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. 50

This matter is before the Court on the issues of the necessity of holding a fourth bellwether trial and the future management and structure of potential remand of cases in this multidistrict litigation ("MDL"). On December 21, 2023, the Plaintiffs' Steering Committee ("PSC") filed a Motion for Entry of Case Management Order ("CMO") Governing the Future Management of Cases and Potential Remand (ECF No. 802). At the January 10, 2024 Case Management Conference, the Court ordered the parties to, in conjunction with the briefing on the PSC's Motion, submit briefing on the necessity of a fourth bellwether trial. The issues are fully briefed (ECF Nos. 802, 820, 825). For the following reasons, The PSC's Motion for Entry of CMO to Govern the Future Management of Cases and Potential Remand (ECF No. 802) is **DENIED** and the trial scheduling order for *Bryan v. C.R. Bard, Inc., et al.* (ECF No. 801; Case No. 18-cv-1440, ECF No. 39) is **VACATED**.

I. Fourth Bellwether Trial

The Court has held three bellwether trials in this MDL: *Johns v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1509; *Milanesi, et al. v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1320, and *Stinson v. Davol, Inc., et al.*, Case No. 18-cv-1022. A fourth bellwether trial in *Bryan v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1440, is currently scheduled to begin on April 8, 2024. The Court has spent a total of 56 days in trial and has issued more than 100 opinions on dispositive motions and evidentiary

issues in bellwether cases. The usefulness of another lengthy and expensive trial is dubious at best. The Court has already tried one case based on Florida law (*Milanesi*) and one case that featured a polypropylene-only inguinal mesh device (*Stinson*). This case features many of the same experts who testified in the previous trials. Although this case features a different device than the previous three trials, there are 22 devices encompassed by this MDL and the intention was never to try a case for each device. And while Defendants argue that trial would be helpful because this plaintiff has different injuries, each of the more than 21,000 plaintiffs in this MDL will be different.

The PSC argues that Defendants' strategy in seeking to proceed with the fourth bellwether trial is to "[d]elay resolution discussions, delay remand, delay the just disposition of these actions." (ECF No. 825 at PageID #9306.) The PSC likens this case to *In re: E. I. Du Pont de Nemours and Company C-8 Personal Injury Litigation* and quotes this Court's reasoning that "[y]ears of delay may appeal to [Defendants], but it is fundamentally unfair in the administration of justice." (Case No. 13-md-2433, CMO No. 20, ECF No. 4624 at PageID #100954.) This comparison is not borne out by the record. As Defendants point out, they "ha[ve] not been dragging [their] feet[,] [b]ellwether cases have been tried, not settled before trial, and [Defendants have] never sought to stay or delay the overall proceedings." (ECF No. 820 at PageID #9122.) Additionally, the parties have engaged in negotiations facilitated by a court-appointed settlement master since August of 2022. (ECF No. 653.) Although the Court disagrees with Defendants that there is merit in holding a fourth bellwether trial, there is no indication that Defendants seek to do so for nefarious purposes.

Defendants' arguments in favor of holding a fourth trial seem to revolve around the effect that a verdict would have on case filings, and how a defense verdict or favorable summary judgment ruling would affect settlement numbers. (ECF No. 820 at PageID #9116–17.) However, Defendants' motion for summary judgment in *Bryan* was granted as to the majority of that plaintiff's claims (Case No. 18-cv-1440, Dispositive Motions Order No. 9, ECF No. 91), including claims

Defendants emphasize in their briefing on this issue. (*See* ECF No. 820 at PageID #9115 (arguing that the fact that Bryan's surgeon did not rely on the Instructions for Use or other information from Defendants is "key" and differs greatly from the other bellwether cases).) The Court will also note that there have been multiple other MDLs concerning surgical mesh. There have been many MDLs involving pelvic or transvaginal mesh products, including products manufactured by Defendants. (*See, e.g.*, MDL Nos. 2187, 2325, 2326, 2327, 2387, 2440, 2511.) There have also been other MDLs regarding hernia mesh. (*See, e.g.*, MDL Nos. 2753, 2782, 3029.) In fact, there was a previous MDL against Defendants which included some of the same devices at issue in this case (MDL No. 1842) and there is currently an MDL against Defendants pending in Rhode Island Superior Court that involves most of the same devices at issue in this MDL (Case No. PC-2018-9999). The Court is of the opinion that after the first three bellwether trials and its partial summary judgment ruling in *Bryan*, as well as the extensive other litigation on the same or similar subject matter, there is little left to learn and trying a fourth case would not benefit the parties nor assist in resolving the remaining cases in this MDL. There are not sufficient reasons to spend many hours of the Court's and the parties' time, not to mention the financial cost to the parties, trying a fourth case that will likely produce very little new information. Accordingly, the April 8, 2024 trial date and related deadlines scheduled in *Bryan v. C.R. Bard, Inc., et al.* are vacated.

II. Future Management of Cases

The PSC's motion for a CMO regarding future management of cases and potential remand (ECF No. 802) is premature and unreasonable. The motion is a sharp departure from the plans the Court and the parties have discussed for this MDL for quite some time. The Court discussed with the parties its hope that the parties would reach a global settlement and remanding cases *en masse* would not be necessary. The Court specifically mentioned a period of three to four months after the

last trial for negotiations and mediation between the parties to aid in reaching a settlement, and if that was unsuccessful, discussing remand at that time. (18-md-2846, ECF No. 779 at PageID #8865, 5:6–17.) Yet the PSC asked the Court to "set the remand wheels in motion" several months before the fourth trial was scheduled to even begin. (ECF No. 802 at PageID #9006.) As the Court indicated, the goal in this case is to reach a global settlement, and if that cannot be accomplished, to later begin discussing what the remand process would look like. The PSC argues that a deadline is necessary to keep things moving, and "[w]aiting to impose a deadline will only delay justice for thousands of plaintiffs who have been waiting for years." (ECF No. 825 at PageID #9309.) But the longstanding plan of three to four months of negotiations towards a global settlement then discussing the process for remand is a deadline, just not the one the PSC proposes.

Even if this were the appropriate time to start planning for the remand of all remaining cases, the plan proposed by the PSC clearly favors its interest over Defendants'. The PSC asks this Court to order extremely expedited fact discovery and trials and "determine and advise which federal district court judge will be assigned to which case(s)" in not only in this District, but in three other districts. (ECF No. 802-1 at PageID #9016, proposing 10 cases be tried per month on a 10-month cycle throughout Ohio and West Virginia.) There has been no discussion between the parties and the Court regarding any plan other than global settlement or potential remand of all remaining cases, let alone discussions of a massive undertaking along the lines of the plan proposed by the PSC. And, as Defendants point out, "forcing [Defendants] to work up thousands of PSC-selected cases at a time, especially on an expedited basis, would increase litigation costs greatly without a commensurate increase in the chance of resolution." (ECF No. 820 at PageID #9122.) Accordingly, the PSC's motion is denied.

III. Conclusion

For the reasons set forth above, the PSC's Motion for Entry of CMO to Govern the Future Management of Cases and Potential Remand (ECF No. 802) is **DENIED** and the trial scheduling order for *Bryan v. C.R. Bard, Inc., et al.* (ECF No. 801; Case No. 18-cv-1440, ECF No. 39) is **VACATED**.

IT IS SO ORDERED.

2/1/2024
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE