

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: GADOLINIUM-BASED
CONTRAST AGENTS PRODUCTS
LIABILITY LITIGATION

Case No. 1:08GD50000

MDL No. 1909

Judge Dan Aaron Polster

This Document Applies to All Cases:

**SECOND AMENDED CASE MANAGEMENT ORDER NO. 12:
BELLWETHER TRIAL SELECTION PROTOCOL**

All provisions of Case Management Order No. 12 (ECF No. 360) remain in force except that the Paragraphs set forth below supersede the corresponding Paragraphs of Case Management Order No. 12:

7. Schedule For First Bellwether Trial Case: The *Bullock* case, which is the first bellwether trial case, shall be subject to the following pretrial case-specific schedule:

- a. Remaining Fact Discovery: Case-Specific fact discovery shall be completed on or before February 17, 2010, unless otherwise agreed to by the parties or subsequent order of the Court.
- b. Corporate Witness Identification:
 - i. Defendant in the first Bellwether Trial case shall disclose to Plaintiff the identity of its corporate witnesses it intends to call at trial who have not yet been deposed, on or before November 19, 2009.
 - ii. If Defendant intends to call a corporate witness, who has already been deposed, to provide case-specific testimony at trial about

which he or she has not yet been deposed, the identity of that witness shall be disclosed to Plaintiff on November 19, 2009 and shall be subject to the case-specific fact discovery cut off set in ¶ 7(a) above.

c. Plaintiff Fact Witness Identification:

- i. Plaintiff in the first Bellwether Trial case shall disclose to the Defendant the identity of any fact witness he or she intends to call at trial who has not previously been identified and has not yet been deposed, on or before January 19, 2010.

d. Case Specific Expert Discovery:

- i. The deadline for Plaintiff in the first Bellwether Trial to submit Rule 26(a)(2) expert reports shall be October 13, 2009;
- ii. The deadline for Defendants in the first Bellwether Trial to submit Rule 26(a)(2) expert reports shall be December 7, 2009;
- iii. Depositions of case-specific experts shall be completed on or before January 27, 2010. Depositions of Plaintiff's experts shall occur before Defendant's experts that are disclosed within the same discipline.
- iv. Treating physicians are not subject to this provision and a Rule 26(a)(2) report is not required for these witnesses.

8. Generic Expert Discovery and *Daubert* Motions

- a. All prior schedules or orders of the Court relating to the deadlines for the parties to make generic expert disclosures are hereby vacated.

- b. Generic expert disclosures:
 - i. Plaintiffs' Rule 26(a)(2) generic expert reports were served on counsel for the defendants on June 15, 2009;
 - ii. Defendants' Rule 26(a)(2) generic expert reports were served on the PSC on August 31, 2009;
 - iii. Depositions of generic experts shall be completed on or before December 7, 2009.
 - c. Motions directed at Generic experts:
 - i. Any *Daubert* motion relating to generic expert issues in the first Bellwether Trial shall be filed on or before February 5, 2010;
 - ii. Opposition to any *Daubert* motion relating to generic expert issues in the first Bellwether Trial shall be filed on or before March 1, 2010;
 - iii. Any reply in further support of any *Daubert* motion relating to generic expert issues in the first Bellwether Trial shall be filed on or before March 19, 2010.
 - d. Oral argument, if any, on *Daubert* motions directed at generic experts will be set by subsequent Order of this Court;
 - e. All other aspects of any *Daubert* motion directed at generic experts shall be governed by the Local Rules of this District
9. Case-Specific *Daubert* and Dispositive Motions on the first Bellwether Trial case:
- a. Any *Daubert* or dispositive motions relating to case-specific issues in the first Bellwether Trial shall be filed on or before March 3, 2010;

- b. Opposition to any *Daubert* or dispositive motions relating to case-specific issues in the first Bellwether Trial shall be filed on or before March 24, 2010;
- c. Any reply in further support of any *Daubert* or dispositive motions relating to case-specific issues in the first Bellwether Trial shall be filed on or before April 7, 2010;
- d. Oral argument, if any, on *Daubert* or dispositive motions directed at case-specific expert or other issues will be set by subsequent Order of this Court;
- e. All other aspects of any *Daubert* or dispositive motions directed at case-specific expert or other issues shall be governed by the Local Rules of this District.

10. Pretrial Disclosures:

- a. Deposition Designations:
 - i. Deposition designations sought to be used in either party's affirmative case shall be disclosed to the other party on or before March 29, 2010;
 - ii. Any objections to deposition designations shall be served on the other party on or before April 12, 2010;
 - iii. Counter-designations shall be served on the other party on or before April 12, 2010;
 - iv. Objections to counter-designations shall be served on the other party on or before April 22, 2010;

- v. The parties shall meet and confer to attempt to resolve objections to deposition designations or counter-designations. In the event that agreement cannot be reached, each party shall submit objections to the Court for ruling by no later than 3 p.m. on April 27, 2010.
- b. Witness Lists shall be handled in accordance with ¶ 12 below.
- c. Exhibit Lists shall be handled in accordance with ¶ 12 below. The parties to the first Bellwether trial shall confer and attempt to submit a list of joint exhibits to the Court. To the extent that exhibits cannot be agreed upon, each side shall submit a separate exhibit list on date consistent with ¶ 12 below.
- d. Proposed Jury Instructions:
 - i. Counsel are required to provide jury instructions to the Court only on the issues of law that are the subject of the trial. The Court will provide general boilerplate instructions on issues such as credibility, *etc.* Counsel shall also provide proposed jury interrogatories and verdict forms;
 - ii. Counsel shall exchange proposed jury instructions and interrogatories no later than twenty-one (21) calendar days prior to the Final Pretrial. Counsel shall then confer regarding their respective proposals and make diligent efforts to reach agreement upon a set of joint jury instructions;

- iii. No later than fourteen (14) calendar days prior to the Final Pretrial, a single joint submission shall be filed and delivered (or faxed) to the Court providing: (1) agreed upon instructions and interrogatories; (2) instructions and/or interrogatories and/or verdict form proposed by the plaintiffs, but opposed by defendants; and (3) instructions, interrogatories, and/or verdict form proposed by the defendants, but opposed by plaintiffs. The joint submission shall be provide to the Court as *one document*, divided by the above-described sections;
 - iv. All proposed instructions shall be supported by citations to legal authority. Any and all objections to proposed jury instructions must be accompanied by a statement or reasoning why the Court should not give such instruction. The objection must similarly be accompanied by a citation to legal authority. A mere statement of “objection” is not sufficient and will not be considered;
 - v. The single joint submission of jury instructions, interrogatories, and verdict form to the Court shall be made in writing *as well as produced on a 3.5” computer diskette*. The diskette should be formatted for an IBM compatible computer. The Court is equipped with WordPerfect 8.0. The diskette shall be delivered to chambers at the Final Pretrial.
- e. Voir Dire:

- i. The Court will conduct initial *voir dire* of the panel and of the individual panel members. The Court will thereafter allow one counsel for each party to question the panel briefly on issues not addressed by the Court;
- ii. Proposed *voir dire* questions for the Court's questioning are to be exchanged and a copy delivered (or faxed) to chambers no later than seven (7) calendar days prior to the Final Pretrial;
- iii. Proposed *voir dire* questions shall be provided to the Court on the same diskette as the Proposed Jury Instructions or the files shall be e-mailed to the Court at the time of filing.

11. Motions *in limine* on the first Bellwether Trial case:

- a. Any motions *in limine* shall be filed on or before March 29, 2010;
- b. Opposition to any motions *in limine* shall be filed on or before April 16, 2010;
- c. Any reply in further support of any motions *in limine* shall be filed on or before April 30, 2010;
- d. Oral argument, if any, on motions *in limine* will be set by subsequent Order of this Court;
- e. All other aspects of any motion *in limine* shall be governed by the Local Rules of this District.

12. Final Pretrial. Consistent with this Court's standing order, the Court will hold a Final Pretrial Conference for the first Bellwether trial case on May 12, 2010, and in consideration of any motions then pending. Stipulations of fact, a joint preliminary statement

(which is to be a neutral statement of the case), trial briefs, and witness and exhibit lists shall be filed in accordance with this Court's standing Trial Order with the modification that all Witness and Exhibit lists shall be submitted 14 days prior to the Final Pretrial (with any objections to witnesses or exhibits being due seven days before the Final Pretrial) instead of the time frames in the standing Trial Order.

- a. The Joint Preliminary Statement and Witness List shall also be provided to the Court on the same diskette as the Proposed Jury Instructions and Proposed *Voir Dire* questions.

13. The First Trial shall commence on May 24, 2010. Two weeks shall be allotted for this first trial, excluding jury deliberations, unless otherwise agreed to by the parties or by subsequent Order of this Court. The second trial shall commence four weeks after the conclusion of the first trial and shall also be allotted two weeks, unless otherwise agreed to by the parties or by subsequent Order of this Court.

* * *

15. Generic or general discovery, including depositions of Defendant's corporate witnesses identified pursuant to ¶ 7(b)(i) above, shall be permitted to continue during this pretrial case-specific discovery schedule, notwithstanding the case-specific fact discovery cut-off established in ¶ 7(a). Generic or general discovery also may continue to be conducted after any of the Bellwether trials reach jury verdict. Defendant's right to object to the use of generic discovery taken after March 10, 2010 in the first Bellwether trial is preserved, and Defendant may object to the continuation of generic discovery at any time, but these objections are not agreed to by Plaintiff.

For the convenience of the Court and the parties, the table attached as Attachment A summarizes the deadlines set in this Case Management Order. Attached as Attachment B is a table summarizing the changes between the deadlines originally set forth in Case Management Order No. 12 and this Amended Case Management Order No. 12. These tables are intended for informational purposes only, and the descriptions associated with the deadline do not in any way modify the terms of this CMO.

IT IS SO ORDERED.

Dated: September 17, 2009

s/Dan A. Polster

Honorable Dan Aaron Polster
United States District Judge

ATTACHMENT A TO CMO #12

Event	Deadline	Source
First Bellwether Trial Discovery Plan and Trial Order:		
Case Specific Fact Discovery Cutoff	February 17, 2010 (Wednesday)	CMO 12 ¶ 7(a)
Defendants identify Corporate Witnesses to be called at trial who have not been deposed and Defendants identify Corporate Witnesses who have been deposed to provide case-specific testimony about which (s)he has not been deposed.	November 19, 2009 (Thursday) November 19, 2009 (Thursday)	CMO 12 ¶ 7(b)(i) CMO 12 ¶ 7(b)(ii)
Plaintiffs identify Fact Witnesses to be called at trial who have not previously been identified and deposed.	January 19, 2010 (Tuesday)	CMO 12 ¶ 7(c)
Case-Specific Expert Discovery		
Deadline for Plaintiff to submit R 26(a)(2) expert reports.	October 13, 2009 (Tuesday)	CMO 12 ¶ 7(d)(i)
Deadline for Defendant to submit R 26(a)(2) expert reports.	December 7, 2009 (Monday)	CMO 12 ¶ 7(d)(ii)
Case Specific Expert Discovery Deadline	January 27, 2010 (Wednesday)	CMO 12 ¶ 7(d)(iii)
Case-Specific <i>Daubert</i> / Dispositive Motions Deadline	March 3, 2010 (Wednesday)	CMO 12 ¶ 9(a)
Opposition Briefs	March 24, 2010 (Wednesday)	CMO 12 ¶ 9(b)
Reply Briefs	April 7, 2010 (Wednesday)	CMO 12 ¶ 9(c)

Generic Expert Discovery		
Deadline for Plaintiff to submit R 26(a)(2) Generic Expert reports.	June 15, 2009 (Monday)	CMO 12 ¶ 8(b)(i)
Deadline for Defendant to submit R 26(a)(2) Generic Expert reports.	August 31, 2009 (Monday)	CMO 12 ¶ 8(b)(ii)
Deadline for Generic Expert Depositions	December 7, 2009 (Monday)	CMO 12 ¶ 8(b)(iii)
Deadline for Generic Expert <i>Daubert</i> Motions	February 5, 2010 (Friday)	CMO 12 ¶ 8(c)(i)
Opposition Briefs	March 1, 2010 (Monday)	CMO 12 ¶ 8(c)(ii)
Reply Briefs	March 19, 2010 (Friday)	CMO 12 ¶ 8(c)(iii)
Deposition Designations		
	March 29, 2010 (Monday)	CMO 12 ¶ 10(a)(i)
Objections and Counter designations	April 12, 2010 (Monday)	CMO 12 ¶ 10(a)(ii) & (iii)
Objections to Counter designations	April 22, 2010 (Thursday)	CMO 12 ¶ 10(a)(iv)
Submissions to Court regarding unresolved objections	April 27, 2010 (Tuesday)	CMO 12 ¶ 10(a)(v)
Motions in Limine		
	March 29, 2010 (Monday)	CMO 12 ¶ 11(a)
Opposition Briefs	April 16, 2010 (Friday)	CMO 12 ¶ 11(b)
Reply Briefs	April 30, 2010 (Friday)	CMO 12 ¶ 11(c)
Witness Lists and Exhibit Lists		
	April 28, 2010 (Wednesday)	CMO 12 ¶ 12

Jury Instructions		
Exchange among parties	April 21, 2010 (Wednesday)	CMO 12 ¶ 10(d)(ii)
Joint submission	April 28, 2010 (Wednesday)	CMO 12 ¶ 10(d)(iii)
Proposed Voir Dire Questions	May 5, 2010 (Wednesday)	CMO 12 ¶ 10(e)(ii)
Stipulations and Joint Preliminary Statement and Trial Briefs	May 7, 2010 (Friday)	CMO 12 ¶ 12
Final Pretrial Conference	May 12, 2010 (Wednesday)	CMO 12 ¶ 12
Trial	May 24, 2010 (Monday)	CMO 12 ¶ 13

ATTACHMENT B TO CMO #12

<u>Original Deadline</u>	<u>New Deadline</u>	<u>Event</u>
September 8, 2009 (Tuesday)	October 13, 2009 (Tuesday)	PSC's Case-Specific Expert Designation Deadline
October 1, 2009 (Thursday)	November 19, 2009 (Thursday)	Defendant identifies Corporate Witnesses to be called at trial who have not been deposed; and of those deposed who will provide case-specific testimony about which (s)he has not been deposed
October 19, 2009 (Monday)	December 7, 2009 (Monday)	Generic Expert Deposition Deadline
November 2, 2009 (Monday)	December 7, 2009 (Monday)	Defendant's Case-Specific Expert Designation Deadline
December 1, 2009 (Tuesday)	January 19, 2010 (Tuesday)	Plaintiffs identify Fact Witnesses to be called at trial not identified and deposed.
December 9, 2009 (Wednesday)	January 27, 2010 (Wednesday)	Case Specific Expert Deposition Deadline
December 18, 2009 (Friday)	February 5, 2010 (Friday)	Deadline for Generic Expert <i>Daubert</i> Motions
December 30, 2009 (Wednesday)	February 17, 2010 (Wednesday)	Case Specific Fact Discovery Cutoff
January 11, 2010 (Monday)	March 1, 2010 (Monday)	Generic Expert Opposition Briefs due
January 13, 2010 (Wednesday)	March 3, 2010 (Wednesday)	Case-Specific <i>Daubert</i> / Dispositive Motions Deadline
January 29, 2010 (Friday)	March 19, 2010 (Friday)	Generic Expert Discovery Reply Briefs due
February 3, 2010 (Wednesday)	March 24, 2010 (Wednesday)	Case-Specific Expert Discovery Opposition Briefs due
February 8, 2010 (Monday)	March 29, 2010 (Monday)	Deposition Designations and Motions in <i>Limine</i>
February 17, 2010 (Wednesday)	April 7, 2010 (Wednesday)	Case-Specific Expert Discovery Reply Briefs due
February 22, 2010 (Monday)	April 12, 2010 (Monday)	Objections and Counter deposition designations

<u>Original Deadline</u>	<u>New Deadline</u>	<u>Event</u>
February 26, 2010 (Friday)	April 16, 2010 (Friday)	Opposition Briefs to Motions in <i>Limine</i>
March 3, 2010 (Wednesday)	April 21, 2010 (Wednesday)	Parties Exchange Proposed Jury Instructions
March 4, 2010 (Thursday)	April 22, 2010 (Thursday)	Objections to Counter Deposition Designations
March 9, 2010 (Tuesday)	April 27, 2010 (Tuesday)	Submissions to Court regarding unresolved deposition designation objections
March 10, 2010 (Wednesday)	April 28, 2010 (Wednesday)	Witness and Exhibit Lists due; Joint submission of Jury Instructions
March 12, 2010 (Friday)	April 30, 2010 (Friday)	Reply Briefs to Motions in <i>Limine</i>
March 17, 2010 (Wednesday)	May 5, 2010 (Wednesday)	Objections to Witness and Exhibit Lists; Proposed Voir Dire Questions
March 19, 2010 (Friday)	May 7, 2010 (Friday)	Stipulations and Joint Preliminary Statement; Trial Briefs due
March 24, 2010 (Wednesday)	May 12, 2010 (Wednesday)	Final Pretrial Conference
April 6, 2010 (Tuesday)	May 24, 2010 (Monday)	1st MDL Trial