAL AND FINAL PRETRIAL CONFERENCES**

**A. Trial**

1. The first Bellwether Trial Case is scheduled for trial on **Monday, July 13, 2020**, 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 **Monday, June 29, 2020**, 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 **Tuesday, July 7, 2020**

**and Wednesday, July 8, 2020**, at 10:00 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-B"). The parties shall jointly submit CMO 23-B on or before **Thursday, July 9, 2020**.

## **II. WITNESS LISTS**

### **A. Deadlines**

1. Plaintiff shall serve his/her witness list by **February 24, 2020**.
2. Defendant shall serve its witness list by **March 2, 2020**.

### **B. Procedures**

1. Witnesses not included on a party's witness list shall not be called at trial absent agreement by the parties or a showing of good cause as to why the witness was not included on the witness list. The parties will use good faith efforts to list persons whom they actually intend to call at trial (live or by deposition) based upon on a good faith best current intentions "will call" list, and persons whom they currently believe are unlikely to be called but may be called on a "may call" list. The parties shall also use good faith efforts to state whether each proposed witness will be called live, or by deposition.

## **III. DEPOSITION DESIGNATIONS**

### **A. Deadlines**

1. Plaintiff shall serve page/line designations of deposition testimony by **March 4, 2020**.
2. Defendant shall serve (a) page/line counter-designations of deposition testimony; (b) objections to Plaintiff's page/line deposition designations; and (c) affirmative page/line designations of deposition testimony by **March 27, 2020**.
3. Plaintiff shall serve (a) page/line counter-designations of deposition testimony; (b) objections to Defendant's page/line deposition counter-designations; and (c) objections to defendant's affirmative page/line designations by **April 10, 2020**.

4. Defendant shall serve objections to Plaintiff's page/line counter-designations by **April 24, 2020**.
5. For depositions completed or to be completed<sup>1</sup> **after March 6, 2020**, the parties shall follow the following protocol: (1) the parties shall order an expedited transcript; (2) Plaintiff shall serve page/line designations of deposition testimony **5 days after receipt of the transcript**; (3) Defendant shall serve (a) page/line counter-designations of deposition testimony; (b) objections to Plaintiff's page/line deposition designations; and (c) affirmative page/line designations of deposition testimony **5 days** after receipt of Plaintiff's designations; (4) Plaintiff shall serve (a) page/line counter-designations of deposition testimony; (b) objections to Defendant's page/line deposition counter-designations; and (c) objections to defendant's affirmative page/line designations **3 days** after receipt of Defendant's counter-designations and affirmative designations; and (4) Defendants shall serve shall serve objections to Plaintiff's page/line counter-designations **3 days** after receipt. If a deposition is not completed by May 15, 2020, the parties will apply the Court's rulings on other designations to narrow any objections
6. All page/line designations, counter-designations, and objections shall be exchanged by the parties in an Excel format to be agreed on by the parties.

#### **B. Due to Court**

All unresolved objections must be submitted to the Court by **May 29, 2020**, at 9:00 a.m., along with copies of the deposition transcripts to which there are unresolved objections.

### **IV. EXHIBIT LISTS**

#### **A. Deadlines**

1. The parties shall mark their documentary or physical evidence in advance of trial. The exhibits shall comport with all of the requirements of Federal Rule of Civil Procedure 26(a)(3)(A).
2. Plaintiff shall serve its exhibit list in a format to be agreed by the parties, which shall include all document production numbers (*i.e.*, all known bates numbers, if applicable) and/or a description of the document (if there is no bates number) by **April 17, 2020**. An electronic copy of the exhibits shall also be provided on or before **April 21, 2020**, in a format to be agreed by the parties. Demonstrative exhibits shall be shown to opposing counsel before being displayed to the jury.
3. Defendant shall serve its exhibit list in a format to be agreed by the parties,

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

which shall include all document production numbers (*i.e.*, all known bates numbers, if applicable) or a description of the document (if there is no bates number), by April 28, 2020. An electronic copy of the exhibits shall also be provided by May 1, 2020, in a format to be agreed by the parties. Defendant shall serve any objections to plaintiff's exhibit list by May 8, 2020.

4. Plaintiff may serve any objections to Defendant's exhibit list by May 15, 2020, at 9:00 a.m.
5. 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 May 29, 2020, 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.

### **V. MOTIONS *IN LIMINE***

#### **A. Deadlines**

1. Motions *in limine* shall be filed by May 20, 2020.
2. Responses in opposition to motions *in limine* shall be filed by June 1, 2020.
3. No reply is permitted without leave of Court, and only then for good cause.

#### **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 whether the Court ruled on the issue previously, whether they are moving to preserve, or whether they are asking for reconsideration because of new or different circumstances or other good cause.

## **VI. VOIR DIRE**

The parties shall exchange proposed voir dire questions on **June 19, 2020**. The parties shall submit their proposed voir dire questions to the Court by **June 26, 2020**.

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, Erika Prouty, who can be reached at (614) 719-3253 or Erika\_Prouty@ohsd.uscourts.gov, to arrange access to juror questionnaires.

Because of the length of the estimated length of this trial, the parties shall meet and confer and submit to the Court by **February 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.

## **VII. 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, Erika Prouty. 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 **June 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 **July 3, 2020**.

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.

#### **VIII. 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.

#### **IX. 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 9:00am. 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, Erika Prouty. 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.**

03/24/2020  
DATE

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

03/24/2020  
DATE

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



**UNITED STATES DISTRICT COURT  
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**JUDGE EDMUND A. SARGUS, JR.  
Magistrate Judge Kimberly A. Jolson**

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**CASE MANAGEMENT ORDER NO. 23-B**

**FINAL PRETRIAL ORDER**

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:

**IV. AGREED STATEMENTS AND LISTS**

**A. General Nature of the Claims of the Parties**

1. Plaintiffs' Claims:

The parties shall set out brief summary without detail; an itemized statement of special damages should be included.

2. Defendants' Claims:

The parties shall set out brief summary without detail.

**B. Uncontroverted Facts**

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

**C. Contested Issues of Fact and Law**

1. Contested Issues of Fact.

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

2. Contested Issues of Law.

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

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 filed a resume or curriculum vitae of each expert's qualifications that may be found on the docket at:\_\_\_\_\_.

**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**

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 made any and all stipulations pursuant to the Federal Rules.

**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. 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:

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EDMUND A. SARGUS, JR.  
UNITED STATES DISTRICT JUDGE

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KIMBERLY A. JOLSON  
UNITED STATES MAGISTRATE JUDGE

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Trial Counsel for Plaintiffs

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Trial Counsel for Defendants