

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.

PLAINTIFFS' STEERING COMMITTEE'S MOTION
FOR ENTRY OF A CASE MANAGEMENT ORDER GOVERNING
THE FUTURE MANAGEMENT OF CASES AND POTENTIAL REMAND

The Plaintiffs' Steering Committee ("PSC") moves this Court pursuant to 28 U.S.C. § 1407(a) to enter the attached case management order (Exhibit 1) governing the future management of cases and potential remand.

A memorandum in support of this Motion is attached hereto and incorporated herein.

Dated: December 21, 2023

Respectfully submitted,

/s/ David J. Butler

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**JUDGE EDMUND A. SARGUS, JR.
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**PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR ENTRY OF A CASE MANAGEMENT ORDER GOVERNING THE
FUTURE MANAGEMENT OF CASES AND POTENTIAL REMAND**

The Plaintiffs’ Steering Committee (PSC) submits this memorandum in support of its Motion for a Case Management Order Governing the Future Management of Cases and Potential Remand.

As set forth in more detail below, it is time for an order that contemplates and outlines a remand process to ensure that plaintiffs who have cases filed in this MDL—many of whom who have been waiting for nearly six years—will see their day in court or otherwise reach a just resolution of their claims. The PSC’s proposed case management order achieves this purpose. *See* Proposed CMO, attached as Exhibit 1 to the Motion.

I. INTRODUCTION

On August 6, 2018, the Judicial Panel on Multidistrict Litigation (“JPML”) entered an Order consolidating the cases filed against Defendants C.R. Bard, Inc. and Davol, Inc. (hereinafter collectively “Bard” or “Defendants”) by plaintiffs who claimed injury as a result of the implantation of their defective hernia mesh products. In doing so, the Panel found that these actions shared common questions of fact arising out of allegations related to Defendants’ hernia mesh products that “can lead to complications when implanted in patients, including adhesions, damage to organs, inflammatory and allergic responses, foreign body rejection, migration of the mesh, and infections.” *See* August 6, 2018 Transfer Order from JMPL [ECF No. 1] (“Transfer Order”).

Since the transfer of the nearly 100 related actions that were part of the Motion for §1407 Coordination/Consolidation & Transfer, thousands of cases have followed. As of December 8, 2023, the total number of cases pending in this MDL is now 20,943 cases.

This MDL has been pending for over five years. In that time, there has been extensive liability fact discovery as well as expert discovery, as well as jury verdicts in three bellwether trials, with the fourth trial set to begin in April 2024 (less than four months from now). The

products at issue in each of the bellwether trials were, by design, drawn from each “bucket” of Bard’s product line and are the products that make up the majority of the MDL.¹ In short, this MDL has been conducted to ensure that Section 1407’s primary mandate has been met—the promotion of justice and efficiency. *See* 28 U.S.C. §1407(a). But Section 1407 has another mandate that must also be achieved at the appropriate time—remand. The PSC submits that time is now. To be sure, the PSC’s proposal does not seek to dump over 20,000 cases into district courts throughout the country all at once. It also does not contemplate the immediate closure of this MDL. Rather, the PSC proposes a mechanism that will work-up cases, particularly, case-specific matters, for a large tranche of cases in intervals. Under the PSC’s plan, at the conclusion of case-specific discovery, the cases in each tranche will be remanded to the district court from whence they came, just as 28 U.S.C. §1407(a) envisions.² As noted in its proposal, the PSC proposes the first tranche include 1,500 cases; this represents approximately 7.5 percent of the filed cases.

For the reasons below, the PSC respectfully requests the Court enter the attached Case Management Order to begin the process for remand.

II. ARGUMENT

A. It is the Appropriate Time to Begin the Process of Remand

28 U.S.C. §1407(a) states the following in pertinent part concerning remand:

Each action so transferred **shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the**

¹ The first three bellwether trials alone make up all three buckets, specifically the “ST Bucket” (*Johns*, Ventralight ST); the “ePTFE Bucket,” (*Milanesi*, Ventrallex) and the “All Polypropylene Bucket” (*Stinson*, PerFix). The fourth bellwether trial will be another “All Polypropylene Bucket” (*Bryan*, 3DMax). *See, e.g.*, CMO No. 25 [ECF No. 318]).

² While many cases were transferred to the MDL through a conditional transfer order, the majority of cases in the MDL have been filed directly into the MDL pursuant to the Direct Filing Order (CMO No. 2 [ECF No. 11]). The presumptive remand district is listed in each plaintiffs’ Short Form Complaint in response to Question No. 5 (District Court and Division in which action would have been filed absent direct filing).

district from which it was transferred unless it shall have been previously terminated. . . .

28 U.S.C. § 1407(a) (emphasis supplied) (parts omitted).

This Court has repeatedly indicated that the fourth bellwether trial will be the last. *See, e.g.,* 8/29/23 CMC Tr. [ECF No. 779] at 5:6–17. With the fourth bellwether trial being a mere three and a half months away, the time to set the remand wheels in motion by putting a remand mechanism in place, is now.³

Indeed, as Justice Souter explains:

Beyond this point [transfer by the JPML to the transferee court], however, the textual pointers reverse direction, for §1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but **obligates the Panel** to remand any pending case to its originating court when, **at the latest**, those proceedings have run their course. . . . The Panel’s remand instruction comes in terms of the mandatory “shall,” which normally creates an obligation impervious to judicial discretion.

Lexecon, 523 U.S. at 35 (emphasis added).

With all three buckets of products already under the parties’ proverbial belts, the PSC submits the parties have gleaned all they can from the trials. *See, e.g.,* 8/23/22 CMC Tr. [ECF No. 659] at 13:24–14:1; *see also In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1198 (S.D. Ind. 2001) (“In . . . cases where only case-specific discovery and motion practice remains. . . we would be inclined to issue a suggestion for remand.”); *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 169 F.R.D. 632, 638 (N.D. Ill. 1996) (“[A] multidistrict proceeding is not the appropriate mechanism for the conduct of *case-specific* discovery.”) (emphasis in original). It is not the MDL court’s burden to decide every motion, nor should it proceed with every trial.

³ The PSC is cognizant of the Court’s plan to begin remand 3 to 4 months after the fourth bellwether trial. *See* 8/29/23 CMC Tr. [ECF No. 779] at 5:6–7. The PSC’s proposed order is consistent with this timeline as the actual remand of cases does not begin until the case-specific discovery has concluded for the first tranche.

Rather, remand is appropriate once core discovery is substantially completed, thereby allowing the “District and Division in which action is to be filed upon transfer from the MDL” to proceed with, or finalize, case specific discovery. *Id.* The PSC’s proposed CMO recognizes that it is time to begin the process of remand and spells out a measured and organized approach to fulfill Section 1407’s mandate of remand.

Put simply, if these cases were allowed to sit in the MDL and continue at the same pace of 1 to 2 trials per year, it would take between 10,000 to 20,000 years to try every case. As this Court so eloquently put it in another MDL, “[y]ears of delay may appeal to [Defendants], but it is fundamentally unfair in the administration of justice.” *See In re: E.I. Du Pont de Nemours and Company C-8 Pers. Injury Litig.*, 2:13-md-02433-EAS-EPD [ECF No. 4624] at PAGEID 100957 (CMO No. 20 at 17). The analysis in the *In re: E.I. Du Pont de Nemours and Company C-8 Pers. Injury Litig* is not off base in this MDL.

Accordingly, it is the appropriate time to enter an order that begins the remand process so every plaintiff in this MDL can see eventual resolution of their claims.

B. The PSC’s Proposal Contemplates a Measured Approach that will Achieve the Goal of Remand in an Organized, Logical, and Efficient Manner

As is demonstrated by the proposed case management order, the mechanism by which remand will be achieved in an MDL of this size is not a simple one. To avoid chaos in the district courts, the process should not occur overnight or in one fell swoop. The Court has made clear that it intends for remand to occur approximately three to four months after the conclusion of the fourth bellwether trial. *See* n.3, *supra*. In order for an efficient and ordered remand plan to take effect in that time frame, the process should begin now. The dates in the PSC’s proposed CMO allow enough time for the Defendants’ input and a meaningful discussion at the upcoming case

management conference in January, with the selection of Tranche 1 case beginning in April of 2024.

As to the selection of the cases, the PSC's proposal calls for the PSC to choose the cases from (1) the most severely injured; (2) that have been on file for more than one year; and (3) that involve one of the four cases that have been (or will be) the subject of the four bellwether trials. This proposal is logical. As this Court recognized in the *DuPont* Litigation, after the bellwether trials have concluded, the reasoning for selection ceases to be that reasoning applied in the bellwether selection process but rather the reasoning applied "to any other cases on the [Court's] docket and provide trials first to the most severely impacted plaintiffs." *See In re: E.I. Du Pont de Nemours and Company C-8 Pers. Injury Litig.*, 2:13-md-02433-EAS-EPD [ECF No. 4624] at PAGEID 100962 (CMO No. 20 at 25). There, the Court asked the PSC to choose the cases because the PSC was in the best position to make that determination. Such is the case here. As for the other two criteria, the most logical selection are those plaintiffs who have been filed for longer than a year⁴ and were implanted with products who have a complete trial package by virtue of the bellwether trials, making up all three "buckets" of Bard's product line as well as the majority of the cases filed in this MDL.

Of note, the PSC's proposal calls for the OH/WVa Cases⁵ to be tried with multiple plaintiffs/cases for each trial (a maximum of 10). *See* Ex. 1 at (III)(a). This too is logical and efficient given the circumstances here. A consolidation like the PSC proposes will permit

⁴ *See, e.g., In re: E.I. Du Pont de Nemours and Company C-8 Pers. Injury Litig.*, 2:13-md-02433-EAS-EPD [ECF No. 4624] at PAGEID 100955 (CMO No. 20 at 18) ("This Court, and most district courts, endeavor to complete cases within two years.").

⁵ For the reasons outlined in this Motion, it is the PSC's contention that it would be prudent for the Remand Courts to adopt this same procedure for the "Other District Cases" that they receive pursuant to the Court's Suggestion of Remand.

plaintiffs to allocate the extensive costs of trial among several cases and will avoid needless duplication of testimony. Not surprisingly, other courts, in addition to this Court, have adopted a multi-plaintiff trial paradigm. *See, e.g., In re Actos (PIOGLITAZONE) Prods. Liab. Litig.*, MDL 2299, (W.D. La. February 23, 2015) (holding that five Actos products liability cases would be tried together); *Atwood v. UC Health*, No. 1:16CV593, 2019 WL 6877643, at *5 (S.D. Ohio Dec. 17, 2019) (district court noted that consolidated, multi-plaintiff trials were appropriate where the plaintiffs' claims could be grouped "based upon the type of surgery performed and overlapping expert testimony" and that "jury's individualized verdicts belie[d] the arguments of prejudice."); *see also The Manual for Complex Litigation*, Fourth §11.631 ("Federal Rule of Civil Procedure 42(a) authorizes the judge to consolidate, for trial or pretrial, actions pending in the same court involving common questions of law or fact if it will avoid unnecessary cost or delay."). These considerations are present here and strongly support multi-plaintiff trials. As seen in each of the bellwether cases tried to date, the vast majority of the fact and expert testimony was geared to general issues of product defect and liability, while a small minority of evidence was geared toward plaintiff-specific damages or specific causation.⁶ Further still, because the trials will involve the same products, there will likely be an overlap in the case-specific surgeons used for each plaintiff. Indeed, consolidation will inure to Defendants' benefit as well, as it will permit Defendants to continue to enjoy the reduction in costs that consolidation of cases has provided throughout the proceedings to date. Even more important, consolidation will provide Defendants with more data regarding case valuation than would be obtained from a single verdict. Finally,

⁶ The Court noted this same sort of breakdown in the *DuPont* MDL trials. *See In re: E.I. Du Pont de Nemours and Company C-8 Pers. Injury Litig.*, 2:13-md-02433-EAS-EPD [ECF No. 4624] at PAGEID 100972 (CMO No. 20 at 35) (Noting that "approximately 80% of the evidence that will be presented in each and every trial in this MDL, including expert opinion testimony, has already been presented in prior trials, and approximately 20% of the evidence will be plaintiff-specific.").

given the inability to strike a global settlement to date, the parties need to prepare and move down a different trial track to achieve resolutions for these thousands of plaintiffs.

Regarding the remainder of the proposed order, the PSC submits it is most efficient to work up the case-specific discovery under the supervision of this Court so that the District Court to which the case is transferred has a near “trial-ready” case without the need to set a docket control order from scratch. While case-specific discovery is conducted under the supervision of this Court, the PSC’s proposed order does not burden this Court with motion practice for 1500 cases. Rather, the District Court in the Remand District will be able to set its own briefing schedule and, with the benefit of this Court’s prior rulings, will be able to make rulings on pre-trial motions relatively easily and at its own pace.

In short, the PSC’s proposal makes sense and ensures that plaintiffs in this MDL will see justice relatively soon.

III. CONCLUSION

For the foregoing reasons, the PSC respectfully requests the Court grant the PSC’s Motion and enter the PSC’s Proposed Case Management Order Governing the Future Management of Cases and Remand.

Dated: December 21, 2023

Respectfully submitted,

/s/ David J. Butler

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2023, I electronically filed the foregoing with the Clerk of Court using the Court's CM/ECF system.

/s/ David J. Butler
Plaintiffs' Liaison Counsel

**UNITED STATES DISTRICT COURT
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Case No. 2:18-md-2846

**JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson**

**This document relates to:
ALL ACTIONS.**

**[PROPOSED] CASE MANAGEMENT ORDER NO. _____
Governing The Future Management of Cases and Potential Remand**

Consistent with the directive of 28 U.S.C. § 1407(a), the Court hereby sets the following plan and schedule for potential remand as follows:

I. Selection of Cases for the First Tranche of 1500 Cases

a. Eligibility and Selection for Tranche 1 Cases: By April 1, 2024, the PSC will identify the most seriously injured plaintiffs who have been on file for more than one year and who have been implanted with either a Ventralight ST, Ventralex Patch, PerFix Plug, or 3DMax Mesh. The 1500 cases must be chosen from the remand districts as set forth in Section (I)(b) of this Order.

b. Remand Districts for Tranche 1 Cases: The Remand District for cases transferred to this Court from the JPML will be the federal district court from which each such case was initially transferred. For directly-filed cases, the presumptive Remand District will be the federal district court listed in each plaintiff's Short Form Complaint in response to Question No. 5 (District Court and Division in which action would have been filed absent direct filing). If Defendants believe the

presumptive Remand District is not proper as defined under 28 U.S.C. § 1391, they will have **30 days** from the date of the selection to challenge such district. The PSC must select the following number of cases from the following districts as set forth below:

- i. 300 Cases from any District in Ohio or West Virginia (“OH/WVa Cases”).¹
- ii. 1200 Cases from any federal district court that are not from the districts in (I)(b)(i) above (“Other District Cases”).

II. Discovery Schedule for Tranche 1 Cases

- a. Selection Date:** The PSC must submit the list of 1500 cases by **April 1, 2024**.
- b. Filing Amended Complaints:** Consistent with CMO No. 18, a plaintiff in any action selected as a Tranche 1 Case, shall have 21 days from the date the case is selected to file an amended complaint if a plaintiff desires to do so.² If a plaintiff elects not to file an amended Complaint, and is a plaintiff who previously filed a Short Form Complaint adopting by reference the Master Complaint, plaintiff shall notify counsel of record for Defendants listing the claims from the Master Complaint that they are claiming and shall identify the state law plaintiff contends shall apply to plaintiff’s case (a plaintiff may identify more than one state law plaintiff contends may apply).
- c. Filing of Amended Answers and Notices of Defenses:** Consistent with CMO No. 18, Defendants shall file a more robust and detailed amended Answer and Notice

¹ If there are not 300 cases from districts in Ohio and West Virginia that meet the selection criteria, then this number will be equal to the total of number of cases from the districts in Ohio and West Virginia that do meet the selection criteria.

² Such an amendment may include the addition of Becton Dickinson as a defendant, if applicable.

of Defenses, which shall include Affirmative Defenses, within 14 days after an amended Complaint has been filed pursuant to Section (II)(b), above. If a plaintiff has elected to not file an amended Complaint, but identified the claims and the applicable state(s) law by email instead, then Defendants are only required to file a Notice of Defenses, within 14 days of such notification.

- d. PFS and DFS Completion Dates:** For each plaintiff in Tranche 1, a completed Plaintiff Fact Sheet and authorizations as required under CMO No. 14 (Regarding Plaintiff Fact Sheets), shall be served on Defendants by **May 20, 2024**. A completed Defendant Fact Sheet shall be served on plaintiff's counsel with a copy to the PEC's designee by **June 3, 2024**.³
- e. Completion of Case-Specific Discovery**⁴: Each side will be permitted to take up to three case-specific fact depositions, which shall begin on **June 10, 2024** and conclude on **October 14, 2024**.

III. Remand and Trial Schedule for OH/WVa Cases

The Parties shall work to provide a comprehensive list of all prior rulings and/or directives, and/or agreements regarding general expert *Daubert* rulings, motions *in limine*, deposition designations, exhibit lists, and any other final pre-trial matters, to provide to the district courts in the Remand Districts to which the cases are transferred and/or assigned.

³ With the exception of the deadlines, all procedures outlined in CMO Nos. 14 (PFS) and 16 (DFS) remain in effect.

⁴ Defendants have an obligation to produce sales representatives and/or supervisors requested by plaintiffs even if the sales representative and/or supervisor is a former employee. If Defendants do not provide deposition dates for former employees within 21 days of plaintiffs requesting the depositions, Defendants will produce the last known address of the former employee and plaintiffs' counsel is permitted to communicate directly with said former employees as if the former employee is not represented by counsel.

- a. OH/WVa Cases:** Beginning in October 2024, 100 cases will be set for trial with pre-trial schedules calling for 10 cases to be tried per month on a 10 month cycle. The Court will not schedule any cases for trial from Thanksgiving through Christmas/New Year holidays. The Court will continue to try cases but will also manage a trial schedule that will utilize other judges from this District as well as judges from the remaining Districts in Ohio and West Virginia. Each OH/WVa trial will consist of multiple OH/WVa cases, with a maximum of 10 cases/plaintiffs per trial, with each plaintiff having the same product at issue in any such trial. The sequence of trials within this group of 100 will be decided by a subsequent Case Management Order that will either be by agreement of the Parties or based upon briefing to the Court. Either at the time the sequence of the trials is determined by the Court, or no later than four weeks thereafter, the Court will endeavor to determine and advise which federal district court judge will be assigned to which case(s). A subsequent Case Management Order will govern the trial schedule for the remaining OH/WVa cases in Tranche 1.
- b. Other District Cases:** On November 1, 2024, this Court will begin the process of filing suggestions of remand with the JPML recommending that the Panel remand the Other District Cases from Tranche 1 to the Remand District as defined in this Order.

IV. Future Order Related to the Management of the Remaining Cases and Future Filed Cases in this MDL

A Case Management Order outlining the selection and schedule for Tranche 2 cases will be forthcoming but will be entered no later than August 30, 2024. The general framework will be the same as this Order but may modified depending on the make-up of the remaining cases after

Tranche 1 Cases have been identified. Nothing in this Order shall be construed as closing this MDL or otherwise limiting the ability of plaintiffs to directly file into this MDL pursuant to CMO No. 2.

IT IS SO ORDERED.

DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE