

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. 25

Selection of Initial Bellwether Trial Cases

In accordance with Case Management Order (“CMO”) 25, the Court issues this CMO to select the three initial Bellwether Trial Cases to be tried in this MDL scheduled for May 11, 2020, July 13, 2020, and September 14, 2020.

Pursuant to Case Management Order No. 10 (ECF No. 62), the parties each selected three cases from the twelve Bellwether Discovery Pool Plaintiffs (*see* ECF No. 125) on July 12, 2019. These six cases make up the “Bellwether Trial Pool Plaintiffs.”

On January 13, 2020, the parties simultaneously filed their briefing (ECF Nos. 298 and 299) setting forth which three cases from the Bellwether Trial Pool they submit the Court should select for the three initial bellwether trials in accordance with CMO 20-A (ECF No. 274). On January 21, 2020, the parties filed their responses to the other’s proposed cases (ECF Nos. 307 and 308).

The parties explained that the six Bellwether Trial Pool Plaintiffs include four devices that can be grouped into three “buckets” of devices: 1) “ePTFE” barrier devices

2) “ST” barrier devices, and 3) “all polypropylene,” inguinal hernia devices.¹ The parties submit that the three initial bellwether trials should include a device that falls into one of these three buckets, and proposed a case from each bucket:

Bucket	Device	PSC Pick	Defendant Pick
“ST” barrier devices	Ventralight ST	McCourt v. CR Bard et al	Johns v. CR Bard, Inc., et al
“ePTFE” barrier devices	Ventrex	Milanesi et al v. C.R. Bard, Inc. et al	Campos v. C.R. Bard, Inc., et al
“All polypropylene” inguinal devices	PerFix Plug and 3DMax	Stinson v. Davol, Inc. et al (PerFix Plug)	Miller v. C.R. Bard, Inc. et al (3DMax)

Both the Plaintiff Steering Committee (“PSC”) and Defendants picked a case involving the Ventralight ST device (McCourt and Johns) and a case involving the Ventrex device (Milanesi and Campos). The two remaining cases—Stinson and Miller—involve different inguinal hernia devices (PerFix Plug and 3DMax), but both are in the same “all polypropylene” bucket.

Defendants originally proposed the cases be tried in a specific order based on the devices in issue: a Ventralight ST case first, a Ventrex case second, and an inguinal hernia case (involving 3DMax or PerFix Plug) third (*See* ECF No. 299). Defendants contend that a Ventralight ST case should be tried first, even though it is not the most common device in this MDL,² because the Ventralight ST device still makes up a significant portion of the MDL, there has never been a trial involving the Ventralight ST device, and the claims against the Ventralight ST device implicate Defendants’ entire line

¹ According to Defendants, approximately one-third of devices in this MDL fall within the “ePTFE” bucket, close to another one-third are in the “ST” bucket, and the remaining one-third involve inguinal devices.

² While the parties provided slightly differing numbers and percentages in their opening briefs, it appears they agree that the PerFix Plug is the most common device in this MDL, followed by Ventrex, Ventralight ST, and then 3DMax.

of products involving the “ST” technology. The Ventralex device, in contrast, is scheduled for trial in the Rhode Island state court litigation and is similar to devices that have previously been tried in another MDL, and the inguinal hernia devices, like the PerFix Plug device, as a whole make up a smaller portion of this MDL than the abdominal hernia devices. Defendants submitted that each of its selections in the Bellwether Trial Pool should be selected for each trial: Johns (Ventralight ST), Campos (Ventralex), and Miller (3DMax).

The PSC originally proposed each of its three selections in the Bellwether Trial Pool be selected for the three initial bellwether trials: Milanesi (Ventralex), McCourt (Ventralight ST), and Stinson (PerFix Plug) (*See* ECF No. 298). The PSC did not express a preference for the order of cases to be tried, but instead argued its picks were more representative than Defendants’ picks for each of the three buckets of products.

The parties now agree that Defendants’ proposed sequencing of the trials should be followed: Ventralight ST first, then Ventralex, then one of the inguinal hernia devices (*See* ECF Nos. 308 and 307). In light of the Court’s guidance at the January 13, 2020 Case Management Conference, the parties also agree that the party whose pick is selected for the first trial in May 2020 will pick the case to be tried as the fourth trial in this MDL, while the other party’s picks will be the second and third cases tried in July 2020 and September 2020, respectively.

With those two concepts in mind, the PSC now proposes that Defendants be permitted to select the first and fourth bellwether trial cases, and that the PSC select the second and third trials. The PSC contends that for the first trial, Defendants’ Ventralight ST case, Johns, is more representative than its own case, McCourt. Defendants reiterate

their position that a Ventralight ST case should be the first trial and their suggestion that the Johns case would be appropriate, but does not object to the PSC's Ventralight ST case, McCourt, for the first trial.

Accordingly, the Court selects the following cases for trial:

Trial	Device	Case Caption	Civil Action Number	Plaintiff's Counsel
Bellwether Trial Case No. 1 May 11, 2020	Ventralight ST	Johns v. CR Bard, Inc. et al (Defendant Pick)	2:18-cv-01509-EAS-KAJ	Robert J. DeBry & Associates
Bellwether Trial Case No. 2 July 13, 2020	Ventralex	Milanesi et al v. C.R. Bard, Inc. et al (PSC Pick)	2:18-cv-01320-EAS-KAJ	Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A
Bellwether Trial Case No. 3 September 14, 2020	PerFix Plug	Stinson v. Davol, Inc. et al (PSC Pick)	2:18-cv-01022-EAS-KAJ	Fleming, Nolen & Jez, L.L.P.
Bellwether Trial Case No. 4 TBD		Defendant Pick		

The parties shall inform the Court by January 27, 2020 at 12:00pm EST whether they object to the Court's selections by filing a written response of no more than 5 pages.

The deadlines for dispositive motions and *Daubert* motions, as established in CMO 20-A, shall apply *only* to first bellwether trial beginning on May 11, 2020, and are reiterated here:

<u>Date</u>	<u>Event</u>
February 3, 2020	Dispositive motions to be filed.
February 21, 2020	Opposition papers to dispositive motions to be filed.
February 28, 2020	Reply papers to dispositive motions to be filed.
TBD	Oral argument on dispositive motions, at the discretion of the Court.

<u>Date</u>	<u>Event</u>
February 3, 2020	Deadline for filing of any <i>Daubert</i> or other motions concerning any expert (hereafter 'expert motions').
February 21, 2020	Opposition papers to expert motions to be filed.
February 28, 2020	Reply papers to expert motions to be filed.
TBD	Oral argument on expert motions, at the discretion of the Court.

The pretrial and trial schedule for the first bellwether trial are set forth in CMO 23 (ECF No. 283). The parties shall submit to the Court via email by February 7, 2020 a proposed CMO establishing deadlines for *Daubert* and dispositive motions for the second and third trials, and a procedure for Defendants' selection of the fourth bellwether trial case.

In the event that a case selected for trial is dismissed before trial, the Court may at its discretion allow the selection of a replacement case by Defendants or the PSC, depending upon the circumstances of the dismissal, or otherwise adjust the balance of selections or the terms of this CMO to ensure the integrity of the bellwether process.

IT IS SO ORDERED.

1-24-2020
DATE


EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE