

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

Pretrial and Trial Schedule for First Bellwether Trial Case

The first Bellwether Trial Case<sup>1</sup> is scheduled for trial in this multidistrict litigation (“MDL”) on Monday, May 11, 2020.

**I. TRIAL AND FINAL PRETRIAL CONFERENCES**

**A. Trial**

1. The first Bellwether Trial Case is scheduled for trial on **Monday, May 11, 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, April 27, 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 **Monday, May 4, 2020 and Tuesday, May 5, 2020**, 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.

---

<sup>1</sup> Pursuant to CMO No. 20-A, the Court will select the first Bellwether Trial Case on January 24, 2020.

- b. All trial counsel must appear.
- c. Attached to this CMO is the Court's Final Pretrial Order ("CMO 23-A"). The parties shall jointly submit CMO 23-A on or before **Wednesday, May 6, 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 13, 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 **March 20, 2020.**
4. Defendant shall serve objections to Plaintiff's page/line counter-designations by **March 27, 2020.**
5. 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 April 20, 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 March 16, 2020. An electronic copy of the exhibits shall also be provided on or before March 18, 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, 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 March 23, 2020. An electronic copy of the exhibits shall also be provided by March 25, 2020, in a format to be agreed by the parties. Defendant shall serve any objections to plaintiff's exhibit list by March 30, 2020.
4. Plaintiff may serve any objections to Defendant's exhibit list by April 6, 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 April 20, 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 April 3, 2020.
2. Responses in opposition to motions *in limine* shall be filed by April 13, 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 April 17, 2020. The parties shall submit their proposed voir dire questions to the Court by April 24, 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](mailto: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 **April 24, 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 **May 1, 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.**

12-11-2019  
DATE

  
\_\_\_\_\_  
EDMUND A. SARGUS, JR.  
UNITED STATES DISTRICT JUDGE  
  
\_\_\_\_\_  
KIMBERLY A. JOLSON  
UNITED STATES MAGISTRATE JUDGE