

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

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This Document Applies to All Cases:

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

1. Scope. This Case Management Order supersedes the parties' obligations set forth in Paragraph 7 of Case Management Order ("CMO") No. 8.

2. Strikes from Eligible Trial Pool Cases. The PSC and Defendants collectively shall each strike 5 cases from the opposing parties' 10 Eligible Trial Pool cases. The remaining cases shall constitute the group of potential trial cases for the parties' and the Court's consideration for selection as Bellwether Trial Cases. The parties shall exercise these strikes by the deadline set by the Court (presently August 4, 2009 under CMO No. 10).

3. Selection of Bellwether Trial Cases. After the parties each strike 5 cases selected by the opposing party in the Eligible Trial Pool pursuant to Paragraph 2 above, the parties will have one week (presently until August 11, 2009) to attempt to reach agreement as to the identity and order of the first 4 cases to be tried (these first 4 cases to be tried shall be the "Bellwether Trial Cases"). Of the 4 Bellwether Trial Cases, 2 shall be from Plaintiffs' remaining selections, and 2 shall be from Defendants' remaining selections.

4. Order of Bellwether Trial Cases. The first and third Bellwether Trial Cases to be scheduled for trial shall be from Plaintiffs' selections. The second and fourth Bellwether Trial

Cases to be scheduled for trial shall be from Defendants' selections. Mallinckrodt shall not be a party in the first Bellwether Trial Case tried.

5. Lack of Agreement on Bellwether Trial Case Selection. If by August 11, 2009 the parties cannot agree either on the selection of the Bellwether Trial Cases under Paragraph 3 or on the order of trials for the Bellwether Trial Cases under Paragraph 4, the parties shall submit their recommendations to the Court by no later than noon Eastern Time on August 14, 2009. The Court shall then select the identity and order of the Bellwether Trial Cases consistent with the terms of this Order and the Court's Minute Order of March 12, 2009 (ECF No. 302).

6. Waiver of *Lexecon* in Bellwether Trial Cases. Plaintiffs and those defendants named in the 20 eligible trial pool cases agree to waive *Lexecon* (personal jurisdiction) and venue for trial purposes in the Bellwether Trial Cases of the first four plaintiffs selected for trial in this Court pursuant to the trial selection protocol set forth in this Order. Any *Lexecon* and venue objections other than for the plaintiffs in the first 4 Bellwether Trial Cases are preserved. Bayer AG does not waive personal jurisdiction in any Eligible Trial Pool case. Any defendant named in one of the Bellwether Trial Cases, in accordance with the schedule for dispositive motions set forth in ¶ 9 below, may seek dismissal or summary judgment.

7. Schedule For First Bellwether Trial Case: Once the first trial case is identified it shall be subject to the following pretrial case-specific schedule:

- a. Remaining Fact Discovery: Case-Specific fact discovery for the first Bellwether trial shall be completed on or before December 30, 2009, 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 October 1, 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 October 1, 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 December 1, 2009.
- 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 September 8, 2009;
  - ii. The deadline for Defendants in the first Bellwether Trial to submit Rule 26(a)(2) expert reports shall be November 2, 2009;
  - iii. Depositions of case-specific experts shall be completed on or before December 9, 2009. 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 shall be served on counsel for the defendants on or before June 15, 2009;
  - ii. Defendants' Rule 26(a)(2) generic expert reports shall be served on the PSC on or before August 17, 2009;
  - iii. Depositions of generic experts shall be completed on or before October 19, 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 December 18, 2009;
  - ii. Opposition to any *Daubert* motion relating to generic expert issues in the first Bellwether Trial shall be filed on or before January 11, 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 January 29, 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 January 13, 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 February 3, 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 February 17, 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 February 8, 2010;

- ii. Any objections to deposition designations shall be served on the other party on or before February 22, 2010;
  - iii. Counter-designations shall be served on the other party on or before February 22, 2010;
  - iv. Objections to counter-designations shall be served on the other party on or before March 4, 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 March 9, 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, interrogatories and verdict form 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, interrogatories, and verdict form; (2) instructions, 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* in WordPerfect format. 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 or the files shall be e-mailed to the Court at the time of filing.

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 February 8, 2010;
- b. Opposition to any motions *in limine* shall be filed on or before February 26, 2010;
- c. Any reply in further support of any motions *in limine* shall be filed on or before March 12, 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 March 24, 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 or the files shall be e-mailed to the Court at the time of filing.

13. The First Trial shall commence on April 6, 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.

14. Case-specific pretrial schedules and the exact date on which the trial will commence for the second, third and fourth cases to be tried, as set forth above, will be set by subsequent Orders of this Court containing sequencing and time allotments for each event consistent with those set forth in this Order.

15. Plaintiffs may continue to take general or generic discovery (including depositions of Defendant's corporate witnesses identified pursuant to Paragraph 7(b)(i) above), notwithstanding the case-specific fact discovery deadline for the first Bellwether trial set forth in Paragraph 7(a). However, Defendants reserve the right to object to the use in the first Bellwether trial of generic discovery taken after January 20, 2010, and Plaintiff reserves the right to use in the first Bellwether trial generic discovery taken after January 20, 2010.

16. For the convenience of the Court and the parties, the table attached as Attachment A summarizes the deadlines set in this Case Management Order. This table is 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: May 12, 2009

/s/Dan Aaron Polster  
Honorable Dan Aaron Polster  
United States District Judge

**ATTACHMENT A TO CMO #12**

<b>Event</b>	<b>Deadline</b>	<b>Source</b>
Parties each strike five cases from Eligible Trial Pool	August 4, 2009 (Tuesday)	CMO 12 ¶ 2
Agreement on identity and order of bellwether trials	August 11, 2009 (Tuesday)	CMO 12 ¶ 3
If no agreement on identity/order of bellwether trial cases, submission of parties' recommendations to the Court	August 14, 2009 (Friday)	CMO 12 ¶ 5
<b>First Bellwether Trial Discovery Plan and Trial Order:</b>		
<b>Case Specific Fact Discovery Cutoff</b>	December 30, 2009 (Wednesday)	CMO 12 ¶ 7(a)
Defendants identify <b>Corporate Witnesses</b> to be called at trial who have not been deposed and Defendants identify <b>Corporate Witnesses</b> who have been deposed to provide case-specific testimony about which (s)he has not been deposed.	October 1, 2009 (Thursday)  October 1, 2009 (Thursday)	CMO 12 ¶ 7(b)(i)  CMO 12 ¶ 7(b)(ii)
Plaintiffs identify <b>Fact Witnesses</b> to be called at trial who have not previously been identified and deposed.	December 1, 2009 (Tuesday)	CMO 12 ¶ 7(c)
<b>Case-Specific Expert Discovery</b>		
Deadline for Plaintiff to submit R 26(a)(2) expert reports.	September 8, 2009 (Tuesday)	CMO 12 ¶ 7(d)(i)
Deadline for Defendant to submit R 26(a)(2) expert reports.	November 2, 2009 (Monday)	CMO 12 ¶ 7(d)(ii)
Case Specific Expert Discovery Deadline	December 9, 2009 (Wednesday)	CMO 12 ¶ 7(d)(iii)

<b>Case-Specific <i>Daubert</i> / Dispositive Motions Deadline</b>	January 13, 2010 (Wednesday)	CMO 12 ¶ 9(a)
Opposition Briefs	February 3, 2010 (Wednesday)	CMO 12 ¶ 9(b)
Reply Briefs	February 17, 2010 (Wednesday)	CMO 12 ¶ 9(c)
<b>Generic Expert Discovery</b>		
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 17, 2009 (Monday)	CMO 12 ¶ 8(b)(ii)
Deadline for Generic Expert Depositions	October 19, 2009 (Monday)	CMO 12 ¶ 8(b)(iii)
Deadline for Generic Expert <i>Daubert</i> Motions	December 18, 2009 (Friday)	CMO 12 ¶ 8(c)(i)
Opposition Briefs	January 11, 2010 (Monday)	CMO 12 ¶ 8(c)(ii)
Reply Briefs	January 29, 2010 (Friday)	CMO 12 ¶ 8(c)(iii)
<b>Deposition Designations</b>	February 8, 2010 (Monday)	CMO 12 ¶ 10(a)(i)
Objections and Counter designations	February 22, 2010 (Monday)	CMO 12 ¶ 10(a)(ii) & (iii)
Objections to Counter designations	March 4, 2010 (Thursday)	CMO 12 ¶ 10(a)(iv)
Submissions to Court regarding unresolved objections	March 9, 2010 (Tuesday)	CMO 12 ¶ 10(a)(v)
<b>Motions in Limine</b>	February 8, 2010 (Monday)	CMO 12 ¶ 11(a)
Opposition Briefs	February 26, 2010	CMO 12 ¶ 11(b)

	(Friday)	
Reply Briefs	March 12, 2010 (Friday)	CMO 12 ¶ 11(c)
<b>Witness Lists and Exhibit Lists</b>	March 10, 2010 (Wednesday)	CMO 12 ¶ 12
Objections	March 17, 2010	CMO 12 ¶ 12
<b>Jury Instructions</b>		
Exchange among parties	March 3, 2010 (Wednesday)	CMO 12 ¶ 10(d)(ii)
Joint submission	March 10, 2010 (Wednesday)	CMO 12 ¶ 10(d)(iii)
<b>Proposed Voir Dire Questions</b>	March 17, 2010 (Wednesday)	CMO 12 ¶ 10(e)(ii)
<b>Stipulations and Joint Preliminary Statement and Trial Briefs</b>	March 19, 2010 (Friday)	CMO 12 ¶ 12
<b>Final Pretrial Conference</b>	March 24, 2010 (Wednesday)	CMO 12 ¶ 12
<b>Trial</b>	April 6, 2010 (Monday)	CMO 12 ¶ 13