

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**IN RE: COVIDIEN HERNIA MESH
PRODUCTS LIABILITY LITIGATION
NO. II,**

This Document Relates To:

All Cases

MDL No. 1:22-md-03029-PBS

PARTIES' POSITION STATEMENTS ON PROPOSED SCHEDULING ORDER

At the status conference on August 10, 2023, the Court advised that the parties should meet and confer about mediation and dispositive/*Daubert* motion deadlines, and submit one or more proposals by Friday, September 8. The parties met and conferred several times but have been unable to reach agreement and so provide separate proposals, which are attached hereto as Exhibit A (Plaintiffs' Proposed Scheduling Order) and Exhibit B (Defendants' Proposed Scheduling Order). Below are the parties' position statements on those proposals for the Court's consideration.

PLAINTIFFS' POSITION

The fundamental difference between Plaintiffs' proposed scheduling order (attached as Exhibit A) and Defendants' proposal (attached as Exhibit B) is that Plaintiffs' proposal contemplates selection and briefing of the first two trials only, whereas Defendants propose briefing for all six cases in the Discovery Pool at the same time. Put simply, Defendants' proposal will overburden this Court. In a complex case like this, there almost certainly will be over 30 expert witnesses disclosed and even more reports served.¹ Historically, in surgical mesh

¹ For example, in the Bard Hernia Mesh MDL (MDL 2846), there were a total of 36 experts disclosed and *45 reports served* for 6 Bellwether cases with 4 products at issue. In the Proceed Hernia Mesh New Jersey Consolidation (MCL 630), there were a total of 27 experts disclosed with *55 reports served* for 9 Bellwether cases and only 2 products at issue.

cases, *Daubert* briefs are filed for every single report served. In addition, Plaintiffs anticipate that Defendants will file a motion for summary judgment for all six cases. If six cases are selected *and briefed*, the impact on this Court's resources will be profound. Plaintiffs' proposal not only saves this Court's resources but also creates efficiencies. Specifically, the guidance provided by the Court's orders in the first two cases will be instructive to the parties and enable the parties to streamline their arguments and reduce the issues briefed if and when additional cases are selected for trial. Further, if it becomes necessary to try any additional cases, the remaining four cases in the Discovery Pool will already be completely worked-up as all discovery and expert work will be complete. Plaintiffs, therefore, respectfully ask the Court to adopt their proposal as to the number of cases to be selected and briefed initially.

Lastly, Defendants have added an unnecessary sentence in their proposal, which "reserves the right" to raise the issue of additional dispositive motions related to all cases in this MDL. Not only is this sentence unnecessary for this scheduling order, it contemplates a process that would be unprecedented. This Court would have to address thousands of motions for summary judgment that likely will force the Court to analyze the laws of all 50 states. This arduous process is simply not envisioned by, nor the intent of, Section 1407 of the U.S. Code. Furthermore, briefing on the mass scale suggested by Defendants has due process implications as each Plaintiff deserves his or her case to go through the discovery process before such a consequential decision can be made. For these reasons, the Court should not adopt this language.

In consideration of this Court's resources and the efficiencies to be gained by Plaintiffs' proposal, Plaintiffs respectfully request the Court to adopt Plaintiffs' proposed scheduling order in its entirety.

DEFENDANTS' POSITION

Mediation and *Lexecon* waivers are not in dispute. As an initial matter, the parties agree on the timing and manner of mediation. Both proposals require the parties to identify a mediator by June 7, 2024, and complete mediation by January 17, 2025. Likewise, the parties agree that the Court set December 1, 2023 as the date for confirmation of *Lexecon* waivers, which is the same date as the close of case-specific fact discovery.

Dispositive/*Daubert* motion practice should proceed in all 6 bellwether cases to ensure only triable cases advance and to avoid delay. The fundamental difference between Plaintiffs' proposed scheduling order and the one proposed by Defendants is the timing of selection of trial cases and whether dispositive/*Daubert* motions should be briefed in all 6 bellwether cases or only in the cases selected as trial cases. Defendants' proposed scheduling order intends to address directly the "bad experiences" the Court described with bellwethers in the past, namely that the Court and the parties invest significant resources preparing one or two cases for trial, only for them to be dismissed after dispositive motions or otherwise resolved, and have to start over. Because the parties here already have selected and actively are working up six bellwether cases, Defendants propose setting a dispositive/*Daubert* motion deadline for all six cases, and then the parties will select the trial cases and order of those cases for trial from the cases that remain after the resolution of motion practice.

Plaintiffs' proposal to select two cases for trial and subject only those two cases to dispositive/*Daubert* motions risks leaving us in the position the Court cautioned against (*i.e.*, no case ready for trial and needing to start over).² In the federal hernia mesh cases against Covidien

² To the extent Plaintiffs argue in their position statement that this structure is preferable because it is the one used in the *In re Davol/C.R. Bard* hernia mesh MDL in the Southern District of Ohio, trial selection procedures in other MDLs involving different manufacturers and products are not instructive because they do not take into consideration the case management procedures and discovery schedule this Court employed to get us here, or this Court's own

that preceded this MDL, nearly every case that survived pleading challenges was dismissed at or around summary judgment. *See Avendt v. Covidien Inc.*, 262 F. Supp. 3d 493 (E.D. Mich. 2017) (granting summary judgment for Covidien); *Emery v. Medtronic, Inc.*, No. 4:18-cv-358 (S.D. Tex. Apr. 24, 2019), ECF. No. 66, *aff'd* 793 F. App'x 293 (5th Cir. 2019) (same); *Northrup v. Covidien LP*, No. 5:20-cv-355 (C.D. Cal. Nov. 24, 2021), ECF No. 100 (same). Given this track record, Defendants' proposal of briefing dispositive/*Daubert* motions in all six bellwether cases offers the most flexibility and assurance that there will be cases available for trial in a timely fashion. In contrast, Plaintiffs' proposal does not advance the four bellwether cases that are not selected as trial cases, and they would not be immediately trial ready if one or both cases were dismissed or resolved before trial.

Dispositive/*Daubert* motion practice should proceed in all 6 bellwether cases to promote efficiency. There are efficiencies to be gained by briefing dispositive/*Daubert* motions in all six bellwether cases at the same time. Defendants anticipate that there may be common dispositive legal issues, such as statute of limitations and other defenses, that the Court could address in one or more cases that would be informative for significant portions of the docket. For example, certain states' laws require evidence of a safer alternative design to prove a design defect claim and based on the plaintiffs' pleadings it remains an open question whether they can produce such evidence for certain hernia mesh products.

Defendants also anticipate that the parties will disclose the same experts in multiple cases (but not the same experts in all six cases). Addressing *Daubert* issues at the same time for common experts—some of whom would not be disclosed if the parties were to select only two

priorities for managing this MDL. As noted at the August hearing, this Court's priorities are front-loading legal issues that may be dispositive of, or informative for, other cases across the docket and having cases that are ready for trial. Defendants' proposal accomplishes both goals.

cases for briefing—allows the Court to evaluate the reliability of the experts’ opinions at one time in a single hearing and issue rulings that again will be informative for significant portions of the docket. For example, in two prior hernia mesh cases filed in federal court in California, different plaintiffs relied on the same surgeon expert. *See Northrup v. Covidien LP*, No. 5:20-cv-355 (C.D. Cal. Nov. 24, 2021), ECF No. 100; *Jorden v. Covidien LP*, No. 3:19-cv-05709 (N.D. Cal. June 21, 2021), ECF No. 73. Covidien moved to exclude that surgeon as not qualified and his methodology as unreliable, which the Court granted. *Northrup v. Covidien LP*, No. 5:20-cv-355 (C.D. Cal. Nov. 24, 2021), ECF No. 100 (granting summary judgment for defendant and excluding the opinions of Dr. Grischkan because he “is not qualified to render an opinion as to the PCOx product design or IFU” and his “opinion is not the product of a properly conducted differential diagnosis, or any other discernible methodology”). To the extent the parties proffer common experts across some or all of the six bellwether cases, it will be efficient and informative to resolve those common issues in a single instance.

The scheduling order should allow the parties to bring other docket-wide motions in the future. Defendants’ proposed scheduling order also includes a provision reserving Defendants’ right to bring other docket-wide dispositive motions in the future. As the Court noted at the August hearing, there is value in addressing cross-cutting legal issues. In addition to the six bellwether cases, such additional motion practice will be particularly informative to the parties as we evaluate the relative merits of the rest of the docket. Defendants will be strategic and efficient with any such motions, ensuring that the resolution of such legal issues will be useful to the larger litigation evaluation.

Defendants appreciate the Court’s request to set mediation and dispositive/*Daubert* motion deadlines. We believe that our proposed scheduling order will provide an efficient but

thoughtful path forward. We are happy to answer any questions the Court may have about the proposal at the next status conference or sooner by way of a telephonic meeting.

Dated: September 8, 2023

Respectfully submitted,

/s/ Kelsey L. Stokes

Kelsey L. Stokes

Plaintiffs' Co-Lead Counsel

Texas Bar No. 24083912

FLEMING, NOLEN & JEZ, L.L.P.

2800 Post Oak Blvd., Suite 4000

Houston, TX 77056-6109

Tel: (713) 621-7944

Fax: (713) 621-9638

kelsey_stokes@fleming-law.com

Timothy M. O'Brien

Plaintiffs' Co-Lead Counsel

Florida Bar No. 055565

LEVIN, PAPANTONIO, RAFFERTY,

PROCTOR, BUCHANAN, O'BRIEN,

BARR & MOUGEY, P.A.

316 South Baylen St., Ste. 600

Pensacola, FL 32502

Tel: (850) 435-7084

Fax: (850) 436-6084

tobrien@levinlaw.com

Walter Kelley, Esq.

Plaintiffs' Liaison Counsel

BBO# 670525

4 Court Street

Plymouth, MA 02360

Tel: (617) 420-1111

Fax: (617) 830-0712

wkelley@realjustice.com

Attorneys for Plaintiffs

/s/ Jessica C. Wilson

Jessica C. Wilson (BBO No. 692674)

Katie Insogna (BBO No. 568923)

DLA Piper LLP (US)

33 Arch Street, 26th Floor

Boston, MA 02110-1447

Tel: (617) 406-6000

Fax: (617) 406-6100

jessica.wilson@us.dlapiper.com

katie.insogna@us.dlapiper.com

Loren H. Brown

DLA Piper LLP (US)

1251 Avenue of the Americas, 27th Floor

New York, New York 10020-1104

Tel: (212) 335-4500

Fax: (212) 335-4501

loren.brown@us.dlapiper.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Jessica C. Wilson, certify that on September 8, 2023 a true and correct copy of the foregoing document was served on all counsel of record by filing it with the Court's NextGen CM/ECF system.

/s/ Jessica C. Wilson

Jessica C. Wilson

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: COVIDIEN HERNIA MESH
PRODUCTS LIABILITY LITIGATION
NO. II,

This Document Relates To:

All Cases

MDL No. 1:22-md-03029-PBS

CASE MANAGEMENT ORDER NO. ____
(Scheduling Order – Dispositive Motions & Trials)

In furtherance of the effective and efficient case management of complex litigation, the Court sets the following case deadlines. None of the deadlines below modify or change the case deadlines set forth in CMO 4, which remain in effect.

I. SELECTION OF TRIAL CASES

<u>Date</u>	<u>Event</u>
December 1, 2023	Deadline for the Parties to confirm that the Bellwether Discovery Pool Plaintiffs, as well as Defendants, have waived <i>Lexecon</i> as to the six Bellwether Discovery Cases only.
September 15, 2024	The Parties shall each identify one plaintiff from the Bellwether Discovery Pool, which will be the first two cases to be tried in this MDL (“Trial Cases”).

II. DISPOSITIVE/DAUBERT MOTIONS

<u>Date</u>	<u>Event</u>
October 14, 2024	Deadline for the parties to file dispositive and/or <i>Daubert</i> motions in the Trial Cases.
November 22, 2024	Deadline for the parties to file responses in opposition to any dispositive and/or <i>Daubert</i> motions in the Trial Cases.
December 13, 2024	Deadline for the parties to file replies in support of any dispositive and/or <i>Daubert</i> motions in the Trial Cases.

III. MEDIATION

<u>Date</u>	<u>Event</u>
June 7, 2024	Deadline for the parties to identify a mediator.
January 17, 2025	Deadline for the parties to complete mediation.

IV. MANNER & ORDER OF TRIAL CASES

<u>Date</u>	<u>Event</u>
January 13, 2025	Deadline for the parties to submit to the Court either as a joint proposal or as separate proposals a memorandum on the proposed manner of trial, order of the Trial Cases, and timing of trial. Separate proposals shall be limited to no more than 12 pages in length.
January 21, 2025	Deadline for any responses to the memorandum on manner and order of the Trial Cases, which shall be limited to 6 pages in length.

V. TRIAL CASES

The Court will select the order of the Trial Cases for trial and will select the dates for trial after January 24, 2025.

SO ORDERED.

Hon. Patti B. Saris
United States District Judge

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: COVIDIEN HERNIA MESH
PRODUCTS LIABILITY LITIGATION
NO. II,

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All Cases

MDL No. 1:22-md-03029-PBS

CASE MANAGEMENT ORDER NO. ____
(Scheduling Order – Dispositive Motions & Trials)

In furtherance of the effective and efficient case management of complex litigation, the Court sets the following case deadlines. None of the deadlines below modify or change the case deadlines set forth in CMO 4, which remain in effect.

I. *LEXECON* WAIVER

<u>Date</u>	<u>Event</u>
December 1, 2023	Deadline for the Parties to confirm that the Bellwether Discovery Pool Plaintiffs, as well as Defendants, have waived <i>Lexecon</i> as to the six Bellwether Discovery Pool Cases only.

II. *DISPOSITIVE/DAUBERT* MOTIONS

<u>Date</u>	<u>Event</u>
October 14, 2024	Deadline for the parties to file dispositive and/or <i>Daubert</i> motions in the Bellwether Discovery Pool Cases.
November 22, 2024	Deadline for the parties to file responses in opposition to any dispositive and/or <i>Daubert</i> motions in the Bellwether Discovery Pool Cases.
December 13, 2024	Deadline for the parties to file replies in support of any dispositive and/or <i>Daubert</i> motions in the Bellwether Discovery Pool Cases.

The parties reserve the right to raise with the Court the filing of additional dispositive motions on over-arching legal issues likely to impact multiple cases besides

the Bellwether Discovery Pool Cases and streamline the docket.

III. MEDIATION

<u>Date</u>	<u>Event</u>
June 7, 2024	Deadline for the parties to identify a mediator.
January 17, 2025	Deadline for the parties to complete mediation.

IV. MANNER & SELECTION OF TRIAL CASES

<u>Date</u>	<u>Event</u>
30 days after the Court issues decisions on the dispositive and/or <i>Daubert</i> motions in the Bellwether Discovery Pool Cases	Deadline for the parties to submit to the Court either as a joint proposal or as separate proposals a memorandum on the selection of specific Trial Cases from the Bellwether Discovery Pool and the order of such Trial Cases for trial. Separate proposals shall be limited to no more than 12 pages in length.

V. TRIAL CASES

The Court will select the order of the Trial Cases for trial and will select the dates for trial after January 24, 2025.

SO ORDERED.

Hon. Patti B. Saris
United States District Judge