

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:
Milanesi et al. v. C.R. Bard, et al.
Case No. 2:18-cv-1320

CASE MANAGEMENT ORDER NO. 29-A

Pretrial and Trial Schedule for Second Bellwether Trial Case

On January 24, 2020, the Court selected *Milanesi et al. v. C.R. Bard et al.*, Case No. 2:18-cv-01320 as the second 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, January 10, 2022. This amended CMO supersedes the deadlines in CMO No. 29 as set forth below.

I. TRIAL AND FINAL PRETRIAL CONFERENCES

A. Trial

1. The second Bellwether Trial Case is scheduled for trial on **Monday, January 10, 2022**, at 9:00 a.m. in Courtroom 2.
2. Unless otherwise notified by the Court, 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 **November 30, 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 **December 1, 2021**, at 9:00 a.m. in the chambers of Judge Sargus.

- a. The Court will resolve any remaining objections to the deposition designations¹ and objections to the exhibits at that time.
- b. All trial counsel must appear.
- c. Attached to this CMO is the Court's Final Pretrial Order ("CMO 29-A"). The parties shall jointly submit CMO 29-B on or before **Monday, January 3, 2022.**

II. WITNESS LISTS

A. Deadlines

1. Plaintiffs shall serve their witness list by **September 24, 2021.**
2. Defendants shall serve their witness list by **October 1, 2021.**

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. The parties shall serve page/line designations of the deposition testimony from the top ten (or less) depositions that each anticipate playing in their case by **October 15, 2021.**
2. As to the witnesses timely designated by the opposing parties, the parties shall serve (a) page/line counter-designations of deposition testimony; and (b) objections to other party's page/line deposition designations by **October 29, 2021.**

¹ To the extent that the depositions designations/objections have not yet been ruled on through the process of rolling submissions outlined in Section III of this Order, the Court will decide any remaining designation issues at this time.

3. As to the witnesses timely designated by the opposing parties, the parties shall serve (a) page/line counter-counter designations of deposition testimony; and (b) objections to the other parties' page/line deposition counter-designations by **November 12, 2021.**
4. As to the witnesses timely designated by the opposing parties, the parties shall serve objections to the other parties' page/line counter-counter-designations by **November 19, 2021.**
4. For any deposition taken on or after October 9, 2021, any affirmative page/line designations are due one week after the receipt of the final deposition transcripts, objections and counter-designations are due one week after the affirmative page/line designations are delivered, objections and counter-counter-designations are due one week after the objections and counter-designations are delivered, and objections to counter-counter designations are due five days after the counter-counter designations are delivered.
5. 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.
6. After the exchange of the foregoing materials, the parties shall confer in an attempt to resolve any objections by November 30, 2021.

B. Due to Court

On a rolling basis, the parties shall, by **November 15, 2021, at 5:00 p.m.,** begin submitting to the Court the complete designations and objections for timely designated witnesses that remain after the parties' meet-and-conferral process. The submission shall be in same format that was done for the Calabrese, Hutchinson, and Baker depositions in the *Johns* (2:18-cv-01509) trial; specifically, a complete "run report" of all live designations with brief "bubble comments" for live objections and responses thereto. The first submission shall contain at least two depositions and each subsequent submission of no less than two depositions will occur every Monday at 5:00 p.m. until the Second Final Pre-Trial Conference. With each submission, but only to the extent that attaching pages is necessary for

the Court to rule on any pending objection, the parties shall attach the relevant pages of the exhibits referenced in any designated testimony.² Further, the parties shall each submit no more than one page, double-spaced describing the deponent's position and potentially relevant testimony to the claims or defenses in this case.

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. Plaintiffs shall serve their 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 **October 25, 2021**. An electronic copy of the exhibits shall also be provided on or before **October 27, 2021**, in a format to be agreed by the parties. Demonstrative exhibits shall be shown to opposing counsel before being displayed to the jury.
3. Defendants shall serve their 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 **November 8, 2021**. An electronic copy of the exhibits shall also be provided by **November 10, 2021**, in a format to be agreed by the parties. Defendants shall serve any objections to Plaintiffs' exhibit list by **November 12, 2021**.
4. Plaintiffs may serve any objections to Defendants' exhibit list by **November 19, 2021**, 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 **November 15, 2021**, at

² The parties shall meet and confer in good faith on the need for attaching exhibits. If there is a disagreement, the party that seeks to attach the exhibit shall state why it believes attaching the exhibit is necessary for the Court's decision.

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.

No later than the day trial commences, the parties shall provide one paper courtesy set of the exhibits that they intend to use at trial to the Court. These copies should incorporate the Court's rulings on objections.

The parties are directed to stipulate to the exhibits for which they have no objections in advance of trial to the furthest extent possible. A joint proposed stipulation and order regarding these exhibits must be submitted to the Court one week after the second final pretrial conference.

C. Exhibits During Trial

At trial, counsel may not approach a witness to tender an exhibit. Rather, the Courtroom Deputy will place each exhibit before each witness. In formulating a question to a witness, counsel shall clearly specify the exhibit number or designation involved to ensure a clear trial record.

Exhibits introduced for the first time must be displayed to opposing counsel. Counsel shall be prepared to provide copies of such exhibits to opposing counsel, the Court, and the witness.

The parties shall also provide to the Courtroom Deputy each morning a list of exhibits that

the witnesses plan to testify to during that day of trial.

V. MOTIONS IN LIMINE

A. Deadlines

1. Motions *in limine* shall be filed by **October 15, 2021**.
2. Responses in opposition to motions *in limine* shall be filed by **October 29, 2021**.
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.
 - d. The moving party shall indicate in any motion *in limine* whether the Court ruled on the issue previously and, if so, whether it is moving to preserve the issue for appeal or whether it is seeking a different ruling because of new or different circumstances, a change in controlling law, or other good cause.
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 **December 6, 2021**. The parties shall submit their proposed voir dire questions to the Court by **December 13, 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, Ashlee Riner, who can be reached at (614) 719- 3253 or ashlee_riner@ohsd.uscourts.gov, to arrange access to juror questionnaires.

Because of the length of the estimated length of this trial, 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, Ashlee Riner. 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 **December 6, 2021.**
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 **December 13, 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.

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 9:00 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, Ashlee Riner. 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 29th day of September, 2021.

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.
United States District Judge

Counsel for Plaintiff

Counsel for Defendant