

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

**IN RE: ELMIRON (PENTOSAN
POLYSULFATE SODIUM)
PRODUCTS LIABILITY
LITIGATION**

Case No. 2:20-md-02973 (BRM)(ESK)

MDL No. 2973

**JUDGE BRIAN R. MARTINOTTI
JUDGE EDWARD S. KIEL**

**THIS DOCUMENT RELATES TO:
ALL ACTIONS**

**CASE MANAGEMENT ORDER NO. 17
(Bellwether Selection and Scheduling Order)**

I. SCOPE OF ORDER

In furtherance of the effective and efficient case management of complex litigation, this Case Management Order (“CMO”) will govern the guidelines and procedures for selecting bellwether cases as part of *In Re: Elmiron (Pentosan Polysulfate Sodium) Products Liability Litigation* (“MDL No. 2973”). This Order will further govern the guidelines and procedures for case-specific discovery to be conducted in bellwether cases (the “Bellwether Discovery Cases”), a smaller subset of which (three) will be proposed and designated as trial cases (“Bellwether Trial Cases”). The guidelines and procedures set forth herein will apply to all actions that are a part of MDL No. 2973, including those transferred to MDL No. 2973 by the Judicial Panel on Multidistrict Litigation (“JPML”); those directly filed in this Court, whether pursuant to Amended CMO 6 (Direct Filing Order) or not; and those removed to this Court.

A number of provisions in this Order, including certain limitations on discovery and the scope of motions practice, reflect compromise and agreement reached by the parties through

extensive meet and confer efforts as well as assistance from Special Master Polifroni. These agreements reflect the parties' assessment of the unique facts and circumstances presented by the cases coordinated in this MDL.

II. CASE ELIGIBILITY

A. A case shall be eligible for initial selection to undergo case-specific bellwether discovery ("Eligible Cases") only where: (1) the plaintiff ingested Elmiron and has provided proof of prescription on or before November 7, 2021; (2) the plaintiff developed pigmentary maculopathy and/or exacerbation of underlying retinal disorder subsequent to Elmiron use;¹ and (3) the plaintiff has uploaded a substantially complete PFS to BrownGreer's MDL Centrality platform on or before September 24, 2021.

III. PROTOCOL FOR SELECTION OF BELLWETHER DISCOVERY AND TRIAL CASES

A. On or before November 15, 2021, Plaintiffs Executive Committee and Lead Counsel for Defendants shall each select and exchange **10** Eligible Cases to undergo case-specific bellwether discovery for a total of **20** Bellwether Discovery Cases. When exchanging selections, each party will provide a list that includes the following information regarding the plaintiffs that they have selected: Plaintiff's counsel, case index number, and primary alleged injury.

B. By November 17, 2021, the parties shall exchange written *Lexecon* waivers for all Bellwether Discovery Cases. To the extent a party fails to waive *Lexecon*, the matter shall be

¹ A party shall not be permitted to challenge the inclusion of a particular case as one of the other party's 10 Bellwether Discovery Cases on the basis of the particular plaintiff's injury or damages alleged.

addressed with Special Master Polifroni immediately and by no later than Friday, November 19, 2021.

C. On or before November 22, 2021, Plaintiffs' Executive Committee and Defendants' Liaison Counsel will jointly notify the Court of their respective selections comprising the Bellwether Discovery Cases.

D. Unless otherwise agreed by the parties, if a Bellwether Discovery Case Plaintiff dismisses a Bellwether Discovery Case *before* December 20, 2021, the party which originally selected the Bellwether Discovery Case may select a replacement case within 10 days of dismissal. If a Bellwether Discovery Case Plaintiff dismisses a Bellwether Discovery Case *after* December 20, 2021 (so long as the dismissal is not based upon a ruling or decision from the Court or due to a mutually agreed to resolution of the case), Defendants may select a replacement case within 10 days of dismissal.

E. Pursuant to the schedule and procedures described below in Section IV, all parties may commence Fact Discovery in the Bellwether Discovery Cases on November 22, 2021 and this fact discovery shall be completed by March 31, 2022, with one exception for certain sales related depositions as described in Part III.F.5 below.

F. To facilitate the efficient conduct of fact discovery in the Bellwether Discovery Cases and compliance with the deadlines herein:

1. On or before December 8, 2021, Plaintiffs' counsel shall be required to provide two dates in January 2022 for depositions of each of the injured plaintiffs selected as a Bellwether Discovery Case, and Defendants shall be required to accept one of those two dates on or before December 15, 2021. In offering deposition dates, Defendants' counsel and Plaintiffs' Executive Committee and/or its designee will

use best efforts to coordinate and avoid offering dates that will necessitate more than 2 individual plaintiff depositions on any day.

2. For any defense witness that a Bellwether Discovery Case Plaintiff seeks to depose, within 14 days of a request for said deposition, Defendants shall provide two available dates for that witness's deposition or provide a last known address. Case-specific defense depositions in the Bellwether Discovery Cases are not subject to the time limitations set out in the CMO Regarding Deposition Limits but shall be made consistent with the agreements reflected in that Order. Namely, witnesses whose depositions already have been taken pursuant to general MDL discovery shall not be re-deposed in any Bellwether Discovery Case absent good cause. Nothing in this Order shall prohibit Defendants from objecting to a proposed case-specific deposition and promptly raising their objections with the requesting Counsel and Special Master Polifroni as necessary. Further, this section is not intended to address sales related depositions, which are defined and governed by Section III.F.5 below.
3. For any witness beyond the injured Plaintiff and Treating Doctors (defined in Section III.F.4. below) that Defendants seek to depose in a Bellwether Discovery Case, within 14 days of a request for said deposition, Plaintiff's counsel shall provide two available dates for that witness's deposition or provide a last known address. Nothing in this Order shall prohibit Plaintiff's counsel and/or a PEC designee from objecting to a proposed case-specific deposition and promptly raising their objections Defendants and Special Master Polifroni as necessary.

4. Beginning on December 15, 2021, Plaintiff's counsel and/or a designee of the Plaintiffs' Executive Committee and Defense Lead Counsel, Defense Liaison Counsel and/or their designee will develop a plan and process to coordinate and schedule the depositions of the relevant prescribing doctors and treating physicians ("Treating Doctors") who rendered care and treatment to the plaintiffs who are part of the Bellwether Discovery Pool. The parties will endeavor to schedule and depose the Treating Doctor depositions during the months of February and March 2021. For any Treating Doctor, the relevant Bellwether Discovery Case Plaintiff shall be deposed first, absent special circumstances.
5. With respect to sales representative depositions, each Bellwether Discovery Case will be initially limited to two such depositions for a total of 40 sales representative depositions to occur before the March 31, 2022 preliminary fact discovery cut off. In addition, upon selection of the Bellwether Trial Cases described in Section III.G below, each Bellwether Trial Case may request up to three (3) additional sales related deposition, *i.e.*, either deposition(s) of additional sales representatives or deposition(s) of regional manager, for a total of up to 49 sales related depositions during the entire bellwether process. The parties will work to schedule the 9 additional sales related depositions permitted in the Bellwether Trial Cases during the month of April and up through May 5, 2022. For purposes of the additional sales related depositions, the witnesses requested in each Bellwether Trial Case must relate to and be relevant to the case-specific plaintiff's prescribing doctor(s) or his/her practice.

G. With respect to Treating Doctor depositions, nothing shall prevent a Plaintiff or her/his counsel from meeting with a Treating Doctor. Should a Bellwether Discovery Case Plaintiff or her/his counsel show or provide a Treating Doctor with copies of some or all documents or other materials contained in Defendants' document production, the identity of such documents or materials shall be disclosed to Lead and Liaison Counsel for Defendants or their designee no later than 48 hours prior to the Treating Doctor's deposition. In the event that documents or other materials are shown or provided to a Treating Doctor within 48 hours of a deposition, then said documents or materials shall be provided to Lead and Liaison Counsel for Defendants or their designee as soon as practical and must be provided at least 3 hours before questioning begins at the Treating Doctor's deposition. Further, before a Treating Doctor is provided such documents or materials, if provided in advance of a deposition, he/she must sign Exhibit A to the Protective Order (as required by that Order), a copy of which shall be provided to Lead and Liaison Counsel for Defendants.

H. Following fact discovery of the 20 Bellwether Discovery Cases, three (3) cases will be selected as the Bellwether Trial Cases. The Bellwether Trial Cases will be selected on April 8, 2022, and either selected by the Court or selected as follows:

- One case will be selected by the Plaintiffs' Executive Committee;
- One case will be selected by the Defendants' Lead Counsel;
- One case will be selected by the Court.

Should the Court desire briefing, facts or data to make case selections, such request shall be discussed no later than the March 2022 Case Management Conference and shall be provided by the parties on or before April 1, 2022.

I. The three (3) Bellwether Trial Cases will proceed to Expert Discovery as follows:

1. Plaintiffs shall serve expert reports in each of the three (3) cases by May 10, 2022.
2. Defendants shall serve expert reports in each of the three (3) cases by June 17, 2022.
3. Plaintiffs shall serve rebuttal reports, if any, in each of the three (3) cases by June 27, 2022.
4. Expert Depositions shall commence no earlier than June 17, 2022 and shall be completed by September 9, 2022.

J. Expert depositions shall not commence until all expert reports have been tendered, although if a given expert does not intend to tender a rebuttal report, the parties may start the deposition(s) of such expert after June 17 and before June 27, 2022.

K. Along with any Rule 26(a) expert disclosures, the parties shall provide two dates when an expert is available for their deposition.

L. For each medical or scientific discipline, the parties shall schedule the deposition for the Plaintiff's expert first, with a deposition of the corresponding Defendants' expert, if any, to follow no sooner than forty-eight (48) hours later. The parties shall meet and confer on scheduling and work cooperatively to achieve this order as often as feasible.

M. The parties intend that the limitations on expert discovery set forth in Rule 26 of the Federal Rules of Civil Procedure, including the provisions of Rule 26(b)(4)(A)-(D) limiting discovery with respect to draft reports, communications with experts, and depositions of consulting experts, shall apply.

IV. SCHEDULE FOR BELLWETHER DISCOVERY AND TRIAL CASES²

A. The schedule is as follows:

² The deadlines in Section IV will apply only to those cases selected as Bellwether Discovery Cases.

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| November 15, 2021 | Initial Bellwether Discovery Cases to be selected. |
| November 22, 2021 | Final Bellwether Discovery Cases reported to Judge Martinotti and Fact Discovery to Commence for the 20 Bellwether Discovery Cases. |
| December 2, 2021 | For each plaintiff selected as a Bellwether Discovery Case, his/her counsel shall provide to Defense Lead and Defense Liaison counsel: <ul style="list-style-type: none"> (1) Any retinal imaging available in the plaintiff or his/her counsel's possession, including in color, digital format where available; and (2) All ophthalmology records in the plaintiff or his/her counsel's possession, including any medical records reflecting a diagnosis of the vision related issue (pigmentary maculopathy or underlying retinal disorder alleged to have been exacerbated subsequent to Elmiron use) identified during the parties' selection of Bellwether Discovery Cases, as set out in Section III.A above. |
| March 31, 2022 | Completion of fact discovery for the 20 Bellwether Discovery Cases, with the exception of the additional sales related depositions for the 3 Bellwether Trial Cases described in Section III.E.5. above. |
| April 8, 2022 | Either the Court will select the three (3) cases to serve as Bellwether Trial Cases or the parties will each pick one and the Court will pick one. |
| May 10, 2022 | Deadline for Plaintiffs to serve expert reports in each of the three (3) Bellwether Trial cases. |
| June 17, 2022 | Deadline for Defendants to serve expert reports in each of the three (3) Bellwether Trial cases. |
| June 27, 2022 | Deadline for Plaintiffs to serve rebuttal expert reports in each of the three (3) Bellwether Trial cases. |
| September 9, 2022 | Expert Depositions to conclude. |
| September 13, 2022 | Dispositive motions to be filed. |
| September 20, 2022 | <i>Daubert</i> motions to be filed. |
| October 13, 2022 | Opposition briefs to dispositive motions to be filed. |
| October 20, 2022 | Opposition briefs to <i>Daubert</i> motions to be filed. |
| October 26, 2022 | Reply briefs to dispositive motions to be filed. |
| November 4, 2022 | Reply briefs to <i>Daubert</i> motions to be filed. |

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| January 2023 | Bellwether Trial Case No. 1 will commence. |
| March 2023 | Bellwether Trial Case No. 2 will commence. |
| May 2023 | Bellwether Trial Case No. 3 will commence. |

B. To the extent dispositive motions are filed, Defendants reserve the right to file a total of 4 dispositive motions. One such motion may be filed in a Bellwether Discovery Case that is not chosen as a Bellwether Trial Case; the other 3 motions may only be filed in one or more of the Bellwether Trial Cases. However, *Daubert* motions shall be limited to the Bellwether Trial Cases.

C. On or before August 1, 2022, the parties will negotiate a Case Management Order to submit to the Court for approval that will set forth the final pre-trial schedules and deadlines for the three (3) 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, including objections to counter designations and reply designations; (3) fact witness and expert witness lists; (4) exhibit lists and objections; (5) proposed jury instructions; (5) proposed *voir dire* process, including a questionnaire, if any; (6) a date for a final pre-trial conference; and (6) any other deadlines and hearings as the Court requires.

D. 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.

It is **SO ORDERED**.

BY THE COURT:

/s/ Brian R. Martinotti
Hon. Brian R. Martinotti, USDJ