

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA

3  
4 IN RE: INCRETIN-BASED  
5 THERAPIES PRODUCTS  
6 LIABILITY LITIGATION

7 *This Document Relates to All Cases*

Case No. 13-md-2452-AJB-MDD

CASE MANAGEMENT ORDER  
REGULATING DISCOVERY AND  
OTHER PRETRIAL PROCEEDINGS  
CONCERNING JANUVIA AND  
JANUMET CASES

Judge: Hon. Anthony J. Battaglia

Magistrate: Hon. Mitchell D. Dembin

10  
11 After reviewing the Parties Motion regarding the entry of a case  
12 management order regulating discovery and other pretrial proceedings, and  
13 the Parties' proposed Order related thereto, and for good cause appearing,

14 **IT IS HEREBY ORDERED:**

15 1. On or before **January 2, 2015**, the PSC and Merck Sharpe &  
16 Dohme Corp. (the "Parties") shall submit to the Court a proposed Case  
17 Management Order identifying the exact process, timing, and other  
18 parameters for selecting and trying bellwether cases. The first four  
19 bellwether trials shall be on the dates discussed herein and will solely  
20 involve claims related to use of Januvia and or Janumet.<sup>1</sup>

21 2. All Plaintiffs who have served their Plaintiff Fact Sheet by  
22 **February 13, 2015** will be part of the bellwether eligible pool of cases<sup>2</sup>,  
23 unless Counsel for any such Plaintiff notifies Defendants' counsel on or  
24

25 <sup>1</sup> To the extent that deadlines in this CMO conflict with deadlines provided in previous case  
26 management orders, the deadlines provided for herein shall control.

27 <sup>2</sup> In light of the extremis nature of many of the Plaintiffs in this MDL, the Court will allow the  
28 PSC to put forth later filed Plaintiffs and/or substitute bellwether discovery selections to ensure  
Plaintiffs are able, if they so choose, to put forth representative Plaintiffs who will be able to  
testify live at trial.

1 before **February 20, 2015** that a particular Plaintiff is unable or otherwise  
2 unwilling to serve as a bellwether trial plaintiff.

3 3. On or before **May 29, 2015**, the Parties shall identify in writing  
4 twelve (12) representative<sup>3</sup> Plaintiffs, or six (6) bellwether candidates per  
5 side, that shall serve as bellwether discovery plaintiffs. The process and  
6 mechanisms of designations and selections of bellwethers shall be done in  
7 accordance with the CMO that is submitted on or before January 2, 2015, as  
8 set forth in paragraph 1, above.

9 4. Between **May 29, 2015** and **December 11, 2015**, case-specific  
10 bellwether discovery shall take place, with a maximum of five (5)  
11 depositions per side for each case. Discovery of Plaintiffs beyond these  
12 depositions as part of case-specific core discovery may be permitted only  
13 upon agreement of the parties or with leave of Court for good cause shown.

14 5. All non case-specific fact discovery shall be completed on or  
15 before **December 11, 2015**. "Completed" means that all discovery under  
16 Rules 30-36 of the Federal Rules of Civil Procedure, and discovery  
17 subpoenas under Rule 45, must be initiated a sufficient period of time in  
18 advance of the cut-off date, *so that it may be completed* by the cut-off date,  
19 taking into account the times for service, notice, and response as set forth in  
20 the Federal Rules of Civil Procedure. All disputes concerning fact discovery  
21 shall be brought to the attention of the Magistrate Judge no later than sixty  
22 (60) days following the date upon which the event giving rise to the dispute  
23 occurred or otherwise became apparent, unless the parties agree otherwise  
24 or for good cause shown. Counsel are required to meet and confer  
25 regarding all discovery disputes pursuant to the requirements of Local  
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27 <sup>3</sup> The Parties shall endeavor to meet and confer on the general criteria/parameters that constitute a  
28 representative plaintiff, and further, each Party shall then work in good faith to select  
representative bellwether discovery plaintiffs who meet those general parameters.

1 Rules 16.5(k) and 26.1(a).

2 6. On or before **December 18, 2015**, each Party shall provide the  
3 Court with their respective, specified number of bellwether cases from  
4 which the bellwether trial cases will be selected as is required in the CMO  
5 that will be submitted on January 2, 2015, as set forth in paragraph 1, above.

6 7. On or before **January 1, 2016**, the Court will select four (4) cases  
7 to serve as the early bellwether trial cases for the Parties subject to this  
8 Order and will designate the order of such bellwether trials. The Court shall  
9 select the first case tried from the bellwether selections submitted by the  
10 PSC. The Court may, in its sole discretion, choose the other cases to be tried  
11 from bellwether plaintiffs submitted by either of the PSC or Defendants.  
12 Moreover, plaintiffs not chosen for the Parties initial bellwether trial shall  
13 act as 'back-up' trial plaintiffs to the Parties first trial setting. Additionally,  
14 two bellwether plaintiffs will be selected by the Court to further act as  
15 'back-up' trial plaintiffs to the Parties four trial settings. To the extent  
16 possible, at the election of the PSC, the first bellwether trial shall involve a  
17 Plaintiff who is then living and able to testify in person or by live video feed  
18 at trial.

19 8. After the Court selects the first four (4) bellwether trial cases, the  
20 parties shall designate additional fact witnesses who may be called as  
21 witnesses in such trials on or before **January 15, 2016**. Depositions of such  
22 fact witnesses, not previously deposed during the case-specific core  
23 discovery, shall take place on or before **February 29, 2016**. No more than  
24 three (3) additional case specific fact witness depositions per side shall be  
25 permitted without a showing of good cause. Further discovery as to the  
26 bellwether Plaintiffs selected by the Court as 'back-ups' will be stayed  
27 pending further order of the Court, or as otherwise agreed by the Parties.

28 9. All expert disclosures required by Fed. R. Civ. P. 26(a)(2) shall

1 be served on all parties on or before **February 1, 2016**. Any contradictory or  
2 rebuttal disclosures within the meaning of Rule 26(a)(2)(D)(ii) shall be  
3 disclosed on or before **March 1, 2016**. Unless otherwise stipulated by the  
4 parties, the required expert disclosures shall include an expert report as  
5 required by Rule 26(a)(2)(B). If a written report is not required, the  
6 disclosure must provide the information required under Rule 26(a)(2)(c),  
7 unless the parties agree otherwise. Case specific expert reports, if required,  
8 will be dealt with in the CMO that will be submitted on January 2, 2015, as  
9 set forth in paragraph 1, above.

10 10. Each expert designation shall include at least two available  
11 dates when each expert can be tendered for deposition. The Parties shall  
12 work cooperatively and in good faith to provide alternate dates upon  
13 request.

14 11. All expert discovery shall be completed by the Parties on or  
15 before **April 1, 2016**. "Completed" means that all discovery under Rules 30-  
16 36 of the Federal Rules of Civil Procedure, and discovery subpoenas under  
17 Rule 45, must be initiated a sufficient period of time in advance of the cut-  
18 off date, so that it may be completed by the cut-off-date, taking into account  
19 the times for service, notice, and response as set forth in the Federal Rules of  
20 Civil Procedure. All disputes concerning expert discovery shall be brought  
21 to the attention of the magistrate Judge no later than forty-five (45) days  
22 following the date upon which the event giving rise to the dispute occurred  
23 or otherwise became apparent, unless the Parties agree otherwise or for  
24 good cause shown. Counsel are required to meet and confer regarding all  
25 discovery disputes pursuant to the requirements of Local Rules 16.5(k) and  
26 26.1(a).

27 a. The parties intend that the limitations on expert discovery set  
28 forth in Rule 26 of the Federal Rules of Civil Procedure,

1 including the provision of Rule 26(b)(4)(A)-(D) limiting  
2 discovery with respect to draft reports, communications with  
3 experts, and depositions of consulting experts, shall apply to all  
4 cases, whether pending in state or federal court.

5 12. All other dispositive motions, including those addressing  
6 Daubert issues, must be filed on or before **April 29, 2016**. Please be advised  
7 that counsel for the moving party must obtain a motion hearing date from  
8 the law clerk of the judge who will hear the motion. Any hearings on  
9 dispositive motions, including those addressing Daubert issues, must be set  
10 on or before **July 1, 2016**. Motions in Limine are to be filed as directed in the  
11 Local Rules, or as otherwise set by Judge Battaglia.

12 a. Summary Judgment Motions and/or Daubert Motions need not  
13 be filed, and the Court encourages the parties to file meritorious  
14 motions rather than motions for "the sake of motions." The  
15 Court will consider awarding costs and expenses to any Party  
16 who prevails on what the Court considers to be a Summary  
17 Judgment Motion and/or Daubert Motion filed against a Party  
18 that appears to have been filed for "the sake of motions."

19 b. Questions regarding this case should be directed to the Judge's  
20 law clerk. The Court draws the parties' attention to Local Rule  
21 7.1(e)(4) which requires that the parties allot additional time for  
22 service of motion papers by mail. Papers not complying with  
23 the rule shall not be accepted for filing.

24 c. Responses to Summary Judgment Motions and or Daubert  
25 Motions, if any, shall be filed on or before **June 1, 2016**. Replies  
26 to responses are discouraged by the Court, but if necessary to  
27 address new issues raised in a response, may be filed within five  
28 (5) days after the response to which it replies upon leave of

1 Court with the proposed reply attached thereto.

2 d. Briefs or memoranda in support of or in opposition to any  
3 pending discovery motion shall not exceed twenty-five (25)  
4 pages in length without leave of the judge who will hear the  
5 motion. No reply memorandum shall exceed ten (10) pages  
6 without leave of the judge who will hear the motion. The Court  
7 will set special page limits after conferring with the Parties in  
8 the future in relation to Daubert issues.

9 13. On or before **December 2, 2015**, the Parties will each designate  
10 settlement counsel(s) to be the primary contact(s) for settlement discussions  
11 and agree on a Mediator to facilitate settlement negotiations. In the event  
12 the parties are not able to agree on a Mediator, they will notify the court  
13 jointly on or before **December 16, 2015**, through a single, joint letter  
14 requesting the designation of a Mediator by this Court. Such letter shall not  
15 exceed two pages in length, and may identify up to three proposed  
16 Mediators proposed by each side.

17 14. Beginning on or before **January 20, 2016**, the Parties shall meet  
18 and confer at least one time per month to discuss settlement. Initial  
19 conferences may take place in person, via videoconference, or by other  
20 means at the Parties' discretion, provided the designated Mediator is a part  
21 of at least one such communication per month. No later than **March 18,**  
22 **2016**, at least one in-person session shall have taken place at a site mutually  
23 agreed upon by the Parties. Thereafter, negotiations may continue either in  
24 person or as agreed to by the Parties and the Mediator. Settlement  
25 conferences shall not include any Defendants other than the Parties to this  
26 Order unless otherwise agreed by the PSC and all Defendants in MDL 2452.

27 15. The mediator and settlement counsel for the Parties may, in the  
28 Court's discretion, be asked to report to the Court on the status of

1 settlement discussions. Nothing in this Order is intended to limit the  
2 Parties' abilities to engage in additional settlement negotiations.

3 16. Furthermore, after expert reports are exchanged and depositions  
4 of experts are taken, if any, as well as any good faith Rule 702 motions are  
5 filed, the Parties shall meet with the Mediator for purposes of convening  
6 focus groups to further settlement negotiations and to attempt to arrive at  
7 settlement values. At the conclusion of the focus groups, the Parties shall  
8 engage in good faith mediation with the Mediator who shall be given full  
9 authority to use every means at his disposal to engage the Parties in an  
10 effort to settle the litigation before the first bellwether trial begins. The  
11 Parties shall share the expenses of the focus groups and Mediator equally.  
12 The focus groups contemplated herein shall be completed on or before **May**  
13 **13, 2016**; and further, the good faith mediation with the Mediator following  
14 the focus groups shall be completed on or before **May 20, 2016**. Focus  
15 groups shall not include any Defendants other than the Parties to this Order  
16 unless otherwise agreed by the PSC and all Defendants in MDL 2452.

17 17. A final Mandatory Settlement Conference shall be conducted on  
18 **June 3, 2016 at 10:00 a.m.** in the chambers of Magistrate Judge Mitchell  
19 Dembin. The appointed Mediator shall attend this mediation session along  
20 with Judge Dembin. The Parties shall share the fees and expenses of the  
21 Mediator equally. Counsel shall submit **confidential** settlement statements  
22 **directly** to Magistrate Judge Dembin's chambers no later than **May 27, 2016**.

23 a. Each party's settlement statement shall set forth the party's  
24 statement of the case, identify controlling legal issues, concisely  
25 set out issues of liability and damages, and shall set forth the  
26 party's settlement position, including the last offer or demand  
27 made by the party, and a separate statement of the offer or  
28 demand the party is prepared to make at the settlement

1 conference. **The settlement conference briefs shall not be filed**  
2 **with the Clerk of the Court, shall be confidential, and shall**  
3 **not be shared with or served upon any other Party.**

4 b. All claims adjusters for insured defendants and representatives  
5 with complete authority to enter into a binding settlement, as  
6 well as the principal attorney(s) responsible for the litigation,  
7 must be present and legally and factually prepared to discuss  
8 and resolve the case at the Mandatory Settlement Conference.  
9 Outside retained corporate counsel shall not appear on behalf of  
10 a corporation as the party who has the authority to negotiate  
11 and enter into a settlement. **All conference discussions will be**  
12 **informal, off the record, privileged, and confidential.**

13 c. The Mandatory Settlement Conference shall not include any  
14 Defendants other than the Parties to this Order unless otherwise  
15 agreed by the PSC and all Defendants in MDL 2452.

16 18. No Memorandum of Law of Contentions of Fact are to be filed.

17 19. The parties must comply with the pretrial disclosure  
18 requirements of Fed. R. Civ. P. 26(a)(3) no later than **June 17, 2016**. The  
19 parties should consult Fed. R. Civ. P. 26(a)(3) for the substance of the  
20 required disclosures.

21 a. **Please be advised that failure to comply with this section or**  
22 **any other discovery order of the Court may result in the**  
23 **sanctions provided for in Fed. R. Civ. P. 37, including a**  
24 **prohibition on the introduction of designated matters in**  
25 **evidence.**

26 20. The parties must meet and confer on or before **June 24, 2016**,  
27 and prepare a proposed pretrial order containing the following:

28 a. A joint neutral statement to be read to the jury, not in excess of

- 1 two pages, of the nature of the case and the claims and defenses.
- 2 b. A list of the causes of action to be tried, referenced to the
- 3 Complaint (and Counterclaim if applicable). For each cause of
- 4 action, the order shall succinctly list the elements of the claim,
- 5 damages and any defenses. A cause of action in the Complaint
- 6 (and/or Counterclaim), which is not listed, shall be dismissed
- 7 with prejudice.
- 8 c. A list, in alphabetical order, of each witness counsel actually
- 9 expects to call at trial with a brief statement, not exceeding four
- 10 sentences, of the substance of the witnesses' testimony.
- 11 d. A list, in alphabetical order, of each expert witness counsel
- 12 actually expect to call at trial with a brief statement, not
- 13 exceeding four sentences, of the substance of the expert
- 14 witnesses' testimony.
- 15 e. A list, in alphabetical order, of additional witnesses, including
- 16 experts, counsel do not expect to call at this time but reserve the
- 17 right to call at trial along with a brief statement, not exceeding
- 18 four sentences, of the substance of the witnesses' testimony.
- 19 f. A list of all exhibits that counsel actually expect to offer at trial
- 20 with a one-sentence description of the exhibit.
- 21 g. A list of all exhibits that counsel do not expect to offer at this
- 22 time but reserve the right to offer if necessary at trial with a one-
- 23 sentence description of the exhibit.
- 24 h. A statement of all facts to which the parties stipulate. This
- 25 statement must be on a separate page and will be read to and
- 26 provided to the jury.
- 27 i. A list of all deposition transcripts by page and line, or videotape
- 28 depositions by section, that will be offered at trial. Over

1 designation is discouraged and may result in sanctions.

2 j. An estimate for the length of trial.

3 The Court encourages the parties to consult with the assigned  
4 magistrate judge to work out any problems in preparation of the proposed  
5 pretrial order, or to discuss necessary modifications to the above  
6 requirements. The Court will entertain any questions concerning the  
7 conduct of the trial at the pretrial conference or by later order.

8 21. The proposed final pretrial conference order, including written  
9 objections, if any, to any party's Fed. R. Civ. P. 26(a)(3) pretrial disclosures,  
10 shall be prepared, served, and submitted to the Clerk's Office on or before  
11 **July 6, 2016** and shall be in the form prescribed in and in compliance with  
12 Local Rule 16.1(f)(6). Any objections shall comply with the requirements of  
13 Fed. R. Civ. P. 26(a)(3). **Please be advised that the failure to file written**  
14 **objections to a party's pretrial disclosures may result in the waiver of**  
15 **such objections, with the exception of those made pursuant to Rule 402**  
16 **(relevance) and 403 (prejudice, confusion or waste of time) of the Federal**  
17 **Rules of Evidence.**

18 22. The final pretrial conference is scheduled on the calendar of the  
19 **Honorable Anthony Battaglia July 22, 2016 at 9:00 a.m.**

20 23. The trial schedule will begin with the first bellwether trial on  
21 **August 1, 2016 (Januvia)**, and bellwether trials shall continue thereafter, on  
22 the following dates: **October 31, 2016 (Januvia), January 9, 2017 (Janumet/**  
23 **Januvia), and July 10, 2017 (Janumet/ Januvia).**

24 24. The dates and times set forth herein will not be modified except  
25 for good cause shown.

26 DATED: \_\_\_\_\_

27 \_\_\_\_\_  
28 Hon. Mitchell D. Dembin  
U.S. Magistrate Judge