



2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**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. 10

BELLWETHER SELECTION

Pursuant to the agreement of the parties (Docs. 102 at 28, 102-1), the Court enters this Case Management Order regarding the process for the selection of and discovery in the first set of bellwether cases for this MDL.

I. Initial Plaintiff Pool.

The Initial Plaintiff Pool for this bellwether process includes all cases filed in, transferred to, or removed to MDL 3081 on or before April 1, 2024.

The parties will provide Plaintiff Profile Forms (“PPF”) and Defendants Profile Forms (“DPF”) for each of the Initial Plaintiff Pool cases. All PPFs for cases in the Initial Plaintiff Pool must be served within thirty (30) days of filing of the Short-Form Complaint and in no event later than **May 1, 2024**; and the DPFs shall be served within forty (40) days after the date of receipt of the PPF and in no event later than **June 10, 2024**. Cases filed after April 1, 2024, shall continue to be governed by the deadlines established in Case Management Order No. 8 regarding profile forms. In order to make the process as efficient as possible, the parties shall provide their PPFs and DPFs on a rolling basis, as they are completed.

1 **II. PFS/DFS Group 1.**

2 On or before **July 1, 2024**, the parties shall make a simultaneous exchange of lists
3 identifying twenty-four (24) representative cases each selected from the **Initial Plaintiff**
4 **Pool**. Those forty-eight (48) cases shall constitute **PFS/DFS Group 1**. The lists exchanged
5 by the parties shall be organized alphabetically by Plaintiffs' last names and shall include
6 the civil action number for each case.

7 Should Plaintiffs and Defendants select one or more of the same cases among their
8 twenty-four (24) cases selected for **PFS/DFS Group 1**, thus resulting in a total pool of
9 fewer than forty-eight (48), the parties will alternate to identify additional Plaintiffs to bring
10 the pool to forty-eight (48), with Plaintiffs having the first selection. The parties shall
11 simultaneously exchange the additional selections to complete the pool within three (3) days
12 of the initial simultaneous exchange set forth above.

13 It is important for the bellwether process that both sides waive applicable venue and
14 forum-non-conveniens challenges for the cases in **PFS/DFS Group 1** and stipulate that the
15 initial scheduled trials can be conducted in the District of Arizona without remanding any
16 case to the transferor forum under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,
17 523 U.S. 26 (1998) ("Lexecon Waiver"). Accordingly, the selection of any case for
18 inclusion in the **PFS/DFS Group 1** constitutes a Lexecon Waiver by the side/party selecting
19 the case. Upon receipt of the list of cases from opposing counsel, each side will have five
20 (5) business days to notify the other side if they do not agree to waive Lexecon with respect
21 to any of the cases selected by the other side. Plaintiffs' Co-Lead Counsel shall use best
22 efforts to secure a Lexecon Waiver for any case selected to be included in **PFS/DFS**
23 **Group 1** by Defendants. Defendants' counsel shall use best efforts to secure a Lexecon
24 Waiver by Defendants for any case selected to be included in **PFS/DFS Group 1** by
25 Plaintiffs.

26 If a Plaintiff in a case selected for inclusion in **PFS/DFS Group 1** by Defendants
27 does not provide a Lexecon Waiver, the Plaintiff or his/her counsel shall show cause why a
28 Lexecon Waiver is not being made in that particular case. If Defendants do not provide a

1 Lexecon Waiver for any case selected for inclusion in **PFS/DFS Group 1** by Plaintiffs,
2 Defendants' counsel shall show cause why a Lexecon Waiver is not being made in that
3 particular case. Any party required to show cause must appear in person or by telephone
4 before the Court to explain why a Lexecon Waiver may not be made in the particular case.

5 For any case removed from **PFS/DFS Group 1** because the Court determines that a
6 Lexecon Waiver is not possible, the side that selected the case shall have the right to select
7 a replacement case within five (5) business days following the Court's determination.
8 Thereafter, the parties shall proceed with the Lexecon Waiver process under this Section
9 for that particular case.

10 **III. Plaintiff and Defendants Fact Sheets.**

11 A Plaintiff Fact Sheet ("PFS") and a Defendants Fact Sheet ("DFS") will be
12 completed for each case in **PFS/DFS Group 1**. The parties will meet and confer about the
13 content of the PFS and DFS and submit a proposed case management order adopting those
14 forms and providing for service via MDL Centrality by no later than **March 1, 2024**. Those
15 forms will be completed and exchanged only in cases designated for **PFS/DFS Group 1**.

16 **A. Timing of Service of Fact Sheets.**

17 Plaintiffs shall serve on counsel for Defendants all PFSs for the **PFS/DFS Group 1**
18 cases no later than **July 31, 2024**.

19 Defendants shall serve on Plaintiffs' Co-Lead Counsel all DFSs for the **PFS/DFS**
20 **Group 1** cases no later than thirty (30) days after service of the PFS and in no event later
21 than **August 30, 2024**.

22 The parties shall provide completed fact sheets on a rolling basis as they are
23 completed.

24 **B. Completion of Fact Sheets.**

25 A completed PFS and DFS shall be considered interrogatory answers under Fed. R.
26 Civ. P. 33, responses to requests for production under Fed. R. Civ. P. 34, and will be
27 governed by the standards applicable to written discovery under Fed. R. Civ. P. 26, 33, 34
28 and 37. The PFS and DFS questions and document requests shall be answered without

1 objection. This section does not prohibit a party from withholding or redacting information
2 based on a recognized privilege; however, if information is withheld or redacted, the party
3 so withholding or redacting information shall contemporaneously provide opposing party
4 with a privilege log.

5 The parties will provide a PFS or DFS that is substantially complete in all respects.

6 “Substantially complete in all respects” requires that:

- 7 a. Every question in the PFS or DFS be answered, even if a party can only
8 answer the question in good faith by indicating “not applicable” or
9 “I don’t know”;
- 10 b. The parties shall provide all medical records relating to the Plaintiff at
11 issue and the alleged damages in their possession or the possession of
12 their attorneys at the time of completing the fact sheets, to the extent
13 not previously provided with the profile forms. The parties will later
14 submit another proposed case management order (by no later than **July**
15 **1, 2024**) governing the collection and production of medical records
16 subsequently obtained from health care providers with the medical
17 authorizations provided with the Fact Sheets.
- 18 c. Plaintiffs shall provide electronically signed copies of the requested
19 records authorizations accompanying the PFS;
- 20 d. The parties will produce the documents requested in the PFS and DFS,
21 or provide a statement certifying that there are no responsive
22 documents; and
- 23 e. Plaintiffs shall sign the PFS and provide verification that the
24 information contained therein is true and correct to the best of Plaintiff’s
25 knowledge, information, and belief, formed after due diligence and
26 reasonable inquiry. If a Plaintiff is suing in a representative or
27 derivative capacity, the PFS shall be completed by the person with the
28 legal authority to represent the estate or the person under legal

1 disability. A Plaintiff's spouse with a claim for loss of consortium shall
2 also sign the PFS, attesting that the responses made to the loss-of-
3 consortium questions in the PFS are true and correct to the best of his
4 or her knowledge, information, and belief, formed after due diligence
5 and reasonable inquiry.

6 **C. Fact-Sheet Deficiencies.**

7 If a Plaintiff fails to timely submit a PFS, or submits a PFS within the allotted time
8 that Defendants deem not to be substantially complete, Defendants shall send an
9 overdue/deficiency letter via MDL Centrality stating whether the PFS is overdue or deemed
10 deficient, in which case the letter shall identify the purported deficiencies. The letter shall
11 include sufficient detail for the parties to meet and confer regarding the alleged deficiencies.
12 Immediately upon submission of the letter, MDL Centrality shall send notification of the
13 submission to the Plaintiff's counsel of record at the email address(es) provided upon
14 registration for MDL Centrality, with a copy to the PLC by operation of an email
15 distribution list provided to MDL Centrality by Plaintiffs' Co-Lead Counsel. The Plaintiff
16 shall have fifteen (15) days from the date of that letter to meet and confer in an effort to
17 resolve the dispute. Should the meet-and-confer process not resolve the dispute, the parties
18 shall arrange a call with the Court to resolve it.

19 Similarly, if Defendants do not submit a DFS within the time specified in this Order,
20 or submit a DFS within the allotted time that Plaintiffs deem not to be substantially
21 complete, Plaintiffs shall send an overdue/deficiency letter via MDL Centrality stating
22 whether the DFS is overdue or deemed deficient, in which case the letter shall identify the
23 purported deficiencies. The letter shall include sufficient detail for the parties to meet and
24 confer regarding the alleged deficiencies. Immediately upon submission of the letter, MDL
25 Centrality shall send notification of the submission to Defendants at portppf-
26 pfs@nelsonmullins.com and portppf-pfs@mccarter.com. Defendants shall have fifteen
27 (15) days from the date of that letter to meet and confer in an effort to resolve the dispute.
28

1 Should the meet-and-confer process not resolve the dispute, the parties shall arrange a call
2 with the Court to resolve it.

3 **D. Records Discovery in PFS/DFS Group 1.**

4 Records discovery for **PFS/DFS Group 1** will proceed in accordance with the
5 separate case management order relating to Joint Records Collection to be entered by the
6 Court.

7 Upon receipt of a PFS, Defendants may commence immediately to obtain records
8 for that Plaintiff pursuant to the provisions for the records vendor process.

9 **IV. Discovery Group 1.**

10 **A. Selection Process.**

11 By **December 10, 2024**, the parties shall exchange lists of fifteen (15) cases selected
12 from **PFS/DFS Group 1**, selected in a manner consistent with the goal of identifying
13 representative cases. The parties can each designate five (5) cases on those lists for
14 automatic inclusion in **Discovery Group 1**. After exchange of lists, the parties will meet
15 and confer in an effort to identify from the exchanged lists the remaining five (5) additional
16 cases that will be included in **Discovery Group 1**. By **December 17, 2024**, the parties will
17 complete their meet-and-confer process and submit to the Court a list of fifteen (15) cases
18 they jointly recommend as **Discovery Group 1**.

19 On **December 17, 2024**, the parties shall file a joint submission identifying each of
20 Plaintiffs' and Defendants' selections of cases, as well as all additional cases on which the
21 parties have agreed for inclusion in **Discovery Group 1**. If the parties are unable to agree
22 upon all five (5) additional cases for **Discovery Group 1**, they shall on **December 17, 2024**,
23 each submit to the Court via email to chambers their proposed list of additional cases to
24 include in **Discovery Group 1** with a memorandum in support of their selections. Within
25 seven (7) business days of such submission, the parties may submit a response to the
26 opposing party's memorandum regarding selection of cases. The Court will then select the
27 remaining cases to be included in the fifteen (15) cases to constitute **Discovery Group 1**.

28

1 **Discovery Group 1** will be governed by a scheduling order and case management
2 order that will be determined at the time the group is selected. The parties will meet and
3 confer in an effort to agree upon such scheduling order.

4 **V. Bellwether Group 1.**

5 **A. Selection Process.**

6 The bellwether cases for trial will be selected from **Discovery Group 1**.

7 After having met and conferred, and by **March 3, 2025**, the parties shall exchange
8 lists of six (6) proposed selections from **Discovery Group 1** for bellwether Plaintiffs and
9 order of trials. The parties will meet and confer in an effort to agree upon a group of six
10 cases to constitute **Bellwether Group 1**, which shall be done in a manner consistent with
11 achieving the goal of proportionate identification of representative cases. If the parties are
12 unable to agree on six cases, the parties shall, by **March 10, 2025**, file their proposed lists
13 and a memorandum in support of their selections and in opposition, if applicable, to the
14 opposing party's selections. Within seven (7) business days of such submission, the parties
15 may file a response to the opposing party's memorandum regarding selection of cases. The
16 parties propose that the Court then select the final group of six cases to form **Bellwether**
17 **Group 1**.

18 **Bellwether Group 1** will be governed by a scheduling order and case management
19 order that will be determined at the time the group is selected. The parties will meet and
20 confer in an effort to agree upon such scheduling order with the goal of completing
21 remaining case-specific discovery as close as possible to the completion of common-issue
22 discovery.

23 **B. Remedies for Diminishment of Discovery Group 1 and/or Bellwether**
24 **Group 1.**

25 1. Should Plaintiffs withdraw, settle, or dismiss a case from **Discovery Group 1**,
26 such case will be replaced by a case from **PFS/DFS Group 1**. The party that originally
27 designated the eliminated case shall select the replacement. However, if the eliminated case
28 was one of the cases chosen by the Court, the Court will select the substitute cases from a

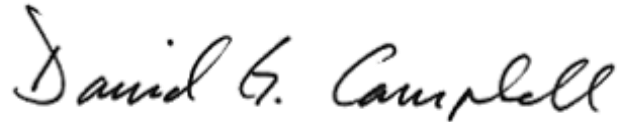
1 list of four (4) cases nominated by the parties (two from Plaintiffs and two from
2 Defendants).

3 2. Should Plaintiffs withdraw, settle, or dismiss a case from **Bellwether**
4 **Group 1**, such case will be replaced by a case from **Discovery Group 1**. (But see CMO 6,
5 ¶ II.G.) The Court will select the substitute case from a list of two (2) cases nominated by
6 the parties (one from Plaintiffs and one from Defendants).

7 **VI. Future Discovery and Bellwether Groups.**

8 The Court does not intend to try more than 6 bellwether cases in this MDL. The
9 parties may raise issues concerning additional bellwether cases and trials if they deem
10 additional cases warranted.

11 Dated this 22nd day of November, 2023.

12
13 

14
15

David G. Campbell
16 Senior United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28