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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability Litigation,	No. 2:15-MD-02641-DGC **THE PARTIES' JOINT STATUS REPORT FOR THE JULY 13, 2017 CASE MANAGEMENT CONFERENCE**

In accordance with Paragraph F.5 of Case Management Order No. 23 [Doc. 5770], the Parties hereby submit their Joint Status Report for the July 13, 2017 Case Management Conference.

I. Discovery

A. MDL Common Discovery

The Parties completed MDL common discovery on February 3, 2017. The following depositions have been completed:

December 15, 2015	30(b)(6) re FDA Warning Letter
January 11, 2016	Kay Fuller
January 20, 2016	Continued 30(b)(6) re FDA Warning Letter
March 18, 2016	30(b)(6) re corporate structure
April 27, 2016	30(b)(6) re ESI systems structure
May 3, 2016	Murray Asch, M.D.
May 11, 2016	Carol Vierling
May 17, 2016	Anne Bynon
May 24, 2016	Len DeCant
June 2, 2016	John DeFord
June 9, 2016	Bret Baird
June 16, 2016	Robert DeLeon
June 17, 2016	Joe DeJohn
July 18, 2016	Abithal Raji-Kubba
July 27, 2016	Bill Little
July 27, 2016	Judy Ludwig
July 29, 2016	John Wheeler
August 9, 2016	Maureen Uebelacker
August 16, 2016	Daniel Orms
August 19, 2016	Mary Edwards
August 24, 2016	Cindi Walcott

August 30, 2016	30(b)(6) re REACH program
September 7, 2016	Steve Williamson
September 7, 2016	30(b)(6) re Sales/Marketing
September 7, 2016	Kevin Shifrin
September 16, 2016	Jack Sullivan
September 19, 2016	Brian Doherty
September 23, 2016	Holly Glass
September 29, 2016	John Van Vleet
October 11, 2016	Chris Ganser
October 18, 2016	Natalie Wong
November 3, 2016	Jack Sullivan (continued)
November 11, 2016	Robert Cortelezzi
December 6, 2016	David Peeler, M.D.
January 4, 2017	John Kaufman, M.D.
January 18, 2017	Michael Randall - 30(b)(6) Meridian/Denali
January 18, 2017	Kim Romney
January 19, 2017	Robert Carr - 30(b)(6) Key Opinion Leaders
January 20, 2017	Scott Trerotola, M.D.
January 24, 2017	Scott Randall
January 25, 2017	Gary Cohen, M.D.
January 26, 2017	Chad Modra - 30(b)(6) Failure Rate Thresholds
January 26, 2017	Anthony Venbrux, M.D.
January 30, 2017	Frank Lynch, M.D.
January 31, 2017	Mark Wilson
February 1, 2017	William Stavropoulos, M.D.
February 2, 2017	Mike Randall
February 2, 2017	Kevin Boyle
June 6, 2017	Rob Carr (Preemption Declaration)

B. MDL Expert Disclosure and Discovery

Plaintiffs made their initial disclosures of expert witnesses on March 3, 2017 and their initial disclosures relating to the Meridian and Denali devices on April 7, 2017. Those disclosures included the following witnesses:

David W. Bates, M.D., MSc

Rebecca Betensky, Ph.D.

Mark J. Eisenberg, M.D.

David Garcia, M.D.

Steven M. Hertz, M.D.

Sanjeeva Kalva M.D.

David A. Kessler, M.D.

Thomas Kinney, M.D., M.S.M.E.

Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME

Robert O. Ritchie, Ph.D.

Suzanne Parisian, M.D.

Anne Christine Roberts, M.D.

Michael B. Streiff, M.D.

Robert L. Vogelzang, M.D.

Defendants made their initial disclosures of expert witnesses on April 14, 2017 and their initial disclosures relating to the Meridian and Denali devices on May 12, 2017. Those disclosures included the following witnesses:

Christine L. Brauer, Ph.D.

Paul Briant, Ph.D., P.E.

Audrey A. Fasching, Ph.D., P.E.

David W. Feigal. Jr., M.D., M.P.H.

Clement J. Grassi, M.D.

Mark W. Moritz, M.D.

Christopher S. Morris, M.D.

Frederick B. Rogers, M.D., FACS

Moni Stein, M.D., FSIR

Ronald A. Thisted, Ph.D.

Donna Bea Tillman, Ph.D., M.P.A.

Plaintiffs made their rebuttal disclosures of expert witnesses on May 12, 2017. Those disclosures included the following witnesses:

Rebecca Betensky, Ph.D.

Kush Desai, M.D.

Mark J. Eisenberg, M.D.

Steven M. Hertz, M.D.

Robert M. McMeeking, Ph.D.

Robert O. Ritchie, Ph.D.

Robert L. Vogelzang, M.D.

The following expert depositions have been taken:

May 9, 2017	David W. Bates, M.D., MSc (class-action)
May 16, 2017	Steven M. Hertz, M.D. (class-action)
May 17, 2017	Christopher S. Morris, M.D.
June 5, 2017	Robert L. Vogelzang, M.D.
June 6, 2017	Kush Desai, M.D.
June 9, 2017	Robert O. Ritchie, Ph.D.
June 15, 2017	Clement J. Grassi, M.D.
June 17, 2017	Thomas Kinney, M.D., M.S., M.E.
June 21, 2017	David L. Garcia, M.D.
June 21, 2017	Suzanne Parisian, M.D.
June 21, 2017	Anne Christine Roberts, M.D.
June 23, 2017	Rebecca Betensky, Ph.D.
June 26, 2017	Audrey Fasching, Ph.D., PE
July 6, 2017	Mark J. Eisenberg, M.D., MPH, FACC, FAHA

July 6, 2017	Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME

The following expert witness depositions are scheduled:

July 7, 2017	Anne Christine Roberts, M.D.
July 11, 2017	Sanjeeva Kalva, M.D.
July 12, 2017	Michael B. Streiff, M.D.
July 13, 2017	Paul Briant, Ph.D, PE
July 18, 2017	Mark W. Moritz, M.D.
July 18, 2017	Frederick B. Rogers, M.D., MS, FACS
July 20, 2017	David W. Feigal, Jr., M.D., MPH
July 21, 2017	Darren R. Hurst, M.D.
July 24, 2017	Derek D. Muehrcke, M.D.
July 25, 2017	Christopher S. Morris, M.D.
July 26, 2017	J. Matthew Sims, M.C., M.S.
July 28, 2017	Ronald A. Thisted, Ph.D.
July 31, 2017	David A. Kessler, M.D.
July 31, 2017	Moni Stein, M.D.
August 2, 2017	Christine L. Brauer, M.D., Ph.D.
August 4, 2017	Robert O. Ritchie, Ph.D. (continued)
August 4, 2017	Donna Bea Tillman, Ph.D.MPA, FRAPS
August 4, 2017	Lora K. White, RN, BSN, CNLCP, CCM, MSCC

C. *Barazza* Class Action Discovery

The Parties have completed the depositions of the named plaintiffs. The following depositions were taken:

October 19, 2016	Diane Washington
October 28, 2016	James Holt
November 10, 2016	Gregory Lester

November 16, 2016	Maria Barazza
November 30, 2016	Edward Mims
December 1, 2016	Nancy Mosher
December 6, 2016	Thomas Flournay
December 6, 2016	Delmar Lee Peck
December 15, 2016	Denise Tomlin
January 24, 2017	John Van Vleet
February 27, 2017	Linda Walker
May 11, 2017	Ana Hernandez

The Parties have designated and disclosed experts on class certification issues, including Plaintiffs' rebuttal expert reports. Many of those class certification experts are also the same experts in the general MDL and have been deposed (or are scheduled to be deposed) at the same time for both the MDL and the class action.

D. Bellwether Group 1 Depositions

1. Fact Discovery

In addition to the numerous fact witness depositions taken by the Parties before the last status conference, the Parties have scheduled or have already taken the following fact witness depositions in the five Bellwether case since that status conference:

May 31, 2017	Angelic Thompson (Mulkey)
May 31, 2017	Lorelie Thompson (Mulkey)
May 31, 2017	Torin Walters, M.D. (Mulkey)
June 1, 2017	Pho Nguyen, M.D. (Mulkey)
June 15, 2017	Brandon Kang, M.D. (Booker)
June 20, 2017	Richard Harvey, M.D. (Booker).
June 26, 2017	Eric Hairston (Booker)
June 27, 2017	Brody Puckett (Kruse, postponed due to illness)
July 7, 2017	Amy Sparks, M.D. (Hyde)
July 11, 2017	Colleen Taylor, M.D. (Jones)

July 12, 2017 Aaron Donner (Mulkey)

August 3, 2017 Chris Smith (Jones)

August 3, 2017 Tim Hug (Hyde)

The parties are also working on coordinating a date for the deposition of Bryan Vogel, a BPV employee in field assurance.

Per CMO 25 (Doc. 6227), the deadline for deposing medical witnesses (treating physicians) is August 7, 2017, and the deadline for deposing all other fact witnesses is August 15, 2018.

2. Case-Specific Expert Disclosures and Discovery

On June 5, 2017, Plaintiffs disclosed case-specific expert reports by the following expert witnesses in all five bellwether cases:

Darren Hurst, M.D.

Derek D. Muehrcke, M.D.

On June 5, 2107, Plaintiffs disclosed the case-specific expert report of David Garcia, M.D. in the Jones bellwether case.

On June 9, 2017, in accordance with the agreement of the Parties, Plaintiffs disclosed case-specific expert reports by Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME in all five bellwether cases.

On June 12, 2017, in accordance with the agreement of the Parties, Plaintiffs disclosed case-specific expert reports by the following expert witnesses in all five bellwether cases:

Robert O. Ritchie, Ph.D.

J. Matthew Sims, MC, MS & Lora K. White, RN, BSN, CNLCP, CCM, MSCC

On July 3, 2017, Defendants disclosed case-specific expert reports for the following expert witnesses:

Mark W. Moritz, M.D.

Christopher S. Morris, M.D.

Moni Stein, M.D., FSIR

The Parties have agreed that Defendants may have until July 13, 2017 to disclose certain medical experts in the Hyde and Booker and to disclose their engineering experts' case-specific opinions by that same date.

Per CMO 25, Plaintiffs are required to file their rebuttal case-specific expert disclosures for Bellwether Group I by July 17, 2017, the depositions of all case-specific experts (other than medical witnesses) must be completed by August 7, 2017, and the completion of depositions of non-medical witnesses must be completed by August 15, 2017. [Doc. 6227]

II. Plaintiffs' Request to Take Trial Deposition of Dr. Henry in Booker Case.

In their bellwether submission, Plaintiffs noted their request to take a trial deposition of the implanting physician in the Hyde case, Dr. David A. Henry. At the last Case Management Conference, this Court stated: "Before ruling that the plaintiffs can redepose the doctors, I would want to look at those depositions and understand the arguments." Defendants do not agree that a trial deposition of Dr. Henry is appropriate.

The Parties' respective positions are set forth below:

A. Plaintiffs' Position

During the depositions of Dr. Henry, Plaintiff Lisa Hyde's treating physician who implanted her G2X IVC filter, Dr. Henry's counsel repeatedly interposed inappropriate objections and instructed Dr. Henry not to answer questions on grounds not permitted in the Rules of Civil Procedure.

The effect of those inappropriate objections and instructions was that Plaintiff was precluded from obtaining trial usable testimony from Dr. Henry. Plaintiffs have attached as **Exhibit A** to this report multiple examples of such interfering objections and instructions. In accordance with the Court's statement at the last Case Management Conference, Plaintiffs will separately submit under seal the entire transcript for the Court for the Court to review.

Plaintiffs contend that, had Dr. Henry been examined at trial, this Court would not have permitted such restricted testimony resulting from such positions and behavior by counsel for the witness and that Plaintiffs would have had the opportunity to elicit, and the jury would have had the opportunity to hear, without unnecessary interruption, Dr. Henry's testimony regarding the care and treatment of plaintiff and the information that he considered or would have considered important in deciding to recommend the G2X filter for Plaintiff Lisa Hyde. In particular, Dr. Henry's attorney completely precluded Plaintiffs from examining Dr. Henry regarding information in Bard's internal documents that predated his implantation of the filter in Ms. Hyde – important information for the jury to assess in light of Bard's assertion of the learned-intermediary affirmative defense.

Accordingly, Plaintiffs respectfully request the Court permit them to take a trial deposition of Dr. Henry with either a special master present to control the conduct of counsel and the witness or with the Court present telephonically as trial judge for the deposition.

B. Defendants' Position

The deposition of Dr. David Henry, who placed Ms. Hyde's G2X Filter, should not be reconvened. First, although Dr. Henry's counsel instructed him not to answer approximately five to seven questions during the deposition, the questions called for expert testimony (i.e., present opinions that were not formed during the treatment of Ms. Hyde), which is inappropriate under Wisconsin law. *See Alt v. Cline*, 589 N.W.2d 21, 25-26 (Wis. 1999) (discussing the basis in substantive Wisconsin law for the privilege "to refuse to testify if the expert is called by a litigant" unless the witness consents to be an expert). Counsel for Dr. Henry explained the law, why counsel's questions called for expert opinions, and how the questions could be rephrased. *See, e.g.*, David Henry Dep. Tr., 21:18 to 22:8; 26:7 to 27:16; 28:17-21; 29:15-23; 30:21 to 31:13; 31:23 to 34:8; 44:2-18; 87:25 to 88:4, excerpts attached as **Exhibit B**.

Second, even if the questions did not call for expert opinions, any objections that counsel for Ms. Hyde perceived as inaccurate could have been met by rephrasing the

questions, which counsel did in several instances, so that they were tied to Dr. Henry's treatment of Ms. Hyde.

Third, at the deposition, counsel could have called the Court when he thought that his examination was being so prejudiced that the deposition would need to be reconvened. For each of these reasons, requiring Bard and a third party witness to reconvene a deposition in Wisconsin to answer five to seven questions is not warranted.

III. Plaintiffs' Request to Depose Dr. Altonaga

Plaintiffs have requested to depose Dr. William Altonaga, the Medical Director at Bard during the relevant time period, in the bellwether cases. Under CMO 23, Discovery Protocols for Bellwether Group 1 [Doc. 5881], the Court ordered that no more than five depositions of case relevant fact (non-expert) witnesses could be taken in each Bellwether Group I case, and that "[t]hese depositions may include Bard present or former employees only if the depositions will likely produce probative evidence that could reasonably have been obtained during general discovery." Bard has opposed the request.

The Parties submit their respective positions as follows:

A. Plaintiffs' Position

Dr. Altogana was Bard's medical director throughout the time period relevant to the devices in the bellwether cases. In that role, he was responsible for reviewing the available information with respect to those devices and ensuring their safety and efficacy. As such, he had particular responsibility to stay apprised of developments and problems with filters including those at issue in the bellwether cases before and after they entered the market. He was also responsible to make decisions regarding the devices at issue in the bellwether cases (G2, G2X, and Eclipse) and whether they were sold, marketed, and what warnings Bard would give relating to them, including in the IFUs.

Specific to the bellwether cases, Plaintiffs expect that Dr. Altonaga will provide testimony regarding his knowledge of developments and problems associated with filters before and after they entered the market and also his decisions as medical director specific to the particular devices and relevant timings for each Plaintiff. Further, as medical

director, Dr. Altonaga is responsible to prepare reports including Health Hazard Evaluations regarding filter problems and adverse events. For example, his knowledge of adverse events relating to the G2 and G2X devices as well as internal tracking and trending of those events at the time that Lisa Hyde's G2X filter was implanted in February 2011 and as it remained in her body until August 2014 are highly probative of issues in Ms. Hyde's case. Similarly, his recommendations and actions as medical director with respect to the G2X at those times are particularly relevant to Ms. Hyde's claims. Dr. Altonaga has similarly relevant knowledge and information for the devices implanted in the other bellwether plaintiffs (the G2 and Eclipse filters) on the pertinent dates in each of those cases.

Although Dr. Altonaga was deposed in a state-court IVC filter case prior to the MDL, that deposition did not address the facts and issues specific to these cases. He was deposed in a case in San Diego County in October 2013. That case, Giordano, involved a specific and unique set of facts – distinct from the bellwethers and nearly all the cases in this MDL. In particular, the plaintiff suffered a perforation and exsanguination that led to her death. That injury is simply one that is not present in any of these bellwether cases, and exists rarely, if at all, across the MDL.

Further, Dr. Altonaga was primarily examined about the time period prior to when he became medical director (and, thus, prior to the time period of the devices in the bellwether cases). And, of the eight exhibits marked at his deposition, seven were corporate documents from the time period prior to when he was medical director.

Dr. Altonaga has never been deposed regarding the time period at issue for these bellwether cases, and he has never been deposed on the particular facts of these cases and his knowledge – as the top medical person at the company – at the particular times relevant to these cases. He was not deposed regarding the adverse events, tracking/trending, and decisions made regarding the bellwether devices. Nor was he examined regarding any of the injuries in the bellwether cases.

Plaintiffs note that, other than Dr. Altonaga, they have not requested the deposition of any other "corporate" witness in the bellwethers other than the sales representatives deposed in the first phase of discovery or the immediate supervisors of those sales representatives and one adverse event investigator who investigated at least two of the bellwether cases. And, Plaintiffs did not seek to depose Dr. Altonoga during common discovery precisely because his testimony is more appropriate in case-specific context because of the direct particular relevance of his knowledge at specific dates

B. Defendants' Position

As a part of bellwether discovery, Plaintiffs are seeking to depose Dr. Bill Altonaga, the former medical director of Bard Peripheral Vascular. However, Dr. Altonaga has no knowledge specific to the bellwether cases. Further, before the creation of this MDL, Dr. Altonaga was deposed by a member of the Plaintiffs' Steering Committee (with the Plaintiffs' co-lead counsel participating by telephone) for almost 7 hours. That deposition focused on a wide array of general issues regarding Bard's filters, and in no way focused on the facts of the case in which it was noticed. Thereafter, Plaintiffs did not once ask to re-depose Dr. Altonaga again in this MDL during the year afforded for general fact discovery.

Case Management Order No. 24 [Doc. 5883] states that the depositions taken as a part of bellwether discovery "may include Bard present or former employees only if the depositions will likely produce probative evidence that could not reasonably have been obtained during general discovery." Here, Plaintiffs have made no effort to make the showing required by Case Management Order No. 24. Nor could they. Plaintiffs could readily have requested an additional deposition of Dr. Altonaga as a part of the dozens of comparable depositions they took during the year-long period of fact discovery, and covered the same general issues they now mention, but clearly chose not to do so. Plaintiffs should not be permitted now to extend general fact discovery (which concluded in February) under the guise of taking additional corporate depositions during the bellwether discovery phase.

Bard also notes that it has cooperated with Plaintiffs to arrange depositions during this phase of past and present Bard employees with specific knowledge potentially relevant to the bellwether cases. Dr. Altonaga, however, presents a different issue, as he has no information specific to these bellwether plaintiffs, and any general information he has could have been readily "obtained during general discovery."

IV. Discoverability of Communications Between or Among Plaintiffs' Experts

Several of Plaintiffs' expert reports were written by more than one expert. Defendants have requested production of correspondence exchanged among the authors of these jointly written reports that in any way relate to this case or the expert reports they jointly drafted. They do not seek production of the draft reports themselves. Plaintiffs have objected to these requests to the extent that such communications are protected from discovery under the Federal Rules of Civil Procedure and include communications with Plaintiffs' counsel that are protected work product.

The plaintiffs have produced the following jointly written expert reports:

- David Garcia, M.D. and Michael B. Streiff, M.D.
- Sanjeeva Kalva, M.D., Thomas Kinney, M.D., M.S.M.E., and Anne Christine Roberts, M.D.
- Robert L. Vogelzang, M.D. and Kush R. Desai, M.D.
- J. Matthew Sims, MC, MS & Lora K. White, RN, BSN, CNLCP, CCM, MSCC

The Parties provide their respective positions as follows:

A. Defendants' Position

At the outset of expert discovery, the Parties agreed that document requests could be served on the expert witnesses with the deposition notices, and that subpoenas would not be necessary. Defendants' deposition notices to the Plaintiffs' experts requested "all communications and emails between you and any fact or expert witness in the Case[.]" Some of the deposition notices also requested certain witnesses to provide "all communications and emails between you and other physicians at Northwestern or

Interventional Cardiologist's LLC that relate in any way to the Case, the Report of Robert L. Vogelzang, M.D. (signed March 2, 2017), or the Medical Monitoring (Morris) Rebuttal Report of Kush R. Desai, M.D. and Robert L. Vogelzang, M.D. (signed April 19, 2017)[.]"[1] *See also* Am. Dep. Notice of David Garcia M.D. (signed May 6, 2017)[2] (requesting "all communications and emails between you and Dr. Michael Streiff that relate in any way to the Case or the expert reports you and Dr. Michael Streiff submitted in this case.").

Because the plaintiffs submitted jointly written expert reports, Bard narrowly seeks the communications among the authors of these reports that relate to this case or the drafting or contents of the reports, but not the draft reports themselves. This limited group of communications is relevant and not subject to work-product protection.[3]

Rule 26 limits work-product protection to communications between counsel for a party and that party's testifying expert witness. *See* Fed. R. Civ. P. 26(b)(4)(C). As the Advisory Committee notes to the 2010 Amendments make clear, "inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule." Advisory Committee Notes to 2010 Amendment, Fed. R. Civ. P. 26. The Ninth Circuit, as well as other appellate and district courts, likewise have ruled that an expert's communications with non-attorneys are discoverable. *See Republic of Ecuador v. Mackay*, 742 F.3d 860, 870 (9th Cir. 2014)

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[1] According to their expert report, Dr. Vogelzang and Dr. Desai wrote their report with Scott Resnick, M.D. and Robert Lewandowski, M.D. All four physicians are colleagues at Northwestern Memorial Hospital. Consequently, Defendants are seeking communications among all four authors of the report and their notes regarding those communications.

[2] *See* Exhibit A(2)(a)(vi), (vii), and (viii) to exemplar Deposition Notices of Plaintiffs Experts Desai and Garcia attached here as **Exhibit C**.

[3] Defendants have met and conferred on this issue with Plaintiffs on multiple occasions, including during an expert deposition, through a followup meet and confer letter, and then, after the meet and confer letter was sent, during calls with Plaintiffs' counsel. Because a number of expert depositions are scheduled that will be impacted by this issue, Defendants believe that resolution of this issue is needed so that the remaining expert depositions can be completed timely.

("Rule [26] allows for discovery of . . . communications the expert had with anyone other than the party's counsel about the opinions expressed."); *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1189-92 (11th Cir. 2013) (finding that a testifying expert's communications with other experts were discoverable); *Republic of Ecuador v. Bjorkman*, 735 F.3d 1179 (10th Cir. 2013) (affirming order compelling discovery of communications between testifying expert and non-attorneys); *Whole Women's Health v. Lakey*, 301 F.R.D. 266, 268-71 (W.D. Tex. 2014) (finding that communications between testifying experts and a non-testifying consulting expert were generally discoverable); *United States v. Veolia Evnt. N. Am. Ops., Inc.*, No. CV 13-MC-03-LPS, 2014 WL 5511398, at *7 (D. Del. Oct. 31, 2014), amended, No. CV 13-MC-03-LPS, 2014 WL 6449973 (D. Del. Nov. 17, 2014) (ordering discovery of communications between testifying experts and non-attorneys).

Moreover, the fact that counsel may have been "copied" on such communications does not impact discoverability of the communications. *See In re Application of Republic of Ecuador v. Douglas*, 153 F. Supp. 3d 484, 491–92 (D. Mass. 2015) (ordering that testifying expert's "communications with non-attorneys—including communications in which attorneys are merely copied, but in which no attorney work product exists—must be provided.").

Because the communications are relevant and not protected by the work-product doctrine, the Court should permit the limited discovery of correspondence exchanged among the authors of jointly written reports (including Dr. Resnick and Dr. Lewandowski) that in any way relate to this case or concerning the drafting or contents of the reports.

B. Plaintiffs' Position

Plaintiffs contend that this issue is not ripe for the Court's consideration. Bard raised this issue mere days before the delivery of its draft of the joint report, and there has not been a proper meet and confer between the Parties. Indeed, Bard first contended that it seeks "the communications among the authors of these [joint] reports that relate to the drafting or contents of the reports" (as distinct from the broader categories of its document

subpoena list to experts) shortly before the parties exchanged drafts and filed this report. Plaintiffs do not, at present, even know what, if any, documents exist that would be responsive to this request were it proper.

Moreover, Bard's request runs directly contrary to Federal Rule of Civil Procedure 26(b)(4)(B), which precludes discovery of drafts of an expert's report. Here, Bard does not address Rule 26(b)(4)(B) and ignores that the communications between joint authors of a report regarding the "drafting or contents of the reports" is essentially asking for drafts of the reports themselves. *See, e.g.*, *In re Application of Republic of Ecuador*, 280 F.R.D. 506, 512-513 (N.D. Ca. 2012) ("Amended Rule 26 provides work product protection for draft reports and disclosures required under Rule 26(b)(3)(A) and (B), regardless of the form in which the draft is recorded"); *United States v. Veolia Environnement N. Am. Ops., Inc.*, 2014 WL 5511398, at *5 (Oct. 31, 2014) ("documents' contents reveal them to be draft reports, demonstrating counsel's collaborative interactions with expert consultants—notwithstanding the form these documents take").

Subject to the above, Plaintiffs have not objected to the production of communications by and between their experts except to the extent that those communications are work-product communications between Plaintiffs' counsel and the experts. Such communications are undeniably protected under Federal Rule of Civil Procedure 26(b)(4)(C). And, while "inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule," Advisory Committee Note to Fed. R. Civ. P. 26, Plaintiffs have not objected to the production of any such communications. Contrary to Bard' suggestion, Plaintiffs have not objected to communications between experts and others on which counsel were merely "copied."

Plaintiffs are not aware that the identified experts have withheld any communications by and between the joint authors of their reports that did not involve information protected under Federal Rule of Civil Procedure 26(b)(4)(B) or (C). Plaintiffs are in the process of determining whether any such documents exist.

V. Defendants' Motion for Summary Judgment on Preemption

Defendants filed a motion for summary judgment based on preemption on March 24, 2017 [Doc. 5397]. In accordance with CMO 23, Defendants made Bard employees Robert Carr and John Van Vleet available for depositions. Mr. Carr was deposed on June 6, 2017. Although Mr. Van Vleet was scheduled to be deposed on June 16, Plaintiffs withdrew their request to depose him.

In accordance with CMO 23, the Parties submitted their respective positions regarding the remaining schedule relating to discovery, expert discovery, response to Defendants' Motion for Summary Judgment Regarding Preemption, and the schedule for briefing on Defendants' Motion and Incorporated Memorandum to Seal. [Doc. 5872]. That proposal is pending before the court.

Plaintiffs' request to revise their proposed schedule, as set forth in the Parties' Joint Submission, to include July 21, 2017, for service of their expert report. Plaintiffs' submit this change to accommodate the schedule of their expert.[4]

Defendants oppose the Plaintiffs' attempt to unilaterally revise the deadline for their submission of expert reports on the preemption issues, because Plaintiffs have made no prior effort to meet and confer with Defendants regarding that issue and have not addressed (much less discussed with Defendants) how the change of that deadline will impact the related deadlines in the proposed schedule. Plaintiffs' dismissal of the need to meet and confer on that issue overlooks the fact that both parties' proposed schedules built off the same deadline for plaintiffs' disclosure of expert reports.

Finally, Parties recently submitted a motion to revise the briefing schedule relating to the Motion to Seal because of issues arising from an inadvertent production of Bard

[4] Bard's "opposition" to Plaintiffs' request to change one date in Plaintiffs' proposed schedule for briefing on the preemption motion lacks merit. There is not agreed or set schedule yet; and the proposed schedule at issue is Plaintiffs' proposal; not a joint one. Plaintiffs have not proposed to change any other date in their proposed schedule – only to move their expert disclosure one week.

documents from FOIA services. That joint motion is pending before the Court. [Doc. 6477].

VI. Procedures for Medical Monitoring Class Certification Hearing

Per Amended CMO 16 [Doc. No. 4141], the Court will hold a class certification hearing at 2:30 pm on August 11, 2017. During the upcoming status conference, the Parties would appreciate the opportunity to discuss with the Court its preferences for the hearing, whether the Court wants the parties to present evidence of any expert or fact witnesses, and the amount of time that will be allotted to each side for the hearing.

VII. Science Day Proposed Procedure

The Parties have discussed the timing and procedure for the upcoming science day.

The Parties anticipate and propose that each side be allocated two hours for their presentations. If the Court has availability, the Parties propose conducting the Science Day on August 10, the day before the hearing on the motion for class certification. The Parties would appreciate having an opportunity to discuss with the Court its preferences and expectations regarding Science Day presentations during the upcoming status conference.

VIII. Miscellaneous Motions

A. Motion to Disqualify Plaintiffs' Expert Dr. Kinney

Defendants' motion to disqualify one of the plaintiffs' experts, Dr. Thomas Kinney [Doc. 5677], has been filed and is fully briefed. The Parties will be prepared to address any questions the Court may have, if any, relating to that motion at the upcoming status conference.

B. Motion to Disqualify Plaintiffs' Experts Drs. Vogelzang and Desai

Defendants wish to alert the Court that it anticipates filing in the near future a motion to disqualify two more of Plaintiffs' experts, Drs. Vogelzang and Desai. These doctors are members of the Division of Interventional Radiology at Northwestern Memorial Hospital in Chicago and submitted a joint report on behalf of Plaintiffs which they both signed. According to their joint report and their deposition testimony, they

wrote their report in conjunction with their colleagues at Northwestern, Scott Resnick, M.D. and Robert Lewandowski, M.D.

In their motion, Defendants will contend that Drs. Vogelzang and Desai should be disqualified because Dr. Resnick actively collaborated in drafting their report. Dr. Resnick is a current consultant for Bard Peripheral Vascular, Inc., and is subject to various confidentiality obligations to Bard. In addition, Dr. Resnick has recently consulted with Bard's counsel in at least one Bard IVC filter case involving members of the Plaintiffs' Steering Committee. Dr. Resnick is also a signatory to a retention agreement regarding that work. As a consequence, Defendants contend that Dr. Resnick has a clear conflict of interest that would warrant his disqualification as an expert witness. Because of his active collaboration with Drs. Vogelzang and Desai in the preparation of those reports, Defendants contends that Dr. Resnick's conflict in turn taints the other experts with the result that they should be excluded.

Plaintiffs will respond to Bard's anticipated motion in due course when filed. However, Plaintiffs note that, once again, Bard has failed to provide any substance in support of its allegations. Bard has provided no proof that it provided any protected information to Dr. Resnick; it has provided no proof that, if Dr. Resnick possessed protected information, he actually shared that information with Drs. Vogelzang and Desai; and it has provided no proof that Drs. Vogelzang and Desai have relied on any protected information in coming to their conclusions. Quite to the contrary, Bard deposed both expert witnesses and failed to raise any of the foregoing issues with either of them – despite the express disclosure in their reports of the fact that they work with Dr. Resnick and wrote their report "in conjunction with" him.

Dr. Resnick is not a testifying expert retained by Plaintiffs; he is a colleague of Drs. Vogelzang and Desai at Northwestern Memorial Hospital in the Division of Radiology Studies. Moreover, the reports and opinions of Drs. Vogelzang and Desai are based solely on publicly available information, identified documents that were disclosed in this litigation, and their own education, training, and clinical experience. They have not

relied on any protected work-product information of Bard from any source, including Dr. Resnick (assuming he has any such information).

Further, as with Dr. Kinney, the timing of Bard's raising this issue is highly prejudicial to Plaintiffs. Bard has known about the Plaintiffs' experts', Drs. Vogelzang and Desai, relationship to Dr. Resnick (who Bard claims was its consultant) since at least March 3 of this year when Plaintiffs served the first expert report of Dr. Vogelzang. That report disclosed the relationship with Dr. Resnick. Nonetheless, Bard first raised its claim that Dr. Resnick was its consultant and its intended motion very recently – even after the depositions of Drs. Vogelzang and Desai. Were disqualification of two of Plaintiffs' experts warranted and an appropriate remedy (which neither is), the timing – after experts have been disclosed and expert discovery is closed – would be unfairly prejudicial to Plaintiffs.

VIII. Scheduling Issues Leading to Bellwether Trials

Plaintiffs request to discuss with the Court the timing and procedure leading up to the trial of the bellwether cases. In particular, Plaintiffs would like to discuss potential dates and timing for the trial setting(s), the pretrial conference(s), the procedures and process for the parties to address objections and admissibility of trial exhibits and the designation of deposition testimony.

IX. Resolution of Choice-of-Laws or Conflicts-of-Law Issues in Bellwether Cases

The Parties have discussed that several of the bellwether cases may involve choice-of-law/conflicts-of-laws issues that are likely to impact the briefing on any summary judgment motions filed with respect to those cases. Plaintiffs would like to address with the Court how it would like to handle resolution of the choice-of-law/conflicts-of-laws issues.

Respectfully submitted this 7th day of July 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/ Deborah Yanazzo

EXHIBIT A

Excerpts of Deposition of David Henry, M.D.

David Henry, M.D. Deposition 04.06.17, (Pages 28:11 to 29:4)

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Q. Doctor, going back to your state of mind in 2011 when you were making the decision about which IVC filter to implant in Ms. Hyde, if an IVC filter carried with it a significant potential for serious injury or death, that would be important information for you to know as a clinician?

MR. LEIB: Yeah, and I think that does call for an expert opinion, and I would instruct him not to answer. And I would invite you to re-frame the question to avoid invading the privilege and --

MS. DALY: Join in the objection.

BY MR. SAELTZER:

Q. So Doctor, I want to go -- again, we'll go back, we time travel back to your thought

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process in exercising your clinical judgment back to 2011 regarding Ms. Hyde. Do you have that time period in mind?

A. Sure.

David Henry, M.D. Deposition 04.06.17, (Pages 29:5 to 32:11)

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Q. Okay. And if the IVC filter, the G2X that you implanted in Ms. Hyde in February of 2011, carried with it a significant potential for serious injury or death, and the company knew about that, you would have wanted them to tell you that, fair to say?

MR. LEIB: Let me object --

MS. DALY: Object.

MR. LEIB: -- I do think --

MS. DALY: Object to the form.

MR. LEIB: Yeah, I think it's a hypothetical question, and I think it does draw upon his expertise to be able to -- to know what or

what isn't significant, what -- you know, what knowledge was known. And because he doesn't recall this patient, to be able to apply it to a patient is calling for -- it's a hypothetical question and I think it does invade a privilege in that regard. So I would instruct him not to answer.

MR. SAELTZER: Well, my question -- this jury's going to hear evidence in this case and is

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going to wonder what doctors rely upon, not lawyers arguing in a court of law. But they're going to have to determine in this case, with this doctor, what type of information was important or not important to that doctor based on the way this doctor applies his clinical judgment.

And so I'm asking this doctor, who implanted this filter, for his state of mind as to the type of information at that time he considered relevant to his clinical judgment. He's the only one who made the decision to implant this filter, and so his state of mind, not his opinion, but his state of mind and custom and practice at that time is -- isn't an expert opinion, it's very relevant to what happened.

MR. LEIB: And --

MS. DALY: I'm going to object to the leading nature of the question. And if you just want to ask him what did he rely on at that time, that would probably be a nonleading question.

MR. LEIB: Okay. And just so we understand my role here, my only purpose is to instruct him regarding privilege and representing the witness; I can't assert or argue leading, foundational, or anything else. But his

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decision-making regarding this patient, we know he doesn't remember the patient, and if the question is what was your custom and practice regarding what information you would use to make decisions regarding this patient, that I don't have a problem

with, as long as it's asked in that form.
And if you recall, then you should indicate you recall. And if you don't recall, you should indicate you don't. He doesn't want you to guess at what the answers are. So -- so you gotta listen closely to the question. So could I ask that you ask the question within a context so I don't have an issue with privilege on it?
BY MR. SAELTZER:
Q. Doctor, based on your custom and practice, if the company, Bard, knew that the G2X filter that you implanted in Ms. Hyde carried a significant risk of injury or death, that is the type of information, based on your custom and practice, you would have wanted to know about?
MS. DALY: Objection, leading, and a hypothetical.
MR. LEIB: It's definitely a hypothetical question, and the expertise that's required is to know what you're talking about as to what's

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significant or not. And unless he has some recollection of 2011 and can state the answer historically as opposed to giving a new opinion now -- 'cause a new opinion now is privileged in this. So unless you can answer that question historically as to what your thought process was in 2011, if this would be giving a new opinion as of today, then I would instruct you not to answer.
THE WITNESS: If the product is FDA approved and I'm comfortable with it, I don't usually hesitate.

David Henry, M.D. Deposition 04.06.17 (Pages 34:8 to 35:12)

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Q. Getting to your custom and practice in 2011, was it your practice to inform the patient of all known risks, meaning risks you knew about that were associated with an IVC filter you were recommending be implanted in that patient?

MR. LEIB: Let me just object, it's not the proper standard under which the doctor would have been practicing in 2011. So I guess I'll let him go ahead and answer the question as long as it isn't construed presently, or at some later date, as some waiver of a privilege. Is that acceptable to you?
MR. SAELTZER: Sure.
MR. LEIB: Taylor, is that acceptable to you?
MS. DALY: Yes.
MR. LEIB: Go ahead.
THE WITNESS: Could you repeat the

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question?
MR. SAELTZER: Let me have the reporter read it back to you, Doctor.
COURT REPORTER: "Getting to your custom and practice in 2011, was it your practice to inform the patient of all known risks, meaning risks you knew about that were associated with an IVC filter you were recommending be implanted in that patient?"
THE WITNESS: No, we don't -- we customarily talk about common things. We don't want to be excessively burdening with all risks.

David Henry, M.D. Deposition 04.06.17, (Pages 54:20 to 56:18)

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Q. Doctor, if the initial author of that report had believed that the results of the Everest G2 trial demonstrated that the G2 filter and safety profile was not consistent with similarly marketed IVC filters, is that the type of information, based on the way you practiced medicine back in 2011, you

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would have wanted Bard to let you know about?
MR. LEIB: Yeah, let me object --
MS. DALY: Object to the -- object to the form and lack of foundation.

MR. LEIB: Yeah, and I believe it invades privilege, and I'll instruct him not to answer.
MR. SAELTZER: Again, Counsel, I'm asking for his state of mind.
MR. LEIB: No, I understand. But he'd have to review the article in order to determine whether or not it contains information that would be important to him in 2011. And I'm not going to have him review the article.
MR. SAELTZER: The foundation can be proven whether or not the article says that.
MR. LEIB: Doesn't matter. You're --
MR. SAELTZER: Can I --
MR. LEIB: -- using --
MR. SAELTZER: Can I please finish? Whether or not or what the article says I'm not asking for his testimony about. I'm asking this treating doctor for the way he practiced medicine and what information he considered, the type of information he considered, back in 2011. And I'm asking him if that type of information had existed,

that would have been something he would have factored into his clinical judgment.
MR. LEIB: You've tethered it to the article, that's the problem. The form of the question invades his privilege, and that's why I'm instructing him not to answer.
BY MR. SAELTZER:
Q. If Bard knew that the G2X filter you implanted in Ms. Hyde was not performing as well as the other competitors' IVC filters, and it knew that before February of 2011, is that the type of information you would have considered if Bard had brought that to your attention?
MS. DALY: Same objection.
THE WITNESS: I don't particularly pay attention to everything that's published or comes my way. And so if I had read the article, I -- I may or may not have been swayed by its contents.

David Henry, M.D. Deposition 04.06.17 (Pages 60:15 to 62:16)

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MR. SAELTZER: Okay. Just before we get to the questions, Doctor, I did want to put on the record: It's my understanding, Counsel, I had told you that I presented a confidentiality agreement, and I had some documents, HHEs, fracture studies, internal Bard documents that I was going to review with the witness. But it's my understanding that you're instructing the witness not to answer those type of questions?

MR. LEIB: Yes. Unless those were documents that he reviewed in the care and

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treatment of this patient. And I understand that they were not -- these things were not available. So yes, I'm instructing him not to answer. I believe it's calling for an expert opinion.

MR. SAELTZER: You threw one thing in there which I want to clarify, which is they're not available to him. They're certainly not part of his care and treatment. They're records that predate the Bard documents that predate his care and treatment. So they existed, but I don't think he saw them.

MR. LEIB: Okay. I mean --

MR. SAELTZER: So you would instruct him not to answer?

MR. LEIB: Yes.

MR. SAELTZER: I just wanted to make the record clear, because I had a bunch of documents here I was going to go through with him, but I don't want to waste our time.

MR. LEIB: It will be the same for defense counsel.

MS. DALY: The documents he's speaking of are all internal Bard documents. Would not have gone external.

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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In Re Bard IVC Filters Products Liability Litigation

No. MD-15-02641-PHX-DGC

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DO NOT DISCLOSE - SUBJECT TO FURTHER CONFIDENTIALITY REVIEW

VIDEOTAPED DEPOSITION OF DAVID HENRY, M.D.

TAKEN AT: Leib Knott Gaynor
LOCATED AT: 219 North Milwaukee Street
Milwaukee, WI

April 6, 2017
10:07 a.m. to 12:28 p.m.
REPORTED BY ANITA K. FOSS
REGISTERED PROFESSIONAL REPORTER

* * * * * * * * * * * * * * *

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I N D E X

E X H I B I T S

inferior vena cava?

A. Yes.

Q. Did you also visualize the inferior vena cava when you were implanting IVC filters?

A. Yes.

Q. Is the -- well, why don't you describe for the jury the main function or what function the inferior vena cava performs.

A. If -- the inferior vena cava is a vein that helps blood from our lower extremities and our pelvis recirculate back in our body.

Q. Can it expand with varying pressures?

A. Yes.

Q. Does it expand with varying pressures?

A. Yes.

Q. Is that well known within the medical community?

MR. LEIB: Well, let me just interject. At this point he's being called as a fact witness, he's not being called as an expert witness. It's asking him to render an opinion as to what is or isn't known within the medical community. I view that as calling for an expert opinion beyond the scope of his care and treatment of this patient.

And he has a privilege under

Wisconsin law, it's called -- referred to as the Alt, A-L-T, privilege. And therefore, I'll instruct him not to answer as to any questions that are asked here today and -- you know, we'll obviously take them one by one. But he has not agreed to present himself here today as an expert witness. So I'll be instructing him if I feel the question invades that privilege.

BY MR. SAELTZER:

Q. Okay. Doctor, based on your training and experience as of February 2011, was it your understanding that the inferior vena cava expands and contracts with normal respiratory and -- and heart function?

A. Yes.

Q. Moving to February of 2011, when Ms. Hyde was your patient, what hospitals did you have privileges at or were you practicing in?

A. Franklin Hospital and St. Francis Hospital.

Q. Back in the time period of February 2011, do you recall who made the decision to use the Bard G2X IVC filter as to a different Bard filter or a competitor's Bard filter?

A. No.

Q. Do you know, based on the custom and practice of the medical group and hospitals where you were practicing at that time, if you would have had input into that decision or if you would have been directed by somebody else which filter to use?

A. I was comfortable with the product, and it was available.

Q. Fair to say, as the implanting treating physician, that you had the discretion to use the IVC filter you believed was the safest and most effective for your patient?

A. Yes.

Q. Am I also correct that you would never put in an IVC filter unless you believed it was the best performing, most effective filter for your patient?

A. No.

MR. LEIB: You're asking him --

MS. DALY: Object to the form.

MR. LEIB: Yeah, you're asking him in regard to your client, Ms. Herd?

MR. SAELTZER: I was asking about his practice as of the time period of February 2011, and the thought process he goes through when selecting which filter to use.

MR. LEIB: Okay.

MS. DALY: Object to the form.

BY MR. SAELTZER:

Q. At least that was the hope of what I was trying to ask. Sometimes when I'm asked that, I say that's what I was trying to ask. I'm not sure I succeeded. So what I'm getting at, or want the jury to understand, is the thought process, the judgment, the clinical judgment and how you exercised that clinical judgment back in February of 2011. Are you following me, Doctor?

A. Sure.

Q. Okay. Because you're presented with a history from a patient; right?

A. Uh-huh.

Q. Is that correct?

A. Yes.

Q. You can review medical records and imaging studies about the patient's condition; right?

A. Yes.

Q. You want to gain an understanding, to the extent you feel is necessary, of the patient's condition to make treatment recommendations?

A. Yes.

Q. And then you also apply your knowledge as to what possible procedures or devices are available to treat that condition; right?

A. Yes.

MS. DALY: Objection. Objection, leading.

BY MR. SAELTZER:

Q. And Doctor, in coming and exercising your clinical discretion, do you perform a risk-benefit analysis?

A. I get an informed consent, which includes risks, benefits, and alternatives.

Q. When you are choosing which IVC filter to implant in a patient, can you describe for me what thought process you go to as to which filter you select from the various options that are out there in the marketplace?

MR. LEIB: We're talking about in or around 2011 as a custom and practice pertaining to your client, Lisa Herd?

MR. SAELTZER: Yes, in and around February of 2011.

THE WITNESS: I look for any filter that's FDA approved, that I'm familiar with placing.

BY MR. SAELTZER:

Q. Back in February of 2011, was it your understanding that all FDA-cleared IVC filters had the same performance? They all performed the same?

MS. DALY: Object to the form, it's an expert -- it's an expert question.

MR. LEIB: Frankly, I didn't hear it that way, and I want to be evenhanded on it. And he's not here as an expert, and he's not presenting himself, but can you elaborate why you felt that was an expert question so I can consider whether or not he should exercise his privilege on it?

MS. DALY: Yes. The way that I heard the question was he's being asked about his opinion about various filters that were in the market at the time. To me, that's an expert question.

MR. LEIB: Maybe we could hear the question back.

COURT REPORTER: "Back in February of 2011, was it your understanding that all FDA-cleared IVC filters had the same performance? They all performed the same?"

MR. LEIB: Yeah, I -- I don't think it's privileged because it was tethered to 2011, and I viewed the question as pertaining to generally his

custom and practice at the time that he implanted on Mr. Saeltzer's patient -- client. So I didn't view it as invading privilege. It was historical as to his thought process. So that's why I didn't assert a privilege, and I wouldn't instruct him.

MS. DALY: I'm sorry, just again note my objection.

MR. LEIB: Yeah, okay. And Taylor, I just didn't want to -- the reason why I asked you to elaborate because I -- you know, I assume that you're going to be asking some questions, and I want to be, as I say, evenhanded as to asserting the privilege to make sure that I understand what your objection is so if other objections come down the pike during your questioning, you know, I'll instruct him evenly between both parties.

MS. DALY: Thank you.

BY MR. SAELTZER:

Q. Do you have the question in mind, Doctor? Would you like it read back to you?

A. I'm sorry, what am I being asked?

Q. That tells me we should probably read you the question. So we'll have the question read to you, Doctor.

COURT REPORTER: "Back in February of

2011, was it your understanding that all FDA-cleared IVC filters had the same performance? They all performed the same?"

THE WITNESS: I think that they -- they were -- they were all very comparable.

BY MR. SAELTZER:

Q. Did you believe that they were all comparable in terms of risk of complications, such as migrations or fractures?

A. Yes.

Q. Doctor, going back to your state of mind in 2011 when you were making the decision about which IVC filter to implant in Ms. Hyde, if an IVC filter carried with it a significant potential for serious injury or death, that would be important information for you to know as a clinician?

MR. LEIB: Yeah, and I think that does call for an expert opinion, and I would instruct him not to answer. And I would invite you to re-frame the question to avoid invading the privilege and --

MS. DALY: Join in the objection.

BY MR. SAELTZER:

Q. So Doctor, I want to go -- again, we'll go back, we time travel back to your thought

process in exercising your clinical judgment back to 2011 regarding Ms. Hyde. Do you have that time period in mind?

A. Sure.

Q. Okay. And if the IVC filter, the G2X that you implanted in Ms. Hyde in February of 2011, carried with it a significant potential for serious injury or death, and the company knew about that, you would have wanted them to tell you that, fair to say?

MR. LEIB: Let me object --

MS. DALY: Object.

MR. LEIB: -- I do think --

MS. DALY: Object to the form.

MR. LEIB: Yeah, I think it's a hypothetical question, and I think it does draw upon his expertise to be able to -- to know what or what isn't significant, what -- you know, what knowledge was known. And because he doesn't recall this patient, to be able to apply it to a patient is calling for -- it's a hypothetical question and I think it does invade a privilege in that regard. So I would instruct him not to answer.

MR. SAELTZER: Well, my question -- this jury's going to hear evidence in this case and is

going to wonder what doctors rely upon, not lawyers arguing in a court of law. But they're going to have to determine in this case, with this doctor, what type of information was important or not important to that doctor based on the way this doctor applies his clinical judgment.

And so I'm asking this doctor, who implanted this filter, for his state of mind as to the type of information at that time he considered relevant to his clinical judgment. He's the only one who made the decision to implant this filter, and so his state of mind, not his opinion, but his state of mind and custom and practice at that time is -- isn't an expert opinion, it's very relevant to what happened.

MR. LEIB: And --

MS. DALY: I'm going to object to the leading nature of the question. And if you just want to ask him what did he rely on at that time, that would probably be a nonleading question.

MR. LEIB: Okay. And just so we understand my role here, my only purpose is to instruct him regarding privilege and representing the witness; I can't assert or argue leading, foundational, or anything else. But his

decision-making regarding this patient, we know he doesn't remember the patient, and if the question is what was your custom and practice regarding what information you would use to make decisions regarding this patient, that I don't have a problem with, as long as it's asked in that form.

And if you recall, then you should indicate you recall. And if you don't recall, you should indicate you don't. He doesn't want you to guess at what the answers are. So -- so you gotta listen closely to the question. So could I ask that you ask the question within a context so I don't have an issue with privilege on it?

BY MR. SAELTZER:

Q. Doctor, based on your custom and practice, if the company, Bard, knew that the G2X filter that you implanted in Ms. Hyde carried a significant risk of injury or death, that is the type of information, based on your custom and practice, you would have wanted to know about?

MS. DALY: Objection, leading, and a hypothetical.

MR. LEIB: It's definitely a hypothetical question, and the expertise that's required is to know what you're talking about as to what's

significant or not. And unless he has some recollection of 2011 and can state the answer historically as opposed to giving a new opinion now -- 'cause a new opinion now is privileged in this. So unless you can answer that question historically as to what your thought process was in 2011, if this would be giving a new opinion as of today, then I would instruct you not to answer.

THE WITNESS: If the product is FDA approved and I'm comfortable with it, I don't usually hesitate.

BY MR. SAELTZER:

Q. What knowledge, if any, do you have of how the Bard G2X filter received FDA clearance?

A. I do not know.

Q. At the time you implanted this filter, did you believe it had gone through full clinical trials to obtain FDA approval?

A. I'm guessing, yes.

Q. At least that was your state of mind back then?

A. Yes.

Q. Are you aware of an alternate FDA approval process called a 510(k) clearance?

A. No.

Q. Are you aware of an FDA process that allows an abbreviated clearance if the company proves the product is substantially similar to a prior product that's already been cleared?

A. No.

Q. Fair to say your state of mind when you implanted this G2X filter is that it was as safe and effective as the competitors' filters that were on the market at that time?

MS. DALY: Object to the form, leading.

MR. LEIB: I think you already asked and answered that, actually. As of 2011, when this was --

THE WITNESS: Yes. My answer's yes.

BY MR. SAELTZER:

Q. Part of your responsibilities as the physician who implanted this filter in Ms. Hyde was to explain to her the risks associated with the filter; am I correct?

A. Yes.

MS. DALY: Objection, leading.

BY MR. SAELTZER:

Q. Did you receive training on that obligation in medical school, your residency, and also in your fellowship?

A. Yes.

Q. Is part of obtaining informed consent included in the training to become an interventional radiologist?

A. Yes.

Q. And to become a doctor?

A. Yes.

Q. Getting to your custom and practice in 2011, was it your practice to inform the patient of all known risks, meaning risks you knew about that were associated with an IVC filter you were recommending be implanted in that patient?

MR. LEIB: Let me just object, it's not the proper standard under which the doctor would have been practicing in 2011. So I guess I'll let him go ahead and answer the question as long as it isn't construed presently, or at some later date, as some waiver of a privilege. Is that acceptable to you?

MR. SAELTZER: Sure.

MR. LEIB: Taylor, is that acceptable to you?

MS. DALY: Yes.

MR. LEIB: Go ahead.

THE WITNESS: Could you repeat the

MR. SAELTZER: Yes.

MR. LEIB: Yeah, that wasn't your question, though. You're asking him for a present opinion as to whether or not something would have been helpful to him in the past. That is calling for an expert opinion. If you --

MS. DALY: Which --

MR. LEIB: Hold on.

MS. DALY: -- which -- which -- let me -- if I could add for the record, which also related to a filter that was a predecessor to the filter in the Hyde case.

MR. LEIB: Yeah, I'm not apprised of the different filters, so I'll leave those objections to counsel. But I'd invite you to rephrase the question. But I think the way you phrased it, it is invading his privilege, that's why I instructed him not to answer.

BY MR. SAELTZER:

Q. Is the information that Bard determined its Recovery filter migrated three times more than the industry average the type of information you would have found useful when you were making your decisions about which filter to implant back in 2011?

THE WITNESS: Oh.

MR. LEIB: -- whether the instructions -- the question is whether or not the instructions state that or whether or not he was aware of that as of 2011? I'm sorry, I lost the question.

BY MS. DALY:

Q. Whether he believed it was within the instructions for use precaution.

MR. LEIB: If you know.

THE WITNESS: I believe it was.

BY MS. DALY:

Q. All right. Thank you. Has any manufacturer of an IVC filter provided you with any information, over time, that showed alleged comparative rates of complications among IVC filter models on the market?

A. Probably.

Q. Do you recall any particular filter product that that was done for -- done with?

A. I do not recall.

Q. Do you know if the FDA has any limitations or restrictions on what a filter manufacturer may provide by way of information about complications to doctors?

MR. LEIB: Well, I think maybe that's

calling for an expert opinion, but I think if you rephrase it as of 2011, when he did this care and treatment, was he aware of that, then I wouldn't have a problem with the question.

THE WITNESS: I don't specifically --

MS. DALY: Let me --

THE WITNESS: I don't --

BY MS. DALY:

Q. Let me go ahead and rephrase it, Doctor, to cure that. Were you aware in 2011, at the time you were placing Ms. Hyde's filter, what limitations or restrictions, if any, the FDA had on information a filter manufacturer can provide to doctors?

A. No.

Q. And you were asked about the type of regulatory process that Bard filters go through, and the 510(k) process was mentioned to you by plaintiff's counsel; do you recall?

A. Yeah, that happened within the last hour.

Q. Okay. Do you have any information, or did you -- let me put it this way. Did you have any information, at the time that you placed Mrs. Hyde's filter, about what those regulations under 510(k) process required Bard to provide to

EXHIBIT C

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Attorneys for Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re Bard IVC Filters Products Liability Litigation	NO. MD-15-02641-PHX-DGC **DEFENDANTS' AMENDED NOTICE OF VIDEOTAPED DEPOSITION DUCES TECUM OF DAVID L. GARCIA, M.D.**

PLEASE TAKE NOTICE THAT, pursuant to F.R.C.P. Rules 26 and 30, and for all purposes authorized by the Federal Rules of Civil Procedure and all other purposes allowed by law, commencing at **9:00 a.m. P.S.T.** on **June 21, 2017,** at the offices of **Williams Kastner** located at **601 Union Street, Suite 4100, Seattle Washington 98101-2380, Conference Call-in dial 866-509-4812, Code 308978**, the defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. in the above-captioned action, will take the videotaped deposition of **David L. Garcia, M.D.**

The deposition will be taken before a videographer and court reporter duly authorized to administer oaths and will continue from day to day until the examination is complete.

The deponent is asked to bring to the deposition the documents described in Exhibit "A" regarding the above-referenced case.

DATED this 6th day of May, 2017.

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Attorney for Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing has been served by email and First Class postage prepaid U.S. Mail on May 6, 2017, to the following:

Mark S. O'Connor, Esq.
Paul L. Stoller, Esq.
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Ramon Rossi Lopez, Esq.
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EXHIBIT A

1. Your current resume or Curriculum Vitae.

2. Your COMPLETE AND ENTIRE FILE in the matter *In Re: Bard IVC Filters Products Liability Litigation*, United States District Court for the District of Arizona, No. 2:14-MD-02641-DGC (the "Case") including, without limitation,

   (a) All materials and documents provided to you or received by you in connection with the Case, including, without limitation,

      (i) all materials and documents provided to you by Plaintiffs' counsel,

      (ii) all articles, sources, references, treatises, guidelines, standards, and regulations,

      (iii) all deposition or trial transcripts and exhibits,

      (iv) all government guidances, regulations, and policies,

      (v) all medical records, imaging, notes, reports, correspondence, and test results, relating to any plaintiff in the Case, and

      (vi) all communications and emails between you and any fact or expert witness in the Case;

      (vii) all communications and emails between you and Dr. Michael Streiff that relate in any way to the Case or the expert reports you and Dr. Streiff submitted in the Case;

      (viii) all notes or summaries of any communications between you and Dr. Michael Streiff that relate in any way to the Case or the expert reports you and Dr. Streiff submitted in the Case.

   (b) All materials and documents you relied upon and/or may rely upon in reaching your opinions in the Case;

   (c) All research done by you, at your direction or provided to you in connection with your involvement in the Case;

   (d) A list of all persons and background sources, if any, that you consulted and/or rely upon in connection with your review of or opinions in the Case; and

   (e) Communications and emails between you and attorneys representing plaintiff in the Case that relate to

      (i) your compensation,

      (ii) any facts or data that were provided to you by the attorney, and

      (iii) any assumptions that were provided to you by the attorney and upon which you rely in forming your opinions. See FRCP 26(b)(4)(C).

3. All documents concerning your inspection of or experimentation upon any medical device or material at issue in the Case, including documents sufficient to identify:

(a) The date and location of the inspection or experimentation;

(b) The persons present during the inspection or experimentation;

(c) The protocol(s) followed for the inspection or experimentation, including details concerning (i) the make/model of the equipment used during the inspection or experimentation and the corresponding settings, (ii) the manner in which the device or material was preserved both before and after testing, and (iii) the method of preparation of the device or material prior to testing;

(d) Any photographs, micrographs and/or videos (in their original form, at their original resolution, and with all associated metadata) taken during the inspection or experimentation, including the identification of all devices depicted in the photographs or videos;

(e) The findings, results, and conclusions from the inspection or experimentation, including without limitation, (i) the raw data files native, electronic format, (ii) any and all data collected in any form; and

(f) Chain of custody information for any devices that were subject to your inspection and/or experimentation.

4. All invoices, bills, billing records, time records, and expense records connected with your involvement in the Case, including information sufficient to identify

(a) your hourly rate;

(b) the amount of time you have spent in connection with your involvement in the Case;

(c) the nature of the activity or work your performed in connection with your involvement in the Case, and

(d) the dates on which such activity or work was performed.

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Attorneys for Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re Bard IVC Filters Products Liability Litigation	NO. MD-15-02641-PHX-DGC **DEFENDANTS' NOTICE OF VIDEOTAPED DEPOSITION DUCES TECUM OF KUSH DESAI, M.D.**

PLEASE TAKE NOTICE THAT, pursuant to F.R.C.P. Rules 26 and 30, and for all purposes authorized by the Federal Rules of Civil Procedure and all other purposes allowed by law, commencing at **9:00 a.m. C.S.T.** on **June 6, 2017,** at **McCorkle Court Reporters** located at **200 N. LaSalle Dr. #2900, Chicago IL 60601**, the defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. in the above-captioned action, will take the videotaped deposition of **Kush Desai, M.D.** The deposition will be taken before a videographer and court reporter duly

authorized to administer oaths and will continue from day to day until the examination is complete.

The deponent is asked to bring to the deposition the documents described in Exhibit "A" regarding the above-referenced case.

DATED this 18th day of May, 2017.

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Attorney for Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing has been served by email and First Class postage prepaid U.S. Mail on May 18, 2017, to the following:

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EXHIBIT A

1. Your current resume or Curriculum Vitae.

2. Your COMPLETE AND ENTIRE FILE in the matter *In Re: Bard IVC Filters Products Liability Litigation*, United States District Court for the District of Arizona, No. 2:14-MD-02641-DGC (the "Case") including, without limitation,

   (a) All materials and documents provided to you or received by you in connection with the Case, including, without limitation,

      (i) all materials and documents provided to you by Plaintiffs' counsel,

      (ii) all articles, sources, references, treatises, guidelines, standards, and regulations,

      (iii) all deposition or trial transcripts and exhibits,

      (iv) all government guidances, regulations, and policies,

      (v) all medical records, imaging, notes, reports, correspondence, and test results, relating to any plaintiff in the Case,

      (vi) all communications and emails between you and any fact or expert witness in the Case,

      (vii) all communications and emails between you and other physicians at Northwestern or Interventional Cardiologist's LLC that relate in any way to the Case, the Report of Robert L. Vogelzang, M.D. (signed March 2, 2017), or the Medical Monitoring (Morris) Rebuttal Report of Kush R. Desai, M.D. and Robert L. Vogelzang, M.D. (signed April 19, 2017),

   (b) All materials and documents that you have reviewed at any time and from any source that relate to inferior vena cava filters, C.R. Bard's inferior vena cava filters, or inferior vena cava filters designed, manufactured or distributed by any other entity;

   (c) All materials and documents you relied upon and/or may rely upon in reaching your opinions in the Case;

   (d) All research done by you, at your direction or provided to you in connection with your involvement in the Case;

   (e) A list of all persons and background sources, if any, that you consulted and/or rely upon in connection with your review of or opinions in the Case; and

   (f) Communications and emails between you and attorneys representing plaintiff in the Case that relate to

      (i) your compensation,

      (ii) any facts or data that were provided to you by the attorney, and

      (iii) any assumptions that were provided to you by the attorney and upon which you rely in forming your opinions. See FRCP 26(b)(4)(C).

3. All documents concerning your inspection of or experimentation upon any medical device or material at issue in the Case, including documents sufficient to identify:

   (a) The date and location of the inspection or experimentation;

   (b) The persons present during the inspection or experimentation;

   (c) The protocol(s) followed for the inspection or experimentation, including details concerning (i) the make/model of the equipment used during the inspection or experimentation and the corresponding settings, (ii) the manner in which the device or material was preserved both before and after testing, and (iii) the method of preparation of the device or material prior to testing;

   (d) Any photographs, micrographs and/or videos (in their original form, at their original resolution, and with all associated metadata) taken during the inspection or experimentation, including the identification of all devices depicted in the photographs or videos;

   (e) The findings, results, and conclusions from the inspection or experimentation, including without limitation, (i) the raw data files native, electronic format, (ii) any and all data collected in any form; and

   (f) Chain of custody information for any devices that were subject to your inspection and/or experimentation.

4. All invoices, bills, billing records, time records, and expense records connected with your involvement in the Case, including information sufficient to identify

   (a) your hourly rate;

   (b) the amount of time you have spent in connection with your involvement in the Case;

   (c) the nature of the activity or work your performed in connection with your involvement in the Case, and

   (d) the dates on which such activity or work was performed.

5. All invoices, bills, billing records, time records, and expense records connected in any way with Interventional Cardiologist's LLC (or any of its members) involvement in the Case, the Report of Robert L. Vogelzang, M.D. (signed March 2, 2017), or the Medical Monitoring (Morris) Rebuttal Report of Kush R. Desai, M.D. and Robert L. Vogelzang, M.D. (signed April 19, 2017), including information sufficient to identify

   (a) hourly rates;

   (b) the amount of time each member of Interventional Cardiologists LLC spent in connection with the Case;

   (c) the nature of the activity or work performed in connection with Interventional Cardiologists LLC's (or any of its members) involvement in the Case; and

   (d) the dates on which such activity or work was performed and by whom.