

IN THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
PHILADELPHIA COURT OF COMMON PLEAS  
TRIAL DIVISION – CIVIL

IN RE: XARELTO® PRODUCTS LIABILITY  
LITIGATION

*This documents Relates to All Actions*

JANUARY TERM 2015

No. 02349

**CASE MANAGEMENT ORDER NO. 11**  
**(Bellwether Case Selection and Scheduling)**

**THIS MATTER**, having been opened to the Court by counsel for the parties, and the parties having consented, **IT IS**, on this 14<sup>th</sup> day of Oct 2016, hereby **ORDERED** as follows:

**I. BELLWETHER CASE SELECTION**

1. In order to advance the objective of minimizing expenses, eliminating the duplication of effort and promoting judicial economy, the initial trials in this litigation shall be organized as follows:

In Re: Xarelto Litigation-ORDER



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J. STEWART

**A. THE “CORE-DISCOVERY POOL”**

2. The following cases constitute the first “*Core Discovery Pool*” which will be created as follows:

<b>Trial Category</b>	<b>Indication/Injury category</b>	<b>Total Number of cases</b>	<b>Plaintiff Picks</b>	<b>Defendants Picks</b>	<b>Random Cases (Selected by Brown Greer)</b>
1	Plaintiff took Xarelto® in order to reduce the risk of stroke and systemic embolism due to nonvalvular atrial fibrillation and alleges a gastrointestinal or rectal bleed or death due to a gastrointestinal or rectal bleed and was between the ages of 50 and 90 at the date of the alleged event.	10	4	4	2
2	Plaintiff took Xarelto® to treat deep vein thrombosis (DVT), to treat pulmonary embolism (PE), to reduce the risk of recurrence of DVT or PE, or for the prophylaxis of DVT, which may lead to PE in patients undergoing knee or hip replacement surgery and alleges a gastrointestinal or rectal bleed or death due to a gastrointestinal or rectal bleed and was between the ages of 40 and 80 at the date of the alleged event.	8	3	3	2
3	Plaintiff took Xarelto® in order to reduce the risk of stroke and systemic embolism due to nonvalvular atrial fibrillation and alleges a brain bleed/hemorrhagic stroke or death due to a brain bleed/hemorrhagic stroke and was between the ages of 50 and 90 at the date of the alleged event	6	2	2	2

**B. ELIGIBILITY FOR INCLUSION IN THE “CORE-DISCOVERY POOL”**

3. Those Plaintiffs who have met the core requirements for the Plaintiff Fact Sheet (“PFS”) are eligible for selection in the discovery pool. The core requirements for the PFS are identified in CMO-6 as the Core Case Information requested in Section 1 of the PFS, including copies of prescription and/or pharmacy records demonstrating use of Xarelto as well as medical records demonstrating an alleged injury. Plaintiffs with a PFS that was core deficient as of September 26, 2016 will not be included in the *Core-Discovery Pool*.

4. If it has not already occurred, within 48 hours of the entry of this Order, Brown Greer shall provide a list to the Liaison Counsel of the cases that are eligible for inclusion into the *Core-Discovery Pool* based on the categories specified in this Order.

5. The parties shall meet and confer concerning whether cases should be added or subtracted from that list within 72 hours of its production by Brown Greer and the Plaintiffs shall have an opportunity to dispute and/or cure the deficiency or seek leave of Court on the issue of the cases eligibility for inclusion into the *Core-Discovery Pool*.

6. The *Core-Discovery Pool* case selection process shall be completed by October 31, 2016. The parties agree that this deadline may be modified by written agreement of the parties and with leave of Court.

7. If a *Core-Discovery Pool* case is dismissed for any reason, the dismissed case will be replaced by another case from the same *Trial Category*. The replacement case will be selected in the same manner as the dismissed case. For the sake of clarity, the preceding sentence means that the party that selected the original case for inclusion into the *Core-Discovery Pool* shall replace a dismissed or settled case (*i.e.*, if the Plaintiff picked the case then the Plaintiff shall select a replacement; if the Defendants selected the case then the Defendants shall select the

replacement. If the case was randomly selected, then it will be replaced by random selection. For cases dismissed for whatever reason after December 7, 2016, no case will be substituted.

**C. “CORE-DISCOVERY”**

8. “*Core-Discovery*” in the cases selected for the *Core-Discovery Pool* shall begin immediately upon selection of the *Core-Discovery Pool* cases and shall be completed by April 3, 2017.<sup>1</sup>

9. The parties agree that the discovery deadline above may be modified by written agreement of the parties and with leave of Court.

10. *Core-Discovery* in the cases in the *Core-Discovery Pool* cases consists of only the following depositions:

- a) Plaintiff and spouse or significant other;
- b) The health care provider(s) who prescribed Xarelto® to the Plaintiff;
- c) One physician who provided care related to Plaintiff’s alleged physical injuries; and
- d) One detail representative who detailed Plaintiff’s prescriber before the prescription(s) at issue.<sup>2</sup>

11. Plaintiffs will identify the one detail representative per case whose custodial file and deposition they want in connection with the *Core-Discovery Pool* cases by November 14, 2016. The custodial file for each such rep shall be produced on a rolling basis, and to the extent possible, custodial files for detail representatives in *Trial Category 1* cases will be produced first, custodial files for detail representatives in *Trial Category 2* cases will be produced next, and

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<sup>1</sup> The parties will cooperate in scheduling depositions and recognize that due to scheduling and rolling production of documents, the depositions of detail representatives may need to occur after this date.

<sup>2</sup> The Plaintiff may opt to defer taking this detail representative deposition during the *Core-Discovery* Phase. If the Plaintiff does so defer, the Plaintiff will be entitled to take one additional deposition of a detail representative when the case is scheduled for trial or selected to be in a *Trial-Pool*.

custodial files for detail representatives in *Trial Category 3* cases will be produced last. The production of custodial files for detail representatives will be completed no later than February 7, 2017.

12. **Questioning physicians in their depositions:**<sup>3</sup>

a) **Prescribing Physicians:** Plaintiffs' counsel shall be the first to question the prescribing physician, followed by the defense counsel;

b) **Non-prescribing treating physicians:** the order of questioning non-prescribing treating physicians will alternate between Plaintiff and Defendants, based on an alphabetical ordering of the *Core-Discovery Pool* cases with the Plaintiffs questioning first in the first *Core-Discovery Pool* case listed by alphabetical order.

13. **Communications with Healthcare Providers in Core Discovery Pool Cases:**<sup>4</sup>

a) Plaintiffs are permitted to engage in *ex parte* communications with Plaintiffs' prescribing/treating healthcare providers and are permitted to provide prescribing/treating healthcare providers with documents not previously seen by said healthcare providers and may inquire into how said documents might have changed the healthcare providers' prescribing / treating decisions, if at all.

b) Documents that may be provided include:

- i. research documents, scientific studies, and related materials;
- ii. internal Defendant documents;
- iii. documents identified as confidential or highly confidential and subject to Case Management Order No.5; and,
- iv. product warnings or labels.

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<sup>3</sup> This paragraph is entered pursuant to the direction of the Court. Defendants' objections are noted.

<sup>4</sup> This paragraph is entered pursuant to the direction of the Court. Defendants' objections are noted.

c) Documents provided to prescribing/treating healthcare providers during any *ex parte* communications may not contain notes, highlighting, underlining, Plaintiff supplied redactions or any other markings that modify the document or direct a reader's attention to a particular portion of the document.

d) In the event Plaintiffs' counsel has communicated with the healthcare provider prior to the deposition, Plaintiffs must provide the Defendants precise designations, descriptions or copies of all documents provided to any such healthcare provider during such *ex parte* communications ("ex parte materials") at least forty-eight (48) hours prior to the deposition of any such witness. In the event the *ex parte* communication occurs less than 48 hours prior to the deposition, Plaintiffs shall provide the *ex parte* materials as soon as is practically possible before the deposition.

f) Plaintiffs must comply with the requirements of the *Case Management Order No. 5* when providing prescribing/treating healthcare providers with any documents deemed confidential or highly confidential pursuant to *Case Management Order No. 5*.

14. In the event either party seeks *Core-Discovery* beyond these core discovery depositions in an individual Plaintiff's case, agreement, in writing, between Trial Counsel must be obtained or, if no agreement can be obtained after a good-faith attempt, leave of Court or the Special Master must be obtained upon a showing of good cause. Other than the provisions set forth in paragraph 12 above regarding the questioning of physicians in their depositions and paragraph 13 regarding the communications with Healthcare Providers in *Core-Discovery Pool* Cases the limitations on discovery set forth herein do not apply to any case selected for trial pursuant to paragraph 23-24 *infra*. The limitations set forth above do not apply to trial preservation depositions.

15. Immediately upon designation of any case as a *Core-Discovery Pool* case, Plaintiffs shall review the status of the PFS and all medical authorizations obtained from Plaintiffs, and amend the PFS and/or update any medical authorizations that need amending or updating within ten (10) days of any case being designated as a *Core-Discovery Pool* case. In addition, Plaintiffs shall cooperate with Defendants and obtain new or location specific authorizations as requested by Defendants within ten (10) days of being requested to do so.

16. Within thirty (30) days of receiving an amended or updated PFS as set forth in paragraph 15 above, the Defendants shall provide the Plaintiff with an updated DFS.

17. Absent a showing of good cause or upon agreement of the parties, no discovery shall be allowed in the cases that are not included in the *Core-Discovery Pool* until further Order of this Court.

**IV. TRIAL SELECTIONS**

18. At the conclusion of the *Core-Discovery* period, the parties shall have the right to exercise strikes of *Core-Discovery Pool* cases as follows, to get to a *Trial-Pool* of ten (10) cases:

<b>Trial Category</b>	<b>Number of Strikes per Side</b>
1	<ul style="list-style-type: none"> <li>• 3 for Plaintiffs</li> <li>• 3 for Defendants</li> </ul>
2	<ul style="list-style-type: none"> <li>• 2 for Plaintiffs</li> <li>• 2 for Defendants</li> </ul>
3	<ul style="list-style-type: none"> <li>• 2 for Plaintiffs</li> <li>• 2 for Defendants</li> </ul>

19. Strikes must be exercised by April 10, 2017, and shall be communicated to the other party via E-mail. The parties shall have a meet and confer on strikes after exchanging lists. After that meet and confer, a final list of *Trial-Pool Cases* shall be submitted to the Court.

20. The parties shall notify each other and the Court by E-mail of their respective selected trial picks in each trial category on April 24, 2017. Cases shall be set for trial starting September 29, 2017, at two week intervals as follows:

<b>Trial Date</b>	<b>Trial Category</b>	<b>Source of Case</b>
September 29, 2017	1	Plaintiff Pick
October 13, 2017	1	Defense Pick
October 27, 2017	2	Plaintiff Pick
November 10, 2017	2	Defense Pick
November 27, 2017	3	Plaintiff Pick
December 11, 2017	3	Defense Pick
After the first six cases, the remaining four (4) will be selected randomly. Dismissal of a trial set case shall not impact the remaining trial dates and cases set for those dates.		

**V. PRE-TRIAL SCHEDULE IN TRIAL-POOL CASES**

21. The parties shall meet and confer and submit a schedule of staggered deadlines for the completion of non-core discovery other than custodial file production, and the exchange of expert reports in the *Trial-Pool Cases*.

**VI. FACT DISCOVERY IN TRIAL-POOL CASES**

22. Defendants may take up to ten (10) additional fact witness depositions, including both medical and non-medical witnesses in the *Trial-Pool Cases*. Defendants may seek additional depositions by leave of Court for good cause shown.



23. Plaintiffs may depose up to two additional detail representatives<sup>5</sup> who interacted with the Plaintiff's prescribing physician before the prescription(s) at issue and/or District Managers who supervised the detail representatives who interacted with the Plaintiff's prescribing physician before the prescription(s) at issue, to be identified no later than April 26, 2017. Custodial files for these witnesses will be produced on a rolling basis, and to the extent possible, custodial files for witnesses in *Trial Category 1* cases will be produced first, custodial files for witnesses in *Trial Category 2* cases will be produced next, and custodial files for witnesses in *Trial Category 3* cases will be produced last. The production of custodial files for these witnesses will be completed no later than August 1, 2017.<sup>6</sup>

24. The dates for completion of fact discovery under this Order may be extended in individual cases by agreement of the parties or for good cause shown with approval of the Court.

## **VII. EXPERTS**

25. The parties have agreed so that there is consistency between the MDL and Pennsylvania as to the rules regarding the form and content of expert disclosures and the scope of expert discovery, Fed. R. Civ. P. 26 (a)(2) shall apply to all experts as do the limitations on expert discovery set forth in Fed. R. Civ. P. 26, including the provisions of Fed. R. Civ. P. 26(b)(4)(A)-(D) limiting discovery with respect to draft reports and communications.

26. This Order is not intended to abrogate any work-product disclosure protection afforded drafts of any expert report or disclosure, regardless of the form in which the draft is recorded, that otherwise might be contained in Pa. R. Civ. P. 4003.3 or Fed. R. Civ. P. 26.

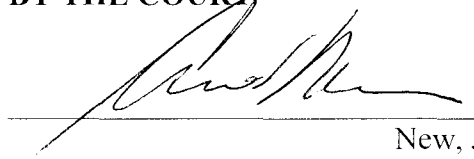
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<sup>5</sup> See footnote 1 above. If a Plaintiff has deferred taking a detail representative during *Core-Discovery*, then she or he may take the deposition of an additional detail representative in a case selected for trial.

<sup>6</sup> The parties will cooperate in scheduling depositions and recognize that due to scheduling and rolling production of documents, the depositions of detail representatives may need to occur after the cut-off date for fact discovery in the *Trial-Pool* cases.

27. This Order is not intended change the standard under which this Court considers expert testimony under Pennsylvania Rule of Evidence 702 and the relevant common law in Pennsylvania.

**BY THE COURT**



\_\_\_\_\_ New, J.