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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

IN RE: Bard Implanted Port Catheter
Products Liability Litigation,

MDL No. 3081

CASE MANAGEMENT ORDER NO. 15
(Fourth Case Management Conference)

(Applies to All Actions)

The Court held a fourth Case Management Conference on March 1, 2024. This order reflects matters discussed and decided during the conference.

I. Proposed Case Management Orders.

The parties have proposed a Case Management Order on records collection. Doc. 456. The Court has reviewed the proposed order and will adopt it with one change to paragraph 15 that was discussed during the conference.

The parties have proposed a Case Management Order that sets forth a deposition protocol. Doc. 457. The Court and parties discussed a number of issues in the proposed protocol, including that the seven-hour time limit for fact depositions should include all parties' questioning (see ¶¶ 13, 21(c)), a typo in paragraph 14 and the need to delete the reference in that paragraph to possible three-day depositions, the need for agreement on the payment of fees for expert depositions, and language encouraging consideration of remote

1 depositions (see ¶¶ 18-19). The Court has also identified a typo in the heading of paragraph
2 15. The parties will revise the joint proposed order and resubmit it by **March 27, 2024**.

3 The parties have proposed a Case Management Order on Plaintiff and Defendant
4 Fact Sheets. Doc. 458. The Court has reviewed the order and will adopt it with proofing
5 corrections to be shared with the parties before the order is filed.

6 The parties have proposed a Case Management Order on evidence preservation.
7 Doc. 459. The Court raised several issues that require clarification, including overlapping
8 references to “Steelgate” and “The Storage Facility,” somewhat inconsistent references to
9 a chain of custody form, the need to clarify “protocols” and whether they exist or will be
10 developed in the future, and clarifications in the final two paragraphs of the proposed order.
11 The parties will revise the joint proposed order and resubmit it to the Court by **March 27,**
12 **2024**.

13 **II. Adding Port Reservoir Allegations to the MDL.**

14 On February 5, 2024, the JPML added port reservoir claims to this MDL. Doc. 366.
15 Plaintiffs shall file an Amended Master Complaint that adds the port reservoir claims
16 included in the original proposed Master Complaint as soon as possible, and in any event
17 by **March 27, 2024**. Plaintiffs do not believe the current Short Form Complaint requires
18 amendment to accommodate the new claims. Plaintiff Profile Forms (PPFs) should be
19 amended to include the original port-reservoir questions in the proposed forms. The parties
20 shall propose a method for accomplishing this amendment as soon as possible. The
21 amended form will be used for all PPFs due on or after **March 15, 2024**. Any revisions to
22 PPFs that were produced before that date shall be submitted to Defendants by **May 1, 2024**.

23 **III. Discovery Issues.**

24 The parties submitted a joint report before the Case Management Conference that
25 included a substantial discussion of the current size of this MDL, concerns by Defendants
26 that proposed discovery will be disproportionate if the MDL does not grow as Plaintiffs
27 have predicted, and various discovery issues on which the parties have been conferring.
28 Doc. 451. Defendants also expressed concern that the bellwether process which starts on

1 April 1, 2024 (CMO 10, Doc. 115) will be based on an insufficient sampling of the MDL
2 cases if the MDL does grow as Plaintiffs have predicted.

3 This MDL currently includes about 115 cases. Plaintiffs predicted in previous
4 conferences that the MDL will grow to several thousand cases. Plaintiffs stated during the
5 current conference that they still hold that belief and that many new cases are being
6 processed for filing.

7 After reviewing the parties' joint report, reviewing statistics from the IVC Filter
8 MDL previously handled by this Court, and hearing extended comments from the parties,
9 the Court concluded that current discovery expectations should not be changed and the
10 bellwether process should proceed as scheduled. This conclusion is based in part on the
11 growth rate of the IVC filter litigation as determined from a review of the Court's CM/ECF
12 system:

<u>Time Period</u>	<u>Cases Filed</u>
August 2015 to February 2016	225
February 2, 2016 to August 18, 2016	634
August 19, 2016 to February 18, 2017	698
February 19, 2017 to August 18, 2017	899
August 19, 2017 to February 18, 2018	1183
February 19, 2018 to August 18, 2018	778
August 19, 2018 to February 18, 2019	2138
February 19, 2019 to May31, 2019	<u>1748</u>
Total	8305

22 As these numbers show, the filter MDL grew slowly at first and faster in later years,
23 with 81% of the cases being filed more than 18 months after the MDL began. In light of
24 this relevant experience, the Court cannot conclude that the current case count in this MDL
25 suggests it will be significantly smaller than Plaintiffs have predicted.

26 Defense counsel stated during the conference that 407 cases had been filed when the
27 bellwether process started in the filter MDL in the Spring of 2016. This number accords
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1 with the numbers set forth above. While 407 cases certainly constitute a more
2 representative sample than 115, they still represented less than 5% of the eventual total case
3 count in the filter litigation. The 115 cases pending in this MDL would be a significantly
4 smaller sample size than in the filter MDL, but Plaintiffs predicted during the conference
5 that significant additional filings will happen in the coming weeks, increasing the pool for
6 bellwether selection.

7 In light of this discussion with the parties, and further discussions on other discovery
8 issues, the Court reached the following conclusions during the conference:

9 **A. Defendants' Proposed Limitation on ESI Custodians.**

10 The Court will not adopt Defendants' proposal that ESI custodians be limited to 25.

11 **B. Defendants' Proposed Limitation on Further Written Discovery.**

12 The Court will not adopt Defendants' proposal that Plaintiffs be permitted additional
13 written discovery only with leave of court.

14 **C. Custodian Selection and Search Term Determination.**

15 To promptly complete the important process of identifying ESI custodians whose
16 records will be searched and the terms that will be used to search them, the Court established
17 the following schedule:

- 18 • Week of March 4: The parties shall meet and confer about the custodians to be
19 searched in this case, working off Defendants' proposed 41 custodians and
20 Plaintiffs proposed 80. The parties shall also confer on narrowing and focusing
21 the search terms based on the parties' current proposals.
- 22 • Week of March 11: Defendants shall run hit reports on their current proposed
23 search terms and 300 of Plaintiffs' proposed terms (to be selected by Plaintiffs),
24 unless the parties are able to agree on some other set of terms to use. The hit
25 reports shall be produced to Plaintiffs by March 15, 2024. The reports should be
26 run on custodians to which the parties have agreed. Because files of all
27 custodians may not be available in a searchable format by the week of March 11,
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1 Defendants should use their best efforts to run hit reports on as many agreed-
2 upon custodial files as possible, and as representative a sample as possible.

- 3 • Week of March 18: The parties shall meet and confer to see if they can reach
4 agreement on custodians and search terms in light of their preceding discussions
5 and the hit reports. If they cannot reach full agreement, they shall specifically
6 identify as many of the custodians and search terms as they do agree on.¹
- 7 • By March 27, 2024, the parties shall file a report on their discussions. If they
8 have not reached full agreement, they shall specifically identify the custodians
9 and terms on which they have agreed and the custodians and search terms that
10 remain in dispute, with general descriptions of the parties' positions on the
11 disputed custodians and terms.
- 12 • At 9:00 am Phoenix time on March 29, 2024, the Court will convene a video
13 conference with the parties to resolve any disputed items. The parties should
14 reserve the full day for the conference to ensure there is sufficient time to
15 complete this work. By the end of the day, the Court will decide the final list of
16 custodians and search terms to be used in the ESI production in this case. The
17 Court reminded the parties that they will do a better job of choosing custodians
18 and terms than the undersigned judge, and encouraged them to reach agreement
19 to the greatest extent possible before filing the March 27, 2024 report.

20 **D. Production of U.S. Communications With Foreign Regulators.**

21 The Court concludes that Plaintiffs should be permitted to obtain the results of
22 focused searches for communications by Defendants' U.S. employees with foreign
23 regulators. The communications have relevance on issues such as alternative designs,
24 available safety measures, and Defendants' knowledge of hazards, but the searches for these
25 communications should be narrowly focused on relevant topics to avoid undue burden. So

26 ¹ Last week, Merriam-Webster announced that it is now "permissible in English for a
27 preposition to be what you end a sentence with." Merriam-Webster, *The Words of the Week*
28 – Mar. 1, <https://www.merriam-webster.com/wordplay/the-words-of-the-week-mar-1> (last
visited Mar. 4, 2024).

1 focused, the Court concludes that this discovery is not disproportionate to the issues in this
2 case. Fed. R. Civ. P. 26(b)(1). The parties should include this discovery in the discussions
3 outlined above and report the results in their **March 27, 2024** report.

4 **IV. Deadline for Substantial Completion.**

5 For reasons discussed during the conference, the Court concludes that the production
6 of documents in this case should occur in phases, tied to depositions Plaintiffs plan to take,
7 to ensure that relevant documents are produced before depositions are taken and that
8 depositions are not delayed until late in the fact discovery period. The Court proposed that
9 the parties break the depositions into three phases, August-September, October-November,
10 and December-January, with Plaintiffs identifying in advance the witnesses they intend to
11 depose in each phase. The Court recognizes that preferred depositions can change as
12 discovery progresses; Plaintiffs should make their best efforts to identify witnesses for each
13 phase and to notify Defendants of a change in plans far enough in advance for Defendants
14 to adjust their document production without undue burden. The Court proposed that the
15 parties identify a substantial completion deadline for each phase, which will allow
16 Defendants to complete their production on a rolling basis while allowing depositions to
17 move forward in time to meet the discovery deadline. The parties are not bound by the
18 specifics of the Court's recommendations, and should jointly propose a Case Management
19 Order on this subject with their **March 27, 2024** report.

20 **V. Plaintiff Profile Forms.**

21 Defendants described considerable difficulty obtaining completed PPFs in this case.
22 Of the cases filed so far, 61 PPFs were produced in an incomplete form. Defendants have
23 followed up with the respective Plaintiffs' counsel, but 34 remain incomplete. 24 of these
24 Plaintiffs have produced amended PPFs, their disclosures remain incomplete, and their
25 counsel have assured Defendants that further disclosures are forthcoming. These 24
26 Plaintiffs are identified in Exhibit A to this order. An additional 10 Plaintiffs have failed to
27 produce complete information. Although some have filed amended PPFs, counsel for these
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1 Plaintiffs have promised no additional disclosures to Defendants. These 10 Plaintiffs are
2 identified in Exhibit B to this order.

3 This is a serious problem. The Court's CMO 8 (Doc. 113) sets forth a detailed
4 procedure, with specific compliance deadlines, that applies to every Plaintiff and every
5 Plaintiff's counsel in this case. The procedures and schedules are intended to ensure that
6 discovery in this MDL can proceed efficiently, and that the upcoming bellwether selection
7 process can be fair to both sides. Plaintiffs and their counsel who fail to comply with CMO
8 8 jeopardize the fairness and efficiency of these proceedings, and this problem will only
9 grow as the number of cases increases. The Court will be required to take action to remedy
10 this problem if difficulties persist. All counsel who represent Plaintiffs in this MDL are
11 admonished to comply fully with CMO 8, and to do so promptly. Plaintiffs identified in
12 Exhibits A and B shall complete their production of full PPFs by **May 1, 2024**.

13 Plaintiffs' leadership agrees with these concerns and stands ready to assist in
14 securing full compliance with CMO 8. In addition to copying Plaintiffs' leadership on
15 initial deficiency letters, Defendants should keep Plaintiffs' leadership apprised of their
16 communications with individual Plaintiff attorneys whose clients have not made full
17 disclosures. Plaintiffs' leadership should designate one or more attorneys to work closely
18 with defense counsel on this issue. The parties should provide an update in their **March 27,**
19 **2024** joint report.

20 Defense counsel requested leave to file motions to dismiss against (1) Plaintiffs who
21 have produced no PPF within the time allotted in CMO 8, and (2) Plaintiffs who died before
22 the filing of their cases. The Court directed defense counsel to confer with counsel for these
23 Plaintiffs and provide an update in the **March 27, 2024** joint report. The Court will address
24 this issue during the **March 29, 2024** hearing and will authorize motions to dismiss where
25 appropriate.

25 **VI. Privilege Logs.**

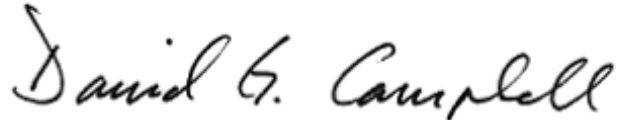
26 The parties shall provide a joint proposed Case Management Order on privilege logs
27 to the Court by **March 27, 2024**.

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1 **VII. Conclusion.**

2 The next Case Management Conference will be held on **March 29, 2024**. The Court
3 appreciates the efforts of Plaintiffs' leadership counsel and defense counsel to work
4 cooperatively in managing this MDL. The tone of written filings has also improved, which
5 is appreciated as well.

6 Dated this 5th day of March, 2024.

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9 David G. Campbell
10 Senior United States District Judge
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Exhibit A

Plaintiff and Member Case No.	Date of Deficiency Notice	Date of Amended PPF	Missing information remaining
Axley, Karen 2:23-cv-02520-DGC	January 19, 2024	February 21, 2024 ¹	Incomplete PPF: <ul style="list-style-type: none"> • information regarding the subsequent device that was implanted on December 9, 2022
Bigsbee, Beverly 2:23-cv-2021-DGC	January 4, 2024	January 18, 2024	Missing medical records: <ul style="list-style-type: none"> • no removal operative report • no medical records confirming product identification (although product identification provided via handwritten note)
Bradford, Tashera 2:23-cv-2123-DGC	January 19, 2024	January 29, 2024	No product identification: <ul style="list-style-type: none"> • no product code for device one or device two • no lot number for device one or device two Incomplete PPF: <ul style="list-style-type: none"> • Device One: no lot number, no product code, no removing physician, no date of removal, no removal records, no information regarding subsequent device • Device Two: no lot number, no product code, unknown implant date, no implanting physician, no implant records, no removal information, no removing physician, no date of removal

¹ This Amended Fact Sheet was submitted late.

			<p>Missing medical records:</p> <ul style="list-style-type: none"> no product identification for device one or device two no implant operative report for device one or device two no removal operative report for device one or device two <p>Verification:</p> <ul style="list-style-type: none"> improper verification of Amended PPF no verification for Device 2 PPF
Canales, Sylvia 2:23-cv-1764-DGC	January 19, 2024	January 31, 2024	<p>No product identification:</p> <ul style="list-style-type: none"> no product code no lot number <p>Missing medical records:</p> <ul style="list-style-type: none"> no implant operative report no removal operative report
Criner, Stacey 2:23-cv-1707-DGC	N/A	N/A	<p>Invalid product identification:</p> <ul style="list-style-type: none"> invalid lot number provided
Cunningham, Jean 2:23-cv-1625-DGC	February 15, 2024	February 23, 2024	<p>Insufficient product identification:</p> <ul style="list-style-type: none"> no lot number for Device One
Curry, Tammy 2:23-cv-1756-DGC	January 23, 2024	February 7, 2024	<p>No product identification:</p> <ul style="list-style-type: none"> no lot number no product code
Doner, Teddy 2:23-cv-1757-DGC	N/A	N/A	<p>Invalid Product Identification:</p> <ul style="list-style-type: none"> invalid lot number provided for Device Two
Ellis, Mary 2:23-cv-1705-DGC	January 23, 2024	February 7, 2024	<p>Missing medical records:</p> <ul style="list-style-type: none"> no implant operative report
Franks, Carrie 2:23-cv-2163-DGC	January 19, 2024	January 26, 2024	<p>Incomplete PPF:</p> <ul style="list-style-type: none"> information regarding the subsequent device

			Verification: <ul style="list-style-type: none"> No verification for substantive information in amended PPF
Green Rebecca 2:23-cv-1704-DGC	January 4, 2024	January 18, 2024	Missing medical records: <ul style="list-style-type: none"> no implant operative report
Hawkins, Vera 2:23-cv-02020-DGC	January 4, 2024	January 19, 2024	Missing medical records: <ul style="list-style-type: none"> no implant operative report no removal operative report
James, Peter 2:23-cv-02669-DGC	January 4, 2024	January 8, 2024	No product identification: <ul style="list-style-type: none"> no lot number no product code
Kessler, Paul 2:23-cv-1696-DGC	January 4, 2024	January 18, 2024	Insufficient product identification: <ul style="list-style-type: none"> no lot number Incomplete PPF: <ul style="list-style-type: none"> no implant date Missing medical records: <ul style="list-style-type: none"> no implant operative report no removal operative report
Prentice, Lori 2:23-cv-0627-DGC	January 23, 2024	February 7, 2024	Incomplete PPF: <ul style="list-style-type: none"> information regarding the subsequent device Verification: <ul style="list-style-type: none"> no verification for substantive information in amended PPF
McKinley, Donald 2:23-cv-1702-DGC	January 4, 2024	January 9, 2024 (First Amended) ; January 17, 2024 (Second Amended)	Missing medical records: <ul style="list-style-type: none"> no removal operative report

Gay, Paisami 2:23-cv-1755-DGC	January 4, 2024	February 9, 2024	Missing medical records: <ul style="list-style-type: none"> no removal operative report
Reed, Auntron 2:23-cv-02695-DGC	N/A	N/A	No product identification: <ul style="list-style-type: none"> no lot number no product code
Russow, Hiliary 2:23-cv-1701-DGC	January 4, 2024	January 18, 2024	Missing medical records: <ul style="list-style-type: none"> no implant operative report no removal operative report
Sanders, Michelle 2:23-cv-1698-DGC	January 19, 2024	February 6, 2024	Verification: <ul style="list-style-type: none"> improper verification to Amended PPF that provided substantive information
Smith, Tracie Lewis 2:23-cv-1709-DGC	January 23, 2024	February 7, 2024	Insufficient product identification: <ul style="list-style-type: none"> no lot number
Sorensen, Lloyd 2:23-cv-2557-DGC	January 30, 2024	February 14, 2024	No product identification: <ul style="list-style-type: none"> no lot number no product code Verification: <ul style="list-style-type: none"> amended PPF with new substantive information was not verified
Sours, Jay 2:23-cv-1706-DGC	N/A	N/A	Invalid product identification: <ul style="list-style-type: none"> invalid lot number provided
Stone, Cindy 2:23-cv-02696-DGC	February 7, 2024	February 21, 2024	Insufficient product identification: <ul style="list-style-type: none"> no lot number Missing medical records: <ul style="list-style-type: none"> no removal operative report

Exhibit B

Plaintiff and Member Case No.	Date of Deficiency Notice	Date of Amended PPF	Missing Information Remaining
Nicosia, Danielle 2:23-cv-2122-DGC	January 23, 2024	NONE	No product identification: <ul style="list-style-type: none"> no lot number no product code Incomplete PPF: <ul style="list-style-type: none"> it is unclear whether subsequent product is at issue in this lawsuit and plaintiff did not respond to deficiency letter asking for clarification
Songy, Brandie 2:23-cv-1699-DGC	January 19, 2024	NONE	Incomplete PPF: <ul style="list-style-type: none"> did not provide Plaintiff's former name or occupation
Zumalt, Tyler 2:23-cv-1697-DGC	January 19, 2024	NONE	Incomplete PPF Device 2: <ul style="list-style-type: none"> no type of infection identified no date of complication diagnosis identified no medical provider who identified and/or treated the complication identified Missing medical records Device 2: <ul style="list-style-type: none"> no records reflecting diagnosis of alleged complication Verification <ul style="list-style-type: none"> no verification for Device 2 PPF
Beltz, Dana 2:23-cv-1640-DGC	January 23, 2024	February 7, 2024	Verification: <ul style="list-style-type: none"> no verification for substantive information in amended PPF
Cabello, Christopher or Elizabeth (deceased) 2:23-cv-01729-DGC	January 4, 2024	January 18, 2024	Missing medical records: <ul style="list-style-type: none"> no implant operative report PPF claims and Complaint claims are not consistent: <ul style="list-style-type: none"> it is unclear (and inconsistent) whether this is a wrongful death claim, or a survivor

			<p>claim with loss of consortium.</p> <ul style="list-style-type: none"> The original Complaint is plead as a wrongful death claim. The SFC is improperly filed in the decedent’s name and is plead as a survival claim, but no loss of consortium is alleged. The initial PPF indicates that it is a survival claim and alleges pain and anxiety, but no loss of consortium. The amended PPF alleges loss of consortium.
<p>Divelbliss, Kimberly 2:23-cv-1627-DGC</p>	<p>February 1, 2024</p>	<p>February 9, 2024</p>	<p>Medical records and claims in Amended PPF do not match:</p> <ul style="list-style-type: none"> Based on our review of the medical records, Plaintiff had multiple ports implanted, and because the medical records produced and the claims in the PPF and Amended PPF do not match, Defendants cannot tell which port(s) are at issue or whether the medical records produced relate to the port at issue. In the Amended PPF, for example, Plaintiff alleges that she “seeks damages only for the failure of a device installed on 7/13/17 at Las Palmas Medical Center,” but she produced medical records dated 07/13/17 showing that a port was implanted by a different doctor at a different facility. Plaintiff did not provide any implant records for any port implanted on that day at Las Palmas Medical Center.

Elwell, Shannon 2:23-cv-1662-DGC	January 4, 2024	January 18, 2024	Missing medical records: <ul style="list-style-type: none"> incomplete implant operative report incomplete diagnostic records
Hawkins, Tiffany 2:23-cv-1735-DGC	January 23, 2024	February 7, 2024	Unable to determine what product is at issue in the lawsuit: <ul style="list-style-type: none"> SFC and PPF identify different lot numbers and implant dates. Medical records show yet a third possible implant date and no lot number. Verification: <ul style="list-style-type: none"> no verification for substantive information in amended PPF
Hickman, LaDawn 2:23-cv-02721-DGC	February 19, 2024	February 21, 2024	Missing medical records: <ul style="list-style-type: none"> no removal operative report Incomplete PPF: <ul style="list-style-type: none"> PPF is unclear with respect to whether catheter fragments were removed on 1/4/22, or the device as a whole was removed on 1/4/22
Willis, Ann 2:23-cv-02604-DGC	January 30, 2024	February 14, 2024	Verification: <ul style="list-style-type: none"> No verification for substantive information in amended PPF