

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOSTAVAX (ZOSTER VACCINE
LIVE) PRODUCTS LIABILITY
LITIGATION

MDL NO. 2848

CIVIL ACTION NO. 18-md-2848

PRETRIAL ORDER NO. 312

(Amended Bellwether Selection and Scheduling Order -- Stipulated)

I. **SCOPE OF ORDER**

This Order will serve to amend and supplement PTO 82, which governs the guidelines and procedures for selecting and conducting case-specific discovery in bellwether cases as part of *In Re: Zostavax (Zoster Vaccine Live) Products Liability Litigation* (“MDL No. 2848”). To the extent not modified herein, the provisions of PTO 82 shall remain in full force and effect. This Order may be modified or amended for good cause shown, after appropriate notice and opportunity to be heard is provided to the affected parties, when the Court believes the interest of justice requires modification.

II. **GROUP A BELLWETHER DISCOVERY AND TRIAL CASES**

1. In accordance with PTO 82, the parties selected sixteen (16) Group A Bellwether Discovery Cases and conducted Core Fact Discovery on those cases. Subsequently, the parties

selected six (6) of the Group A Bellwether Discovery Cases as Group A Bellwether Trial Pool Cases and conducted Additional Fact Discovery on those six (6) cases.¹

2. Following further discovery and workup of the six (6) Group A Bellwether Trial Pool Cases, which will include expert discovery, *Daubert* motion practice, and dispositive motion practice, three (3) cases will be selected as the Group A Bellwether Trial Pool Cases for bellwether trials. One case will be selected by the Plaintiffs’ Executive Committee, one case will be selected by the Defendants’ Liaison Counsel, and one case will be selected by the Court following briefing by the parties no later than September 17, 2021. The three (3) Group A Bellwether Trial Pool Cases will proceed to final pretrial and trial as set forth below in Section III.

3. In the event that a Group A Bellwether Trial Pool Case is dismissed before trial, the Court may at its discretion allow the selection of a replacement case by the Plaintiffs Executive Committee or Defendants’ Liaison Counsel, depending upon the circumstances of the dismissal, or otherwise adjust the balance of selections and/or the terms of this PTO to ensure the integrity of the bellwether process.

4. The bellwether cases that are initially selected and those that are ultimately picked as the initial trials are to be representative cases.

III. AMENDED SCHEDULE FOR GROUP A BELLWETHER TRIAL POOL CASES

February 12, 2021	Completion of all remaining fact discovery for the Group A Bellwether Trial Pool Cases, including depositions of former or current Merck employees.
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¹ In light of the recent death of Sue Ann Elmegreen (2:17-cv-2044), a plaintiff selected as a Group A Trial Pool Case, the parties in this case may conduct Additional Fact Discovery, as defined in PTO 82, until September 11, 2020. Additional depositions in the remaining Group A Trial Pool Cases also may be taken if the Court grants leave for additional depositions or the parties agree that additional depositions are appropriate.

February 26, 2021	Plaintiffs to serve expert reports in the six (6) Group A Bellwether Trial Pool Cases.
April 7, 2021	Defendants to serve expert reports in the six (6) Group A Bellwether Trial Pool Cases.
April 29, 2021	Rebuttal reports due, if any, in the six (6) Group A Bellwether Trial Pool Cases.
June 21, 2021	Deadline for expert depositions in the six (6) Group A Bellwether Trial Pool Cases.
July 16, 2021	<i>Daubert</i> motions and dispositive motions due in the six (6) Group A Bellwether Trial Pool Cases.
August 6, 2021	Opposition briefs to <i>Daubert</i> motions and dispositive motions due in the six (6) Group A Bellwether Trial Pool Cases.
August 27, 2021	Reply briefs to <i>Daubert</i> motions and dispositive motions due in the six (6) Group A Bellwether Trial Pool Cases.
TBD	Oral argument on <i>Daubert</i> motions and dispositive motions in the six (6) Group A Bellwether Trial Pool Cases, at the discretion of the Court.
September 17, 2021	Selection of three (3) trial cases out of the six (6) Group A Bellwether Trial Pool Cases, and the order in which they will proceed to trial.
November 8, 2021	Group A Bellwether Trial Case No. 1 will commence.
January 18, 2022	Group A Bellwether Trial Case No. 2 will commence.
March 28, 2022	Group A Bellwether Trial Case No. 3 will commence.

The Court will set all final pre-trial schedules and deadlines for the final three (3) Group A Bellwether Trial Cases, which shall include schedules and deadlines for the following: (1) motions *in limine*, oppositions, replies, and argument(s), if so determined by the Court; (2) deposition designations, counter designations and objections, and objections to counter designations and reply designations; (3) fact witness and expert witness lists; (4) exhibit lists designations and objections; (5) proposed jury instructions; (6) proposed *voir dire* questions; and (7) a date for a final pre-trial conference; and (8) other deadlines and hearings as the Court requires.

IV. GROUP B BELLWETHER DISCOVERY AND TRIAL CASES

1. In accordance with PTO 82, the parties selected eight (8) Group B Bellwether Discovery Cases and commenced Core Fact Discovery on those cases. Core Fact Discovery was stayed prior to its completion by operation of PTO 272, entered February 12, 2020.

2. If, prior to September 25, 2020, any Group B Bellwether Discovery Case is voluntarily dismissed by plaintiff(s), other than because of settlement, Defendants' Liaison Counsel may select a replacement case for inclusion in the Group B Bellwether Discovery Cases. If, prior to September 25, 2020, any Group B Bellwether Discovery Case is settled by Defendants, Plaintiffs' Executive Committee may select a replacement case for inclusion in the Group B Bellwether Discovery Cases.

3. If, prior to September 25, 2020, any Group B Bellwether Discovery Case is dismissed after motion practice initiated by Defendants, the party that selected the dismissed case may select a replacement case for inclusion in the Group B Bellwether Discovery Cases. In addition, in the event that cases selected as Group B Bellwether Discovery Cases are dismissed before September 25, 2020, the Court may modify the below deadlines depending upon the circumstances of the dismissal or otherwise adjust the balance of selections or the terms of this PTO to ensure the integrity of the bellwether process.

4. As described in Section V below, after Core Fact Discovery occurs for the eight (8) Group B Bellwether Discovery Cases, the Plaintiffs' Executive Committee and Defendants' Liaison Counsel will each simultaneously identify two (2) cases for trial consideration, for a total of four (4) cases. The four (4) cases selected will be referred to as the "Group B Bellwether Trial Pool Cases." The parties will make these selections on September 25, 2020 and will jointly notify the Court of the four (4) cases that day.

5. Following further discovery and workup of the four (4) Group B Bellwether Trial Pool Cases, which will include expert discovery, *Daubert* motion practice, and dispositive motion practice, two (2) cases will be selected as the Group B Bellwether Trial Pool Cases for bellwether trials. Both cases will be selected by the Court following briefing by the parties by no later than March 25, 2022. The two (2) Group B Bellwether Trial Pool Cases will proceed to final pretrial and trial as set forth below in Section V.

6. In the event that a Group B Bellwether Trial Pool Case is dismissed before trial, the Court may at its discretion allow the selection of a replacement case by the Plaintiffs Executive Committee or Defendants' Liaison Counsel depending upon the circumstances of the dismissal, or otherwise adjust the balance of selections and/or the terms of this PTO to ensure the integrity of the bellwether process.

7. The bellwether cases that are initially selected and those that are ultimately picked as the initial trials are to be representative cases.

V. AMENDED SCHEDULE FOR GROUP B BELLWETHER DISCOVERY AND TRIAL CASES

June 28, 2020	Deadline to serve interrogatories and requests for production related to case specific fact discovery in the eight (8) Group B Bellwether Discovery Cases.
August 28, 2020	Deadline for any motions to compel related to case specific fact discovery related to the eight (8) Group B Bellwether Discovery Cases. Later-filed motions will be considered only upon a showing of good cause.
October 23, 2020	Completion of all core fact discovery for the eight (8) Group B Bellwether Discovery Cases.
November 6, 2020	The Parties will simultaneously each identify a list of two (2) Group B Bellwether Trial Pool Cases from the Group B Bellwether Discovery Cases for trial consideration and will jointly notify the Court of the four (4) Group B Bellwether Trial Pool Cases that day. Additional Fact Discovery will commence as to the four (4) Group B Bellwether

	Trial Pool Cases that day, which will include no more than three (3) additional case-specific fact depositions noticed by each party per case for a total of six (6) additional case-specific fact depositions per case, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. ²
November 20, 2020	Deadline to serve interrogatories and requests for production related to case specific fact discovery in the four (4) Group B Bellwether Trial Pool Cases.
December 4, 2020	Deadline for any motions to compel related to case specific fact discovery related to the four (4) Group B Bellwether Trial Pool Cases. Later-filed motions will be considered only upon a showing of good cause.
January 29, 2021	Completion of all Additional Fact Discovery in the four (4) Group B Bellwether Trial Pool Cases.
August 20, 2021	Completion of all remaining fact discovery in Group B Trial Pool Cases, including depositions of former or current Merck employees. ³
September 3, 2021	Plaintiffs to serve expert reports in the four (4) Group B Bellwether Trial Pool Cases.
October 13, 2021	Defendants to serve expert reports in the four (4) Group B Bellwether Trial Pool Cases.
November 10, 2021	Rebuttal reports due, if any, in the four (4) Group B Bellwether Trial Pool Cases.
December 17, 2021	Deadline for expert depositions in the four (4) Group B Bellwether Trial Pool Cases.
January 10, 2022	<i>Daubert</i> motions and dispositive motions due in the four (4) Group B Bellwether Trial Pool Cases.

² As part of Additional Fact Discovery, each party in a Group B Bellwether Trial Pool Case may only notice two (2) additional case-specific fact depositions of current or former Merck employees, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. If the non-noticing party disputes that the designated deponent has information that is case-specific to the particular Group B Bellwether Discovery Case, the non-noticing party may challenge the notice within five (5) business days by moving for a protective order. The parties must meet-and-confer in good faith prior to the filing of the motion.

³ Any former or current Merck employee deposed as part of Group A discovery will not be deposed as part of Group B discovery absent good cause shown.

February 10, 2022	Opposition briefs to <i>Daubert</i> motions and dispositive motions due in the four (4) Group B Bellwether Trial Pool Cases.
March 10, 2022	Reply briefs to <i>Daubert</i> motions and dispositive motions due in the four (4) Group B Bellwether Trial Pool Cases.
TBD	Oral argument on <i>Daubert</i> motions and dispositive motions in the four (4) Group B Bellwether Trial Pool Cases, at the discretion of the Court.
March 25, 2022	Selection of two (2) trial cases out of the four (4) Group B Bellwether Trial Pool Cases, and the order in which they will proceed to trial.
May 31, 2022	Group B Bellwether Trial Case No. 1 will commence.
August 1, 2022	Group B Bellwether Trial Case No. 2 will commence.

The Court will set all final pre-trial schedules and deadlines for the final two (2) Group B Bellwether Trial Cases, which shall include schedules and deadlines for the following: (1) motions *in limine*, oppositions, replies, and argument(s), if so determined by the Court; (2) deposition designations, counter designations and objections, and objections to counter designations and reply designations; (3) fact witness and expert witness lists; (4) exhibit lists designations and objections; (5) proposed jury instructions; (6) proposed *voir dire* questions; and (7) a date for a final pre-trial conference; and (8) other deadlines and hearings as the Court requires.

It is so **ORDERED**.

BY THE COURT:

/s/ Harvey Bartle III

Harvey Bartle, III, J.

June 17, 2020