

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOSTAVAX (ZOSTER VACCINE  
LIVE) PRODUCTS LIABILITY  
LITIGATION

MDL NO. 2848

CIVIL ACTION NO. 18-md-2848

PRETRIAL ORDER NO. 82  
(Bellwether Selection and Scheduling Order)

**I. SCOPE OF ORDER**

In furtherance of the effective and efficient case management of complex litigation, this Order will govern the guidelines and procedures for selecting bellwether cases as part of *In Re: Zostavax (Zoster Vaccine Live) Products Liability Litigation* (“MDL No. 2848”). This Order will further govern the guidelines and procedures for case-specific discovery to be conducted in the bellwether cases, some of which will be proposed and designated as bellwether trial cases. The guidelines and procedures set forth herein will apply to all actions that are a part of MDL No. 2848, including those transferred to MDL No. 2848 by the Judicial Panel on Multidistrict Litigation (“JPML”), those directly filed in this Court whether pursuant to PTO 22 (Direct Filing Order) or not, and those removed to this Court.

Cases eligible for bellwether selection will be separated into the following two groups, and a protocol for eligibility and selection of discovery cases as well as a schedule for discovery and motion practice will apply to each group:

1. Group A: Plaintiff/plaintiff-decedent received the Zostavax vaccine and subsequently developed: (a) herpes zoster (“shingles”); (b) herpes zoster oticus; (c) Ramsay Hunt syndrome”); (d) herpes zoster ophthalmicus; (e) zoster sine herpette (“shingles without rash”); (f) herpes zoster encephalitis; and/or (g) herpes zoster meningitis. The aforementioned injuries include any sequelae that may flow from the injury, including, but not limited to, postherpetic neuralgia (“PHN”) and allodynia. To qualify under categories (e) through (g), an affirmative diagnosis of herpes zoster or zoster sine herpette must be contained within the plaintiff/plaintiff-decedent’s medical records from a treating medical professional.
2. Group B - Plaintiff/Plaintiff-decedent received the Zostavax vaccination and alleges that he/she subsequently developed an injury other than those included in Group A.

## **II. GROUP A BELLWETHER DISCOVERY AND TRIAL CASES**

### **A. CASE ELIGIBILITY FOR GROUP A BELLWETHER DISCOVERY AND TRIAL**

A case may be eligible for selection as a Group A Bellwether Discover Case only where a Plaintiff Fact Sheet (“PFS) and executed authorizations were due or served pursuant to PTO 46 on or before April 30, 2019 *or* plaintiff-specific fact discovery occurred prior to the date this MDL was created (August 2, 2018).

### **B. PROTOCOL FOR SELECTION OF GROUP A BELLWETHER DISCOVERY AND TRIAL CASES**

1. On or before May 24, 2019, Plaintiffs’ Executive Committee and Defendants’ Liaison Counsel will exchange selections of eight (8) cases from Group A for case-specific bellwether discovery (“Group A Bellwether Discovery Cases”) for a total of sixteen (16) cases. The parties should select cases that they have a good-faith belief fit the criteria of Group A and are representative cases that should be robustly discovered and then taken to trial.

2. Prior to the exchange of the parties’ respective eight (8) cases, the parties will obtain *Lexecon* waivers from their clients in those eight (8) cases. A case in which a *Lexecon* waiver has not been obtained by the selecting party may not be submitted as a Group A Bellwether Discovery Case.

3. If necessary, and before May 31, 2019, the parties will meet and confer in good faith to avoid any duplication in their respective selections of Group A Bellwether Discovery Cases and to resolve any differences between the parties as to whether a specific case meets the criteria of Group A. To the extent the parties are unable to resolve differences regarding whether a case meets the criteria of Group A they may seek the Court's guidance to resolve the dispute.

4. On or before May 31, 2019, Plaintiffs' Executive Committee and Defendants' Liaison Counsel will jointly file with the Court their respective selections of eight (8) Group A Bellwether Discovery Cases, for a total of sixteen (16) cases. Pursuant to the schedule and procedures described below in Section II(C), Core Fact Discovery will commence for the Group A Bellwether Discovery Cases on June 7, 2019.

5. Between May 24, 2019 and June 7, 2019, individual counsel for the plaintiff(s) in the eight (8) cases selected by Defendants, in good faith, will attempt to obtain *Lexecon* waivers from their respective client(s). Similarly, between May 24, 2019 and June 7, 2019, defense counsel, in good faith, will attempt to obtain *Lexecon* waivers from their clients in the eight (8) cases selected by the Plaintiff Executive Committee. On or before June 7, 2019, the parties will notify the Court and Liaison Counsel for the other side whether such a waiver has been obtained.

6. If, prior to November 29, 2019, any Group A Bellwether Discovery Case is voluntarily dismissed by plaintiff(s), other than because of settlement, Defendants' Liaison Counsel may select a replacement case for inclusion in the Group A Bellwether Discovery Cases. If, prior to November 29, 2019, any Group A Bellwether Discovery Case is settled by Defendants, Plaintiffs' Executive Committee may select a replacement case for inclusion in the Group A Bellwether Discovery Cases. If, prior to November 29, 2019, any Group A Bellwether Discovery Case is

dismissed after motion practice initiated by Defendants, the party that selected the dismissed case may select a replacement case for inclusion in the Group A Bellwether Discovery Cases. In addition, in the event that cases selected as Group A Bellwether Discovery Cases are dismissed before November 29, 2019, the Court may modify the below deadlines depending upon the circumstances of the dismissal or otherwise adjust the balance of selections or the terms of this PTO to ensure the integrity of the bellwether process.

7. As described in Section II(C) below, after Core Fact Discovery occurs for the sixteen (16) Group A Bellwether Discovery Cases, the Plaintiffs' Executive Committee and Defendants' Liaison Counsel will each simultaneously identify three (3) cases for trial consideration, for a total of six (6) cases. The six (6) cases selected will be referred to as the "Group A Bellwether Trial Pool Cases." The parties will make these selections on November 29, 2019 and will jointly notify the Court of the six (6) cases that day.

8. Following further discovery and workup of the six (6) Group A Bellwether Trial Pool Cases, which will include expert discovery, *Daubert* motion practice, and dispositive motion practice, three cases will be selected as the Group A Bellwether Trial Pool Cases for bellwether trials. One case will be selected by the Plaintiffs' Executive Committee, one case will be selected by the Defendants' Liaison Counsel, and one case will be selected by the Court following briefing by the parties by no later than August 31, 2020. The three Group A Bellwether Trial Pool Cases will proceed to final pretrial and trial as set forth below in Section II(C).

9. In the event that a case selected for the Group A Bellwether Trial Pool Cases or for trial is dismissed before trial, the Court may at its discretion allow the selection of a replacement case by the Plaintiffs Executive Committee or Defendants' Liaison Counsel depending upon the

circumstances of the dismissal or otherwise adjust the balance of selections or the terms of this PTO to ensure the integrity of the bellwether process.

10. The bellwether cases that are initially selected and those that are ultimately picked as the initial trials are to be representative cases.

11. This Order may be modified or amended for good cause shown, after appropriate notice and opportunity to be heard is provided to the affected parties, when the Court believes the interest of justice requires modification.

**C. SCHEDULE FOR GROUP A BELLWETHER DISCOVERY AND TRIAL CASES<sup>1</sup>**

May 24, 2019	Plaintiffs' Executive Committee and Defendants' Liaison Counsel will exchange lists proposing eight (8) representative plaintiff candidates for the Group A Bellwether Discovery Cases, for a total of sixteen (16) cases, to proceed through case-specific discovery.
May 31, 2019	As part of one filing with this Court, the parties will jointly identify the sixteen (16) Group A Bellwether Discovery Cases.
June 7, 2019	The parties will notify the Court and Liaison Counsel for the other side whether they have <i>Lexecon</i> waivers for the eight (8) cases selected by the other side. Core Fact Discovery will commence for the sixteen (16) Group A Bellwether Discovery Cases. Core Fact Discovery will include no more than four (4) case-specific fact depositions noticed by each party per case, for a total of eight (8) case-specific fact depositions per case, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. <sup>2</sup>

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<sup>1</sup> The deadlines in Section II(C) will apply only to those cases selected as Group A Bellwether Discovery Cases.

<sup>2</sup> As part of Core Fact Discovery, each party in a Group A Bellwether Discovery Case may only notice two (2) case-specific fact depositions of current or former employees of Merck & Co., Inc. and Merck Sharp & Dohme Corp, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. If the non-noticing party

September 15, 2019	Deadline to serve interrogatories and requests for production related to case-specific fact discovery for the sixteen (16) Group A Bellwether Discovery Cases.
November 1, 2019	Deadline for any motions to compel related to case-specific fact discovery for the sixteen (16) Group A Bellwether Discovery Cases. Later-filed motions will be considered only upon a showing of good cause.
November 15, 2019	Completion of all Core Fact Discovery for the sixteen (16) Group A Bellwether Discovery Cases.
November 29, 2019	The parties will simultaneously each identify three (3) Group A Bellwether Trial Pool Cases from the Group A Bellwether Discovery Cases for trial consideration and will jointly notify the Court of the six (6) Group A Bellwether Trial Pool Cases that day. Additional Fact Discovery will commence as to the six (6) Group A Bellwether Trial Pool Cases that day, which will include no more than three (3) additional case-specific fact depositions noticed by each party per case for a total of six (6) additional case-specific fact depositions per case, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. <sup>3</sup>
December 6, 2019	Deadline to serve interrogatories and requests for production related to case-specific fact discovery in the six (6) Group A Bellwether Trial Pool Cases.
January 17, 2020	Deadline for any motions to compel related to case-specific fact discovery for the six (6) Group A Bellwether Trial Pool Cases. Later-filed motions will be considered only upon a showing of good cause.
January 31, 2020	Completion of all Additional Fact Discovery in the six (6) Group A Bellwether Trial Pool Cases.

disputes that the designated deponent has information that is case-specific to the particular Group A Bellwether Discovery Case, the non-noticing party may challenge the notice within five (5) business days by moving for a protective order. The parties must meet-and-confer in good faith prior to the filing of the motion.

<sup>3</sup> As part of Additional Fact Discovery, each party in a Group A Bellwether Trial Pool Case may only notice two (2) additional case-specific fact depositions of current or former Merck employees, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. If the non-noticing party disputes that the designated deponent has information that is case-specific to the particular Group A Bellwether Discovery Case, the non-noticing party may challenge the notice within five (5) business days by moving for a protective order. The parties must meet-and-confer in good faith prior to the filing of the motion.

March 1, 2020	Plaintiff to serve expert reports in the six (6) Group A Bellwether Trial Pool Cases.
April 1, 2020	Defendants to serve expert reports in the six (6) Group A Bellwether Trial Pool Cases.
May 1, 2020	Rebuttal reports due, if any, in the six (6) Group A Bellwether Trial Pool Cases.
June 15, 2020	Deadline for expert depositions in the six (6) Group A Bellwether Trial Pool Cases.
July 1, 2020	<i>Daubert</i> motions and dispositive motions due in the six (6) Group A Bellwether Trial Pool Cases.
July 31, 2020	Opposition briefs to <i>Daubert</i> motions and dispositive motions due in the six (6) Group A Bellwether Trial Pool Cases.
August 19, 2020	Reply briefs to <i>Daubert</i> motions and dispositive motions due in the six (6) Group A Bellwether Trial Pool Cases.
TBD	Oral argument on <i>Daubert</i> motions and dispositive motions in the six (6) Group A Bellwether Trial Pool Cases, at the discretion of the Court.
August 31, 2020	Selection of three (3) trial cases out of the six (6) Group A Bellwether Trial Pool Cases, and the order in which they will proceed to trial.
November 9, 2020	Group A Bellwether Trial Case No. 1 will commence.
January 11, 2021	Group A Bellwether Trial Case No. 2 will commence.
March 15, 2021	Group A Bellwether Trial Case No. 3 will commence.

The Court will set all final pre-trial schedules and deadlines for the final three Group A Bellwether Trial Cases, which shall include schedules and deadlines for the following: (1) motions *in limine*, oppositions, replies, and argument(s), if so determined by the Court; (2) deposition designations, counter designations and objections, and objections to counter designations and reply designations; (3) fact witness and expert witness lists; (4) exhibit lists designations and objections; (5) proposed jury instructions; (5) proposed *voir dire* questions; and (6) a date for a final pre-trial conference; and (6) other deadlines and hearings as the Court requires.

### III. GROUP B BELLWETHER DISCOVERY AND TRIAL CASES

A. **CASE ELIGIBILITY FOR GROUP B BELLWETHER DISCOVERY AND TRIAL**

A case may be eligible for selection as a Group B bellwether case only where a Plaintiff Fact Sheet (“PFS) and executed authorizations were due or served pursuant to PTO 46 on or before October 29, 2019 *or* plaintiff-specific fact discovery occurred prior to the date this MDL was created (August 2, 2018).

B. **PROTOCOL FOR SELECTION OF GROUP B BELLWETHER DISCOVERY AND TRIAL CASES**

1. On or before November 26, 2019, Plaintiffs’ Executive Committee and Defendants’ Liaison Counsel will exchange selections of four (4) cases from Group B for case-specific bellwether discovery (“Group B Bellwether Discovery Cases”) for a total of eight (8) cases. The parties should select cases that they have a good-faith belief fit the criteria of Group B and are representative cases that should be robustly discovered and then taken to trial.

2. Prior to the exchange of the parties’ respective four (4) cases, the parties will obtain *Lexecon* waivers from their clients in those four (4) cases. A case in which a *Lexecon* waiver has not been obtained by the selecting party may not be submitted as a Group B Bellwether Discovery Case.

3. If necessary, and before December 3, 2019, the parties will meet and confer in good faith to avoid any duplication in their respective selections of Group B Bellwether Discovery Cases and to resolve any differences between the parties as to whether a specific case meets the criteria of Group B. To the extent the parties are unable to resolve differences regarding whether a case meets the criteria of Group B they may seek the Court’s guidance to resolve the dispute.

4. On or before December 3, 2019, Plaintiffs’ Executive Committee and Defendants’ Liaison Counsel will jointly file with the Court their respective selections of four (4) Group B



Bellwether Discovery Cases, for a total of eight (8) cases. Pursuant to the schedule and procedures described below in Section III(C), Core Fact Discovery will commence for the Group B Bellwether Discovery Cases on December 10, 2019.

5. Between November 26, 2019 and December 10, 2019, individual counsel for the plaintiff(s) in the four (4) cases selected by Defendants, in good faith, will attempt to obtain *Lexecon* waivers from their respective client(s). Similarly, between November 26, 2019 and December 10, 2019, defense counsel, in good faith, will attempt to obtain *Lexecon* waivers from their clients in the four (4) cases selected by the Plaintiff Executive Committee. On or before December 10, 2019, the parties will notify the Court and Liaison Counsel for the other side whether such a waiver has been obtained.

6. If, prior to May 29, 2020, any Group B Bellwether Discovery Case is voluntarily dismissed by plaintiff(s), other than because of settlement, Defendants' Liaison Counsel may select a replacement case for inclusion in the Group B Bellwether Discovery Cases. If, prior to May 29, 2020, any Group B Bellwether Discovery Case is settled by Defendants, Plaintiffs' Executive Committee may select a replacement case for inclusion in the Group B Bellwether Discovery Cases. If, prior to May 29, 2020, any Group B Bellwether Discovery Case is dismissed after motion practice initiated by Defendants, the party that selected the dismissed case may select a replacement case for inclusion in the Group B Bellwether Discovery Cases. In addition, in the event that cases selected as Group B Bellwether Discovery Cases are dismissed before May 29, 2020, the Court may modify the below deadlines depending upon the circumstances of the dismissal or otherwise adjust the balance of selections or the terms of this PTO to ensure the integrity of the bellwether process.

7. As described in Section III(C) below, after Core Fact Discovery occurs for the eight (8) Group B Bellwether Discovery Cases, the Plaintiffs' Executive Committee and Defendants' Liaison Counsel will each simultaneously identify two (2) cases for trial consideration, for a total of four (4) cases. The four (4) cases selected will be referred to as the "Group B Bellwether Trial Pool Cases." The parties will make these selections on May 29, 2020 and will jointly notify the Court of the four (4) cases that day.

8. Following further discovery and workup of the four (4) Group B Bellwether Trial Pool Cases, which will include expert discovery, *Daubert* motion practice, and dispositive motion practice, two (2) cases will be selected as the Group B Bellwether Trial Pool Cases for bellwether trials. Both cases will be selected by the Court following briefing by the parties by no later than March 31, 2021. The two (2) Group B Bellwether Trial Pool Cases will proceed to final pretrial and trial as set forth below in Section III(C).

9. In the event that a case selected for the Group B Bellwether Trial Pool Cases or for trial is dismissed before trial, the Court may at its discretion allow the selection of a replacement case by the Plaintiffs Executive Committee or Defendants' Liaison Counsel depending upon the circumstances of the dismissal or otherwise adjust the balance of selections or the terms of this PTO to ensure the integrity of the bellwether process.

10. The bellwether cases that are initially selected and those that are ultimately picked as the initial trials are to be representative cases.

11. This Order may be modified or amended for good cause shown, after appropriate notice and opportunity to be heard is provided to the affected parties, when the Court believes the interest of justice requires modification.

C. **SCHEDULE FOR GROUP B BELLWETHER DISCOVERY AND TRIAL CASES<sup>4</sup>**

November 26, 2019	Plaintiffs' Executive Committee and Defendants' Liaison Counsel will exchange lists proposing four (4) representative plaintiff candidates for the Group B Bellwether Discovery Cases, for a total of eight (8) cases, to proceed through case-specific discovery.
December 3, 2019	As part of one filing with this Court, the parties will jointly identify the eight (8) Group B Bellwether Discovery Cases.
December 10, 2019	The parties will notify the Court and Liaison Counsel for the other side whether they have <i>Lexecon</i> waivers for the four (4) cases selected by the other side. Core fact discovery will commence for the eight (8) Group B Bellwether Discovery Cases. Core Fact Discovery will include no more than four (4) case-specific fact depositions noticed by each party per case, for a total of eight (8) case-specific fact depositions per case, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. <sup>5</sup>
March 15, 2020	Deadline to serve interrogatories and requests for production related to case specific fact discovery in the eight (8) Group B Bellwether Discovery Cases.
May 1, 2020	Deadline for any motions to compel related to case specific fact discovery related to the eight (8) Group B Bellwether Discovery Cases. Later-filed motions will be considered only upon a showing of good cause.

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<sup>4</sup> The deadlines in Section III(C) will only apply to the Group B Bellwether Discovery and Trial Cases.

<sup>5</sup> As part of Core Fact Discovery, each party in a Group B Bellwether Discovery Case may only notice two (2) case-specific fact depositions of current or former employees of Merck & Co., Inc. and Merck Sharp & Dohme Corp, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. If the non-noticing party disputes that the designated deponent has information that is case-specific to the particular Group B Bellwether Discovery Case, the non-noticing party may challenge the notice within five (5) business days by moving for a protective order. The parties must meet-and-confer in good faith prior to the filing of the motion.

May 15, 2020	Completion of all core fact discovery for the eight (8) Group B Bellwether Discovery Cases.
May 29, 2020	The Parties will simultaneously each identify a list of two (2) Group B Bellwether Trial Pool Cases from the Group B Bellwether Discovery Cases for trial consideration and will jointly notify the Court of the four (4) Group B Bellwether Trial Pool Cases that day. Additional Fact Discovery will commence as to the four (4) Group B Bellwether Trial Pool Cases that day, which will include no more than three (3) additional case-specific fact depositions noticed by each party per case for a total of six (6) additional case-specific fact depositions per case, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. <sup>6</sup>
June 8, 2020	Deadline to serve interrogatories and requests for production related to case specific fact discovery in the four (4) Group B Bellwether Trial Pool Cases.
July 17, 2020	Deadline for any motions to compel related to case specific fact discovery related to the four (4) Group B Bellwether Trial Pool Cases. Later-filed motions will be considered only upon a showing of good cause.
July 31, 2020	Completion of all Additional Fact Discovery in the four (4) Group B Bellwether Trial Pool Cases.
September 1, 2020	Plaintiff to serve expert reports in the four (4) Group B Bellwether Trial Pool Cases.
October 1, 2020	Defendants to serve expert reports in the four (4) Group B Bellwether Trial Pool Cases.
November 2, 2020	Rebuttal reports due, if any, in the four (4) Group B Bellwether Trial Pool Cases.
December 15, 2020	Deadline for expert depositions in the four (4) Group B Bellwether Trial Pool Cases.
January 11, 2021	<i>Daubert</i> motions and dispositive motions due in the four (4) Group B


<sup>6</sup> As part of Additional Fact Discovery, each party in a Group B Bellwether Trial Pool Case may only notice two (2) additional case-specific fact depositions of current or former Merck employees, unless the Court grants leave for additional depositions to be taken or the parties agree that additional depositions are appropriate. If the non-noticing party disputes that the designated deponent has information that is case-specific to the particular Group B Bellwether Discovery Case, the non-noticing party may challenge the notice within five (5) business days by moving for a protective order. The parties must meet-and-confer in good faith prior to the filing of the motion.

	Bellwether Trial Pool Cases.
February 11, 2021	Opposition briefs to <i>Daubert</i> motions and dispositive motions due in the four (4) Group B Bellwether Trial Pool Cases.
March 4, 2021	Reply briefs to <i>Daubert</i> motions and dispositive motions due in the four (4) Group B Bellwether Trial Pool Cases.
TBD	Oral argument on <i>Daubert</i> motions and dispositive motions in the four (4) Group B Bellwether Trial Pool Cases, at the discretion of the Court.
March 31, 2021	Selection of two (2) trial cases out of the four (4) Group B Bellwether Trial Pool Cases, and the order in which they will proceed to trial.
May 31, 2021	Group B Bellwether Trial Case No. 1 will commence.
July 12, 2021	Group B Bellwether Trial Case No. 2 will commence.

The Court will set all final pre-trial schedules and deadlines for the final two Group B Bellwether Trial Cases, which shall include schedules and deadlines for the following: (1) motions *in limine*, oppositions, replies, and argument(s), if so determined by the Court; (2) deposition designations, counter designations and objections, and objections to counter designations and reply designations; (3) fact witness and expert witness lists; (4) exhibit lists designations and objections; (5) proposed jury instructions; (5) proposed *voir dire* questions; and (6) a date for a final pre-trial conference; and (6) other deadlines and hearings as the Court requires.

It is so **ORDERED**.

**BY THE COURT:**

  
 Harvey Bartle, III, J.  
 January 30, 2019