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22 IN THE UNITED STATES DISTRICT COURT
23 FOR THE DISTRICT OF ARIZONA
24

25 In re Bard IVC Filters Products
26 Liability Litigation

NO. MD-15-02641-PHX-DGC

**STIPULATION AND JOINT
SUBMISSION REGARDING
BELLWETHER SELECTION
PROCESS**

1 In accordance with this Court’s request at the March 31, 2016 case management
2 conference and as provided in Section II of Case Management Order No. 10 (Doc. 1319),
3 the parties jointly provide this submission regarding a stipulated case management order
4 governing the bellwether selection process and fact sheets and procedures for dealing with
5 the issue of *Lexecon* waivers.

6 **I. Stipulated Case Management Order for Bellwether Selection and Fact Sheets**

7 Exhibit 1 to this filing is a stipulated form of case management order for the
8 bellwether selection process.

9 **II. Parties’ Positions Regarding *Lexecon* Waivers**

10 Ideally, the parties would prefer that the Court exercise its ability to seek cross-
11 designation to sit as judge in transferor districts under 28 U.S.C. § 292(b) and (d) for those
12 cases in which both parties do not waive *Lexecon*.

13 If the Court is inclined to require *Lexecon* waiver for cases included in the
14 bellwether process, the parties jointly suggest that the court include the following
15 provision as Subsection C. under Section II (PFS/DFS Group 1) in the attached proposed
16 case management order for the bellwether selection process:

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

1 counsel shall use best efforts to secure a Lexecon Waiver by Defendants for any case
2 selected to be included in **PFS/DFS Group 1** by Plaintiffs.

3 If a plaintiff in a case selected for inclusion in **PFS/DFS Group 1** by Defendants
4 does not provide a Lexecon Waiver, the plaintiff or his/her counsel shall show cause why
5 a Lexecon Waiver is not being made. If Defendants do not provide a Lexecon Waiver for
6 any case selected for inclusion in **PFS/DFS Group 1** by Plaintiffs, Defendants' counsel
7 shall show cause why a Lexecon waiver is not being made in that particular case. Any
8 party required to show cause must appear in person or by telephone before the Court to
9 explain why a Lexecon Waiver may not be made in the particular case.

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

15 DATED this 15th day of April 2016.

16 **ATTORNEYS FOR PLAINTIFFS**

ATTORNEYS FOR DEFENDANTS

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Deborah Yanazzo
Deborah Yanazzo

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

IN RE: BARD IVC FILTERS PRODUCTS
LIABILITY LITIGATION,

No. 2:15-MD-02641-DGC

**[PROPOSED] CASE MANAGEMENT
ORDER NO. __
(Bellwether Selection Process)**

Pursuant to the agreement of the parties, the Court enters this Case Management Order No. __ regarding the process for the selection of and discovery in first set of bellwether cases for this MDL.

I. Initial Plaintiff Pool

A. The **Initial Plaintiff Pool** for this bellwether process includes all cases filed and properly served upon Defendants in MDL 2641 as of April 1, 2016.¹

B. The parties will provide Plaintiff Profile Forms (“PPF”) and Defendants Profile Forms (“DPF”) for each of the **Initial Plaintiff Pool** cases. For purposes of the **Initial Plaintiff Pool** cases, the deadlines established in CMO No. 5 (Doc. 365) will be expedited. All Plaintiff Profile Forms for cases in the **Initial Plaintiff Pool** must be served within thirty (30) days of filing and service, and in no event later than May 1, 2016; and the Defendants Profile Forms shall be served within forty (40) days after the

¹ The **Initial Plaintiff Pool** does not, however, include those cases which make up the group of “Mature Cases” referenced in Case Management Order No. 8, Para. I (C) [Doc. 519], with the exception of the Conn, Milton, and Mintz cases, which the Court removed from that list in Case Management Order No. 10 [Doc. 1319].

1 date of receipt of the PPF and, in no event later than June 9, 2016. Cases filed after April
2 1, 2016 shall continue to be governed by the deadlines established in CMO No. 5 (Doc.
3 365). In order to make the process as efficient as possible, the parties shall provide their
4 PPFs and DPFs on a rolling basis, as they are completed.

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

6 A. By not later than June 29, 2016, the parties shall make a simultaneous
7 exchange of lists identifying twenty-four (24) representative cases each. Those forty-
8 eight (48) cases shall constitute **PFS/DFS Group 1**. The lists exchanged by the parties
9 shall be organized alphabetically by plaintiffs' last name and shall include the civil action
10 number for each case.

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

17 **III. Plaintiff Fact Sheets (PFS) and Defendants Fact Sheets (DFS)**

18 A PFS and a DFS will be completed for each case in **PFS/DFS Group 1**.

19 A. Timing of services of Fact Sheets

20 Plaintiffs shall serve on counsel for Defendants all PFS for the **PFS/DFS Group 1**
21 by no later than July 29, 2016.

22 Defendants shall serve on Plaintiffs' Co-Lead/Liaison Counsel the DFS for a
23 particular matter no later than thirty (30) days after service of the PFS and all DFS shall
24 be served by no later than August 29, 2016.

25 The parties shall provide completed PFS/DFS on a rolling basis as they are
26 completed.

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1 B. Completion of Fact Sheets

2 A completed PFS and DFS shall be considered interrogatory answers under Fed. R.
3 Civ. P. 33, responses to requests for production under Fed. R. Civ. P. 34, and will be
4 governed by the standards applicable to written discovery under Fed. R. Civ. P. 26 and
5 Fed. R. Civ. P. 37. The PFS and DFS questions and document requests shall be answered
6 without objection. This section does not prohibit a party from withholding or redacting
7 information based on a recognized privilege; however, if information is withheld or
8 redacted, the party so withholding or redacting information shall provide opposing party
9 with a privilege log.

10 The parties will provide a PFS or DFS that is substantially complete in all respects.
11 “Substantially complete in all respects” requires that:

12 (a) Every question in the PFS or DFS be answered, even if a party can only
13 answer the question in good faith by indicating “not applicable” or “I don’t know”;

14 (b) Plaintiffs shall provide the requested records authorizations accompanying
15 the PFS;

16 (c) The parties will produce the documents requested in the PFS and DFS, or
17 provide a statement certifying that there are no responsive documents; and

18 (d) Plaintiffs shall sign the PFS and provide verification that the information
19 contained therein is true and correct to the best of Plaintiff’s knowledge, information, and
20 belief, formed after due diligence and reasonable inquiry. If a plaintiff is suing in a
21 representative or derivative capacity, the PFS shall be completed by the person with the
22 legal authority to represent the estate or the person under legal disability. Plaintiff
23 spouses with a claim for loss of consortium shall also sign the PFS, attesting that the
24 responses made to the loss of consortium questions in the PFS are true and correct to the
25 best of his or her knowledge, information, and belief, formed after due diligence and
26 reasonable inquiry.

1 C. Fact Sheet Deficiencies

2 If a plaintiff fails to timely submit a PFS, or submits a PFS within the allotted time
3 which Defendants deem not to be substantially complete, Defendants shall mail an
4 overdue/deficiency letter by e-mail and U.S. mail to Plaintiffs' Co-Lead Counsel and the
5 plaintiff's individual representative counsel, stating whether the PFS is overdue or deemed
6 deficient, in which case the letter shall identify the purported deficiencies. The letter
7 shall include sufficient detail for the parties to meet and confer regarding the alleged
8 deficiencies. The plaintiff receiving such deficiency letter shall have fifteen (15) days
9 from receipt of that letter to meet and confer in an effort to resolve the dispute. Should
10 the meet-and-confer process not resolve the dispute, the parties shall arrange a call with
11 the Court to resolve it.

12 Similarly, if Defendants do not submit a DFS within the time specified in this
13 Order, or submit a DFS within the allotted time which Plaintiffs deem not to be
14 substantially complete, Plaintiffs shall mail an overdue/deficiency letter by e-mail and
15 U.S. mail to Defendants' Lead Counsel, stating whether the DFS is overdue or deemed
16 deficient, in which case the letter shall identify the purported deficiencies. The letter
17 shall include sufficient detail for the parties to meet and confer regarding the alleged
18 deficiencies. Defendants shall have fifteen (15) days from receipt of such a letter to meet
19 and confer in an effort to resolve the dispute. Should the meet-and-confer process not
20 resolve the dispute, the parties shall arrange a call with the Court to resolve it.

21 C. Records Discovery in **PFS/DFS Group 1**

22 Records discovery for PFS/DFS Group 1 will proceed in accordance with the
23 separate Case Management Order relating to Joint Records Collection to be entered by the
24 Court.

25 Upon receipt of a plaintiff's PFS, Defendants may commence immediately to
26 obtain records for that plaintiff pursuant to the provisions for the records vendor process.

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1 **IV. Discovery Group 1**

2 A. Selection Process

3 1. By December 9, 2016, the parties shall exchange lists of ten (10)
4 cases, selected in a manner consistent with the goal of identifying representative
5 cases. The parties can each designate four (4) cases on those lists for automatic
6 inclusion in **Discovery Group I**. After exchange of lists, the parties will meet and
7 confer in an effort to identify from the exchanged lists the remaining four (4)
8 additional cases that will be included in **Discovery Group 1**. By December 16,
9 2016, the parties will complete their meet and confer process and submit to the
10 Court a list of twelve (12) cases they jointly recommend as **Discovery Group 1**.

11 2. On December 16, 2016, the parties shall file a joint submission
12 identifying each of Plaintiffs' and Defendants' selections of cases as well as all
13 additional cases on which the parties have agreed for inclusion in **Discovery**
14 **Group 1**. If the parties are unable to agree upon all four (4) additional cases for
15 **Discovery Group 1**, they shall on December 16, 2016 each submit to the Court,
16 outside of the ECF system, their proposed list of additional cases to include in
17 **Discovery Group 1** with a memorandum in support of their selections. Within
18 seven (7) business days of such submission, the parties may submit a response to
19 the opposing party's memorandum regarding selection of cases. The Court will
20 then select the remaining cases to be included in the twelve (12) cases to constitute
21 **Discovery Group 1**.

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

2 A. Selection Process

3 1. The initial bellwether cases for trial will be selected from **Discovery**
4 **Group 1**.

5 2. After having met and conferred, and by March 1, 2017, the parties
6 shall exchange lists of six (6) proposed selections from **Discovery Group 1** for
7 bellwether plaintiffs, and order of trials. The parties will meet and confer in an
8 effort to agree upon a group of six (6) cases to constitute **Bellwether Group 1**,
9 which shall be done in a manner consistent with achieving the goal of
10 proportionate identification of representative cases. If the parties are unable to
11 agree on six (6) cases, the parties shall submit to the Court, outside of the ECF
12 system, by March 5, 2017, their proposed lists and a memorandum in support of
13 their selections and in opposition, if applicable, to the opposing party's selections.
14 Within seven (7) business days of such submission, the parties may submit a
15 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 (6) cases to form
17 **Bellwether Group 1**.

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

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

25 1. Should Plaintiffs withdraw, settle, or dismiss without prejudice a case
26 from **Discovery Group 1**, such case will be replaced. The party that originally
27 designated the eliminated case shall select the replacement. However, if the
28 eliminated case was one of the cases chosen by the Court, the Court will select the

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

2. Should Plaintiffs withdraw, settle, or dismiss without prejudice a case from **Bellwether Group 1**, such case will be replaced by a case from **Discovery Group 1** selected by the Court from a list of four (4) cases nominated by the parties (two from each side).

VI. Future Discovery and Bellwether Groups.

The selection, discovery, and trial of future bellwether cases will be the subject of a future case management order or orders.