UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION

Case No.: 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
ALL CASES

DEFENDANTS C. R. BARD, INC. AND DAVOL INC.'S MOTION FOR A DOCKET CONTROL ORDER

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INTRODUCTION

Defendants C. R. Bard, Inc., and Davol Inc. (collectively, "Bard") hereby move for a docket control order to address the significant portion of now-pending cases that appear on their face to involve no actionable injury or do not belong in this proceeding. After more than three-and-a-half years and two bellwether trials, the MDL has seen considerable progress. Despite the maturity of this litigation, Plaintiffs continue to file cases at a high rate, such that the total number of pending cases likely will far exceed the current total of more than 16,800. The newer cases are, on average, weaker than the body of cases that were pending in 2018 and early 2019 when CMOs were entered defining the scope of case-specific discovery. It is now apparent that there are a considerable number of pending cases with one or more of the following issues: 1) the plaintiff is suing over a Bard device that is still in-place; 2) the plaintiff is suing over an incidental finding discovered during an unrelated procedure; 3) the plaintiff is suing over an alleged injury that produced no physical symptoms; 4) the plaintiff is suing over a device not made by Bard or otherwise outside of the scope of this MDL; 5) the plaintiff's claims are plainly barred by applicable statutes of limitations and/or repose; 6) the plaintiff has multiple cases arising out of the same operative facts pending in this MDL; and 7) the plaintiff's claims have been resolved in other litigation or are subject to a prior dismissal with prejudice.

The continuously increasing percentages of such cases stand as impediments to this MDL fulfilling its function. The MDL now needs an efficient mechanism to root out the cases that have no merit, so that the litigation can focus on the remaining cases. If steps are not taken now to ensure that basic requirements are met for all pending cases, then the subsequent course of this MDL will likely be prolonged and more complicated.

Based on the current CMOs, it is too easy for a plaintiff to continue with their lawsuit in the MDL without legally cognizable claims, with time-barred or resolved claims, or with claims

that do not belong in this MDL. Such a plaintiff, assuming his/her case was not included in the bellwether trial process, could remain on the docket for years without having to do more than serve the filed short-form complaint ("SFC") and serve a Plaintiff Profile Form ("PPF"). *See* ECF Nos. 57, 61 & 109. Bard, meanwhile, has limited ability to identify cases that should be subject to dismissal and even less ability to pursue dismissal at this time. This is not conducive to the long-term prospects for the MDL and encourages the filing of cases with little or no vetting of the merits.

Bard seeks a docket control order requiring plaintiffs to confirm that plaintiffs have appropriate *bona fides* for inclusion in the MDL. A personal injury lawsuit requires proof of a legally cognizable injury. Before filing a case in this MDL, the lawyer signing the complaint should have already identified medical records and/or generated expert proof that the subject Bard device caused physical injury symptoms and/or limitations, and/or that a complication with the device led to surgical intervention. Providing fundamental proof of a legally cognizable injury should be a simple task at this stage, unless the case does not belong here because suit was filed without such an injury.

Similarly, before bringing a case in this MDL, each plaintiff's counsel should have already obtained medical records making it clear that the plaintiff was implanted with one of the twenty-four Bard polypropylene hernia devices at issue in this MDL. ECF No. 67. In addition, before filing any case, plaintiff's counsel should have assessed whether the claims asserted are time-barred, have been resolved, have been the subject of a prior court order, or have already been asserted in another pending case. Requiring plaintiff's counsel in each case here to confirm that assessments on these issues have been conducted, with the expectation of voluntary dismissal of extraneous cases and claims as appropriate and the possibility of cost-shifting in the event of later involuntary dismissals, does not impose a significant burden on plaintiffs or their counsel. It

would, however, advance the litigation considerably. Implementing staggered deadlines for plaintiffs to take these simple steps for all pending cases and requiring them for all future cases would go a long way toward allowing this MDL to focus on cases that should be pending and will need to be litigated on their merits.

These are not burdensome or outlier requirements, but routine matters championed by many MDL judges (and commentators alike). They level-set the litigation such that all parties can evaluate their positions and work with the Court with confidence to move the litigation forward, knowing that the docket is not loaded down with cases that have no injury, where the product is still in place, where the claims are plainly untimely, and/or do not involve one of the subject products for the MDL. An increasing number of MDLs, particularly in MDLs concerning medical products and MDLs with a high number of pending cases, have imposed requirements on all pending cases to help the overall management of the litigation. Such requirements have also been imposed in MDLs in the same general posture as this MDL, with considerable generic discovery completed, some bellwether trials completed, and enough information on the pending cases to understand the recurring distinctions and issues. The time has come to impose such requirements here to aid in the administration of the large number of cases pending and still being filed.

ARGUMENT

A. A Docket Control Order Requiring Proof Of Compensable Injury Would Be Appropriate And Useful In Culling Meritless Claims

Docket control orders, often referred to as *Lone Pine* orders based on *Lore v. Lone Pine Corp.*, No. L-, 33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Jan. 1, 1986), are "routine" and within the "wide latitude" afforded MDL courts in managing litigation. *In re Avandia Marketing, Sales Practices & Prods. Liab. Litig.*, 687 F. Appx. 210, 214 (3d Cir. Apr. 19, 2017); *see also In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2:19-cv-14669, 2021

U.S. Dist. LEXIS 25296, at *7-*8 (E.D. La. Feb. 10, 2021) ("*Lone Pine* orders have been routinely used by the courts to manage mass tort cases."). Indeed, one study found that federal and state trial courts issued at least 97 Lone Pine orders from 1986 to 2019. *See* Engstrom & Espeland, *Lone Pine Orders: a Critical Examination and Empirical Analysis*, 168 Penn. L. Rev. Online 91, 93 (2020), attached hereto as **Exhibit 1**. "Although no federal rule expressly authorizes the use of *Lone Pine* orders, federal courts have interpreted Rule 16 of the Federal Rules of Civil Procedure to give the authority to enter *Lone Pine* orders in complex litigation." *In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789 (JFK), 2012 U.S. Dist. LEXIS 166734, at *5 (S.D.N.Y. Nov. 20, 2012) (citation omitted); *see also McManaway v. KBR, Inc.*, 265 F.R.D. 384, 385 (S.D. Ind. 2009) ("*Lone Pine* orders are permitted by Rule [16]. . . which provides that a court may take several actions during a pretrial conference, including 'adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.'") (citations omitted).

The particular utility of docket control orders in MDL proceedings like this has been recognized: "A district court, administrating a multidistrict case, faces unique challenges not present when administrating cases on a routine docket." *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, MDL No. 2848, No. 18-md-2848, 2022 U.S. Dist. LEXIS 57935, at *5 (E.D. Pa. Mar. 30, 2022). *Lone Pine* orders are essential tools in helping MDL courts weed out nonmeritorious claims and may "require plaintiffs to furnish specific evidence like proof of a medical diagnosis." *Id*. (quotations and citation omitted); *see, e.g.*, *In re Xarelto*, 2021 U.S. Dist. LEXIS 25296, at *8-*9 (noting that plaintiffs transferred into MDL were required to produce a Rule 26(a)(2)-compliant expert report on medical causation); *In re Testosterone Replacement Therapy ("TRT") Products Liability Litigation*, MDL No. 2545, Master Docket Case No. 1:14-

cv-01748, 2018 U.S. Dist. LEXIS 205125, at *421-*425 (N.D. Ill. June 11, 2018) (requiring each remaining and new plaintiff to produce all medical and pharmacy records, and an expert report within 90 days); *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, MDL NO. 2272, Master Docket Case No. 1:11-cv-05468, 2016 WL 3281032, at*1-*2 (N.D. Ill. June 10, 2016) (entering *Lone Pine* order requiring each plaintiff in bellwether trial track in medical device MDL to identify particular injury claims and provide a signed expert declaration regarding causation in the form attached to the order); *In re Vioxx Prods. Liab. Litig.*, MDL NO. 1657, 557 F. Supp. 2d 741, 742-43, 744-45 (E.D. La. 2008) (denying motion to suspend *Lone Pine* order requiring plaintiffs to produce expert report confirming injury and "showing . . . some kind of scientific basis that Vioxx could cause the alleged injury").

As the judge overseeing the largest current MDL proceeding noted recently in connection with the dismissal of more than 20,000 plaintiffs for failure to submit a specific form or report by the deadline established in a docket control order:

> An MDL judge bears the "enormous" task of "mov[ing] thousands of cases toward resolution on the merits while at the same time respecting their individuality." *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006). To carry out this task in an organized and efficient manner, an MDL court must define and strictly adhere to case management rules. *See id.* at 1232 ("[T]he district judge must establish schedules with firm cutoff dates if the coordinated cases are to move in a diligent fashion toward resolution by motion, settlement, or trial."); *see also* Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"). Pretrial orders—and the parties' compliance with those orders and their deadlines— "are the engine that drives disposition on the merits." *Id.* at 1232. "A [court's] willingness to resort to sanctions in the event of noncompliance can ensure that that the engine remains in tune, resulting in better administration of the vehicle of multidistrict litigation." *In re Cook Medical, Inc. Pelvic Repair Sys. Prof. Liab. Litig.*, 2018 WL 4698953, at *2 (S.D. W. Va. Sept. 28, 2018) (citing *Freeman v. Wyeth*, 764 F.3d 806, 810 (8th Cir. 2014) ("The MDL judge must be given 'greater discretion' to create and enforce deadlines in order to administrate the litigation effectively. This necessarily includes the power to dismiss cases where litigants do not follow the court's orders.")).

Order, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, MDL No. 2885, May 6, 2022 (ECF No. 3076), attached hereto as **Exhibit 2**.

The time has come for this Court to enter a docket control order to help ensure that unsupported cases can be weeded out in an efficient manner. The first part of Bard's proposal would require plaintiffs to produce proof of a medical diagnosis of compensable injury in order to proceed.[1] *See* Proposed Case Management Order, *attached* hereto as **Exhibit 3**. Acceptable proof could include an affidavit from a qualified, licensed surgeon attesting that he or she opines to a reasonable degree of medical certainty that a causal connection exists between the plaintiff's alleged symptomatic injuries and the Bard hernia device in question. This is fundamental information, which plaintiffs would otherwise be required to produce at a much later stage. Such proof would help to identify the plaintiffs who fit into one or more of three categories set out above: 1) the plaintiff is suing over a Bard device that is still in-place; 2) the plaintiff is suing over an incidental finding discovered during an unrelated procedure; and 3) that plaintiff is suing over an alleged injury that produced no physical symptoms. Such cases have no place here.

As the Court may recall, at the beginning of the MDL, plaintiffs' leadership stated that they "anticipate[d] that a large marjority [of the cases in the MDL] will be a revision or surgical intervention as a result of being injured; however, there are instances where the device cannot be safely removed and, in that instance, there would not be." CMC Tr., Sept. 5, 2018, ECF No. 13, at 42:8-11. Or, as paraphrased by the Court, "it's either explanted or [there is] a reason that it can't

[1] The first part of the Proposed Case Management Order is modeled on the stipulated *Lone Pine* orders entered in the Physiomesh MDL and state court coordinated proceedings as models, both of which require plaintiffs to serve case-specific expert reports concerning the specific causation of the plaintiffs' alleged injuries. *See*, *e.g.*, *In re Ethicon Physiomesh Flexible Composite Hernia Mesh Prods. Liab. Litig.*, Civil Action No. 1:17-MD-02782-RWS, Practice and Procedure Order No. 26, ECF No. 743 (N.D. Ga. May 13, 2021), attached as **Exhibit 4**; *In re Physiomesh Mesh Litig.*, Master Case No. ATL-L-2122-18, Case Management Order No. 20 (N.J. Sup. Ct. L. Div. Atlantic Cty. May 13, 2021), attached as **Exhibit 5**.

be explanted." *Id*. at 42:12-13. More than three-and-a-half years later, the number of total cases in the MDL has swelled to more than 16,800, third-most among active MDLs.[2] Without medical records on all pending cases, an exact count is impossible, but it appears that a significant percentage of the pending cases are cases where the only device at issue is still implanted, that is "product-in-place" cases ("PIP").

It also appears that the percentage of PIP cases has increased over time as more law firms have filed cases. In fact, in a sampling of 300 of the 709 new cases filed between September 1, 2021, and March 8, 2022, for which Bard has received Plaintiff Profile Forms, at least 34% appear to be cases in which the device at issue remains in place with or without any post-implant surgical intervention. The number of PIP cases and the trend of an increasing percentage of PIP cases over time limit the ability of the parties to evaluate the remaining inventory of filed and unfiled cases, despite the clear information provided from verdicts in two bellwether trials on the two most prevalent devices at issue in cases in this MDL. Requiring proof from an apparent PIP case of a medical diagnosis of compensable injury will be an effective way to determine which cases do not merit further time or effort from the parties or Court.

The same need exists as to the many pending plaintiffs who have had their Bard hernia mesh device removed, but for reasons that had nothing to do with any injury or symptoms allegedly caused by the device. As the *Johns* trial and full defense verdict showed, those cases are of negligible value and highly questionable merit in terms of any legally cognizable injury. In *Johns*, the claimed injury of asymptomatic omental adhesions was discovered as an incidental finding during a second surgery for a recurrent diastasis recti (not a hernia) and the Ventralight ST was removed to facilitate the repair (rather than because of the adhesions). *See Johns v. C. R. Bard,*

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-May-16-2022.pdf.

Inc., et al., Case No. 2:18-cv-01509-EAS-KAJ, Trial Tr., Aug. 16, 2021, ECF No. 565, at 143:1-13 (explanting surgeon testifying that he did not attribute plaintiff's pain at the time of his second surgery to his adhesions and that he did not even discover them until he operated) & 145:2-10 (confirming that the pain plaintiff experienced was from his recurrent diastasis).

The point here is not to relitigate *Johns*, but to draw attention to the fact that there are "explant" cases where it should be evident from the records that the removal was only incidental, and thus more akin to a PIP case than a case in which the plaintiff underwent a removal surgery specifically because of a doctor-perceived complication connected to a Bard hernia mesh device. Requiring plaintiffs to produce documents they should already have or can easily obtain will allow for the differentiation between cases where there may be a compensable injury and those where, despite an explant procedure, there is no compensable injury.

Similarly, for plaintiffs who have had no post-implant surgical intervention, it may be important to distinguish between those suing without any evidence of physical symptoms or limits (e.g., claiming only emotional distress or the risk of future injury) and those who may have compensable injuries despite not having had surgical intervention. The latter category may match with the stated expectation from plaintiffs' leadership *supra* that "there are instances where the device cannot be safely removed." CMC Tr., Sept. 5, 2018, ECF No. 13, at 42:8-11. A plaintiff with a medical diagnosis of a compensable physical injury that his or her physicians have determined cannot be addressed through a safe surgical intervention should have proof on these issues available to produce. Likewise, any plaintiff who claims to have a compensable injury—implicit in bringing a product liability suit in the first place—should also be prepared to provide proof of a medical diagnosis of a compensable physical injury.

These requirements for current and future cases would further "[t]he basic purpose of a *Lone Pine* order [] to identify and cull potentially meritless claims." *Baker v. Chevron USA, Inc.*, Case No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007). This identification and culling would help to "boost efficiency" for the MDL by "ensur[ing] that only plaintiffs with meritorious cases are compensated" in the event of a settlement or "ensur[ing] that the home districts receive only viable cases" in the event of remand. *See In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *7; *see also In re Zostavax*, 2022 U.S. Dist. LEXIS 57935, at *7 ("It is now time for plaintiffs to come forward with the Laboratory Reports or other documentation Merck requests to enable the court to weed out non-meritorious claims and move along these 1,700 or more cases toward a final resolution."); *McManaway*, 265 F.R.D. at 388-89 ("[I]n order to promote efficiency in the resolution of the case, an order on Plaintiffs' Fed. R. Civ. P. 26(b) expert disclosures should issue directing Plaintiffs to provide expert disclosures in the three areas of inquiry defendants requested (exposure, injury, and causation)."). As the MDL court in the *In re Zostavax* litigation stated recently:

> While a district court must be careful not to stifle meritorious claims, it may impose a *Lone Pine* order so as to "require plaintiffs to furnish specific evidence like proof of a medical diagnosis, with the goal of winnowing non-compliant cases from the MDL."

In re Zostavax, 2022 U.S. Dist. LEXIS 57935, at *5 (quoting *Hamer v. Livanova Deutschland GmbH,* 994 F.3d 173, 178 (3d Cir. 2021)). Providing the parties and the Court with an effective method to cull out the claims of uninjured plaintiffs will advance the needs of the MDL and potentially discourage future plaintiffs from bringing unsupported cases.

B. A Docket Control Order Requiring Counsel Certifications As To Basic Requirements Would Be Appropriate And Useful In Advancing The MDL's Purpose

In addition to seeking production of proof of medical diagnosis of compensable injury, Bard seeks production and certification from plaintiff's counsel as to four other basic issues, discussed *supra*, each of which should have been considered before bringing suit in this MDL. *See* Proposed Case Management Order, **Exhibit 3**. Unfortunately, based on information that Bard has at this time, there are a relatively large number of cases that should be dismissed or transferred because of one or more of the following reasons: 1) the plaintiff is suing over a device not made by Bard or otherwise outside of the scope of this MDL; 2) the plaintiff's claims are plainly barred by applicable statutes of limitations and/or repose; 3) the plaintiff has multiple cases that arise from the same operative facts pending in this MDL; and 4) the plaintiff's claims have been resolved in other litigation or are subject to a prior dismissal with prejudice. By entering a docket control order requiring plaintiffs and their counsel to take certain basic steps, the parties and the Court will be in a better position to weed out cases than if Bard had to file individual motions after the completion of costly case-specific discovery.

This is well within the Court's authority under Fed. R. Civ. P. 16(c)(2), as well as its inherent authority described above. That provision authorizes the Court to take action on, among other matters, "eliminating frivolous claims or defenses, "amending the pleadings," "controlling and scheduling discovery," "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, and "facilitating in other ways the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c)(2)(A), (B), (F), (L) & (P); *see also* Fed. R. Civ. P. 16 adv. comm. note (1983) (referencing the "court's power to identify the litigable issues," the goal of "promoting efficiency and conserving judicial resources by identifying the real issues prior

to trial," and that "[t]here is no reason to require that [eliminating frivolous claims or defenses] this await a formal motion for summary judgment"). The provisions that Bard seeks here fall squarely within what the Court, particularly in its MDL function, has been authorized to do.

This MDL was established to address common issues in connection with product liability cases against Bard and Davol concerning one or more of their twenty-four polypropylene-based hernia mesh devices (hereinafter, "covered devices"). ECF Nos. 1 & 67. While there may be cases with claims asserted as other Bard devices or devices of other manufacturers, those cases belong in this MDL only if claims are also being asserted against Bard as to a covered device.[3] A case that does not assert claims against Bard as to a covered device should be dismissed or transferred depending on what other claims are asserted. Even a case that purports to concern a covered device will be subject to dismissal if there is not basic proof that the plaintiff was in fact implanted with the device over which she or he is suing. Requiring that all current and future plaintiffs produce records from the implanting surgeons or hospitals identifying the specific manufacturer and model of each hernia device implanted in the plaintiff will aid in culling out cases that do not belong in this MDL.[4] An attendant requirement that plaintiff's counsel assess the claims asserted, the defendants, and available product identification evidence to determine if a supported claim against Bard as to a covered product can be made would also be appropriate. Cases that do not belong in this MDL can transferred to another district court if claims concerning non-covered devices have been asserted or dismissed if not.

[3] The JPML has assigned a number of multi-manufacturer cases to this MDL even when another MDL exists concerning the other manufacturer's device at issue. This has been the case regardless of which party tags the case first.

[4] The PPF currently required after filing a case does not have this specific requirement, as it asks each plaintiff to produce the medical records he or she has obtained related to the asserted claims. ECF No. 57.

Requirements that plaintiffs produce proof of product identification, purchase, or exposure (as in environmental torts) are some of the most common provisions in *Lone Pine* orders, docket control orders, and case management orders in MDLs, coordinated proceedings, and multi-plaintiff cases. *Lone Pine* itself concerned proof of exposure. Numerous MDLs concerning over-the-counter products have required the early production of product identification information. *See*, *e.g.*, *Burns v. Universal Crop. Protection Alliance*, NO: 4:07CV00535 SWW, 2007 U.S. Dist. LEXIS 71716, at *7-*8, *10-*11 (E.D. Ark. Sept. 25, 2007) (entering *Lone Pine* order requiring plaintiffs to provides affidavits establishing product identification). The dismissal of non-compliant cases in the *3M Combat Arms* MDL discussed above began with the requirement that plaintiffs produce certain records relating to the timing of their military service, which served as a proxy for use of the product at issue. Requiring a counsel certification of consideration of basic issues concerning which defendants are being sued over which products is appropriate because it is something each counsel should have done before bringing suit. *See Albright v. Upjohn Co*., 788 F.2d 1217, 1219-21 (6th Cir. 1986) (reversing district court's denial of Rule 11 sanctions against plaintiff's attorney for "insufficient" pre-filing investigation that would have revealed a lack of evidence that defendant was not manufacturer of allegedly defective antibiotic taken by plaintiff). In *Cook IVC Filter* MDL, the judge has required similar attorney certifications on issues that should have been assessed before bringing suit. CMO No. 28, *In re Cook Med., Inc., IVC Filters Mkt'g, Sales Pract. & Prod. Liab. Litig*., MDL No. 2570, Oct. 26, 2020, *attached* hereto as **Exhibit 6**; CMO No. 30, *In re Cook Med., Inc., IVC Filters Mkt'g, Sales Pract. & Prod. Liab. Litig*., MDL No. 2570, Mar. 29, 2022, *attached* hereto as **Exhibit 7**.

The first of these *Cook IV Filter* orders required plaintiff's counsel to assess applicable statute of limitations and statutes of repose and voluntarily dismiss time-barred cases. *Cook* CMO

No. 28, **Exhibit 6**. In it, the MDL judge specified that plaintiff's counsel's "reasonable screening inquiry requires, at a minimum, communicating with the plaintiff, reviewing the plaintiff's pleadings, and reviewing the plaintiff's [form discovery responses]." *Id.* at 1-2. While this Court has not yet issued any orders on statute of limitations or repose, these are issues that counsel should have assessed up front in every case. *See Johnson v. A. W. Chesterton Co.*, 18 F.3d 1362, 1365 (7th Cir. 1994) (finding that sanctions were properly imposed on plaintiffs' attorney for failing to make reasonable pre-filing investigation that would have revealed claim was barred by statute of limitations); *Doggett v. Perez*, 225 F.R.D. 255, 257 (E.D. Wash. 2004) (imposing sanctions under Rule 11 where "John Doggett's claims were legally frivolous when filed because they were clearly time-barred"); *Augustine v. Adams*, 88 F. Supp. 2d 1166, 1173-74 (D. Kan. 2000) (sanctioning attorney under Rule 11 for filing complaint where he should have realized that plaintiff's claims were barred by res judicata, collateral estoppel, and state statute of limitations, because his position was not warranted by existing law or nonfrivolous argument).

In this MDL, there are strong reasons to suspect that a substantial number of cases ultimately will be barred by statutes of limitations or repose. For instance, the wave of legal advertising that preceded the MDL's creation and has continued since does not focus on a specific recall or other common triggering event that might affect a statute of limitations analysis. Rather, it focuses on reoperation after implant, for any reason and at any time. From the information available from SFCs and PPFs, at least two common patterns can be seen: 1) the implant at issue occurred ten to thirty-five years before the initiation of the suit, and 2) the suit was initiated four or more years after the disclosed explant surgery. For the former pattern, statutes of repose in states like Tennessee should bar these case regardless of when claims accrued. *See Montgomery v. Wyeth*, 580 F.3d 455 (6th Cir. 2009). For the latter pattern, most states have statutes of

limitations applicable to product liability claims that are three years or shorter and claims typically will have accrued by no later than the first surgical intervention. Together, these patterns make it clear that there will be a number of time-barred cases and plaintiffs' counsel should have assessed these issues before filing any case.

It is also clear from SFCs and PPFs that there are hundreds of cases pending where the plaintiff has more than one case in the MDL, where the plaintiff has previously resolved some or all of her or his claims against Bard, and/or where the case has been the subject of a prior order of dismissal. Given existing orders, the process of identifying these cases and seeking dismissal, amendment, or consolidation, either voluntarily or by motion, is time-consuming and inefficient. Rather, the assessment of pending and prior cases by the same plaintiff, whether by talking to the plaintiff or searching dockets, is something that a plaintiff lawyer should have done before filing any case. *See, e.g., In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987) ("Accordingly, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney."); *Stewart v. The Proctor & Gamble Co.*, Case No. C-1-06-374, 2006 U.S. Dist. LEXIS 102384, at *3 (S.D. Ohio July 21, 2006) ("Plaintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time."); *see also Augustine*, 88 F. Supp. 2d at 1173-74 (sanctioning attorney under Rule 11 for filing complaint where he should have realized that plaintiff's claims were barred by res judicata, collateral estoppel, and state statute of limitations, because his position was not warranted by existing law or nonfrivolous argument).

The Sixth Circuit's decision in *In re Ruben* addressed the duties of plaintiffs' counsel in filing cases and the authority of federal courts to discourage frivolous claims. In enunciating the standard for evaluating fee awards under 28 U.S.C. § 1927, the court stated:

> 28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for "unreasonable and vexatious" multiplication of litigation despite the absence of any conscious impropriety. An attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to carte blanche to burden the federal courts by pursuing claims that are frivolous on the merits, or by pursuing nonfrivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise "unreasonable and vexatious."

In re Ruben, 825 F.2d at 984 (quoting *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986)).

As in the *Cook* orders, it is appropriate to require that plaintiff's counsel certify that they have now conducted an assessment in each case to avoid frivolous claims. Such an inquiry should include, at a minimum, by speaking with the plaintiff and checking dockets and other publicly available information. When a plaintiff lawyer determines that a case is duplicative or asserts claims that have been resolved or extinguished, then voluntary dismissal should follow.[5] Similar voluntary actions should follow depending on the particular circumstances, but these plaintiffs should be encouraged to take such actions based on the Court's authority to shift costs and fees in the event that involuntary dismissal is obtained after a refusal to dismiss.[6] *See* 28 U.S.C. § 1927

[5] There are also cases pending in other courts for the same plaintiffs based on the same operative facts. This is particularly true as to the coordinated proceeding in Rhode Island state court. In many instances, the plaintiff's case pending in this MDL was filed second and yet many counsel have failed to dismiss their later-filed cases after Bard provided notice. The existence of previously filed cases for the same plaintiff, regardless of where filed, should have been ascertained by counsel before filing a case in this MDL. Based on principles of comity, these cases should also be identified and subject to dismissal.

[6] There are a number of potential fact patterns related to duplicative cases. For instance, multiple cases in this MDL relating to the same claims against Bard or where a case asserts only claims that have been resolved or extinguished should result in dismissals. Where a plaintiff has brought two separate suits in the MDL relating to two different devices, then consolidation to one case may be appropriate. Where a plaintiff asserts claims, some but all of which have been resolved or extinguished, then a plaintiff may elect to dismiss or amend the SFC. Where an order conditions re-filing on paying Bard's fees in connection with obtaining the prior order of dismissal, then a plaintiff may elect to dismiss or proceed after paying fees. None of these presents particularly complicated legal issues for plaintiff's

(authorizing costs and fees from attorney conduct that "multiplies the proceedings in any case unreasonably and vexatiously"); *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) ("Section 1927 sanctions are warranted when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.'") (quoting *In re Ruben*, 825 F.2d at 984).

The benefit to the MDL from requiring certification of these assessments now should be obvious. In addition to dismissing or transferring cases that should not be pending in this MDL, after these assessments, the parties and the Court will be in better position to identify common issues to resolve through motion practice without extensive case-specific discovery. Cases that remain after voluntary dismissals and motions will be in better position to be litigated on their merits, individually and collectively.

C. Docket Control Orders Do Not Require Prior Settlement

In other proceedings, the argument against a docket control or *Lone* Pine order is often that such an order is not appropriate until there has been a large-scale settlement. While this may be a more palatable way of saying that even frivolous cases should be allowed to remain pending without challenge, settlement activity "has never been deemed a condition precedent" to a *Lone Pine* order. *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *8.

Although *Lone Pine* orders have been entered in an MDL setting as to non-settling plaintiffs after there has been a large-scale settlement, *see, e.g.*, *In re Xarelto,* 2021 U.S. Dist. LEXIS 25296; *In re TRT*, 2018 U.S. Dist. LEXIS 205125, settlement activity is ***not*** a "necessary predicate" for the issuance of such an order. *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *7-*8; *see also In re Zostavax*, 2022 U.S. Dist. LEXIS, at *1, *7, *8 (granting *Lone Pine* order

counsel, particularly those who have filed large numbers of cases in this MDL.

requiring production of lab reports on plaintiffs' alleged rashes without prior settlement). As the *In re Fosamax* court stated in issuing a thorough docket control order over vigorous plaintiff opposition:

> The Court can discern no rationale for requiring parties to have reached a settlement – or be on the brink of settlement – before considering a *Lone Pine* order. Indeed, the primary purpose of *Lone Pine* orders is to eliminate meritless claims, which is at best tangentially related to the status of settlement negotiations.

Id. at *8. Indeed, it remains true today as it was at the time of *In re Fosamax* that settlement is not a prerequisite for the entry of a *Lone Pine* docket control order.

The number of pending cases in this MDL, which continues to rise, is also consistent with the posture of a number of MDLs when they issued orders imposing requirements for basic proof. The *Fosamax* MDL had about 1000 pending cases when its order issued. *Id.* at *2-3. *TRT* had over 7700 cases when it issued its order, *Cook IVC* had about 8200 pending cases when it issued its second order, and *In re Vioxx* had 8575 cases with 23,450 plaintiffs when it issued its first order. *See In re TRT*, 2018 U.S. Dist. LEXIS 205125, *416; JPML data, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-May-16-2022.pdf; Minute Entry, *In re Vioxx Prods. Liab. Litig.*, 2:05-md-01657-EEF-DEK, ECF No. 12626, at 7 (E.D. La. Oct. 11, 2007), attached hereto as **Exhibit 8**. In other words, *Lone Pine* or docket control orders have not been reserved only for cases with significantly fewer or significantly larger number of cases than this MDL has now.

Thus, the current posture of this MDL in terms of its settlement history and size is consistent with other MDLs when they imposed requirements similar to what Bard seeks here. As set out above, the provisions that Bard is requesting will be critical to the future of this litigation, regardless of whether there is any large-scale resolution any time soon.

D. This MDL Is Ripe For A *Lone Pine* Docket Control Order

In its roughly three-and-a-half years of existence, the MDL has moved at a fast pace, with extensive generic fact and expert discovery and verdicts in two bellwether trials. Perhaps more importantly, the pace of case filings and the change in the nature of the inventory of cases over time (e.g., the percentage of PIP cases) remove any doubt that the MDL is mature and ripe for an order that would require current and future cases to provide certain key records and certifications that basic assessments have been made and core proof exists. The information available on the vast majority of cases comes from SFCs and PPFs only but even that limited information reveals a number of concerns about cases filed without cognizable injuries or otherwise lacking merit.

At this stage, a *Lone Pine* docket control order could both "cull potentially meritless claims," *Baker*, 2007 U.S. Dist. LEXIS 6601, at *2, and assist the parties in assessing the remaining inventory of cases. With more than 16,800 pending cases and more being filed each week, the justification for a pre-settlement *Lone Pine* order here is even greater than in *In re Fosamax*, where there was only a ***static*** volume of 1,000 cases pending. *In re Fosamax*, 2012 U.S. Dist. LEXIS 166734, at *6. There is no reason that more time should pass before meaningful requirements are imposed.

Particularly for those cases that have been on the docket for several months or years now, this is "merely ask[ing] them to produce information they should already have." *Id.* (citation omitted); *see also In re Avandia Marketing, Sales Practices & Prods. Liab. Litig.*, MDL No. 1871, 2010 WL 4720335 (E.D. Pa. Nov. 15, 2010) (requiring production of "information which plaintiffs and their counsel should have possessed before filing their claims"); *In re Vioxx*, 557 F. Supp. 2d at 744 ("[I]t is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury. . . . Surely if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief[.]"). At an "age" of 45 months since

the JPML's centralization order of August 2. 2018, this MDL is roughly as "old" as a number of the MDLs where when they issued the docket control orders discussed above. The *3M Combat Arms* MDL was 37 months old when it issued order earlier this month. *In re 3M Combat Arms*, **Exhibit 2**. The *Vioxx* MDL was 33 months old, *Zostavax* was 44 months old, *Physiomesh* was 47 months old, *TRT* was 48 months old, and *Xarelto* was 51 months old. *See In re Vioxx*, 557 F. Supp. 2d at 742-45 (referring to November 2007 order); *In re Zostavax*, 2022 U.S. Dist. LEXIS 57935; *In re Physiomesh*, **Exhibit 5**; *In re TRT*, 2018 U.S. Dist. LEXIS 205125; *In re Xarelto*, 2021 U.S. Dist. LEXIS 25296, at *7-*8 (referring to March 2019 order). While it is difficult to compare all the markers of progress between MDLs, this MDL is arguably at least as far along as these six other MDLs were when the first docket control or *Lone Pine* order was issued. This MDL also has continued high rates of case filings despite its maturity. Similar to the *Cook IVC Filter* MDL, where the orders detailed above followed a pattern of refusal to dismiss PIP and no injury cases, this MDL has also seen the failed promise that PIP cases would be limited to special circumstances. The increasing number of cases without apparent compensable injuries weighs in favor of taking steps now to discourage future filing of similar cases.

The same goes for cases that do not belong in the MDL because they are time barred, lack proof of implant with a covered device, are duplicates, or have been resolved. Plaintiff's counsel should have evaluated these issues before filing and mustered the documents and information they would need to address these issues. *See also Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (holding that district court was within its discretion to issue a scheduling order that "essentially required that information that plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3)" be produced); *Trujillo v. Ametek, Inc.*, Case No. 3:15-cv-1394-GPC-BGS, 2016 U.S. Dist. LEXIS 84834, at *12 (S.D. Cal. June 28, 2016) (finding that

Lone Pine order "essentially require[d] that information which plaintiffs should have had before filing their claims") (internal citation omitted). With more than 16,800 pending cases, there is every reason to take steps now to cull out cases that should not be pending in this MDL and, if necessary, start the process of briefing to obtain involuntary dismissals of cases plaintiffs refuse to dismiss. There is no conceivable reason why this process should be delayed.

Winnowing cases, whether because they have no proof of a medical diagnosis of compensable injury, lack product identification concerning a covered device, are time-barred, or are duplicates of pending or resolved cases, will have profound positive impacts on the MDL. In addition to providing the parties with a true picture of potentially meritorious cases, the remaining cases may be worked up on their merits, in the fashion the Court deems appropriate, without the waste inherent patently non-meritorious cases.

CONCLUSION

For the reasons stated above, the Court should enter a docket control order consistent with the Proposed Case Management Order to require production of evidence of a medical diagnosis of compensable injury, proof of implant with a covered device for this MDL, and certification that plaintiff's counsel has conducted an assessment of basic issues that bear on whether a case should be pending in this proceeding. Assessment of cases in the MDL has been complicated by the number of pending cases that lack a compensable injury, are time-barred, or otherwise should not be in this MDL. A docket control order at this juncture would assist in gaining control of the docket and fostering an environment conducive to conclusion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of this electronic filing to all counsel of record.

/s/ Michael K. Brown
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EXHIBIT 1

ESSAY

LONE PINE ORDERS: A CRITICAL EXAMINATION AND EMPIRICAL ANALYSIS

NORA FREEMAN ENGSTROM† & AMOS ESPELAND††

Invented in 1986 and now a prominent feature of the mass tort landscape, Lone Pine *orders require plaintiffs to provide to the court prima facie evidence of injury, exposure, and specific causation—sometimes early, and usually on pain of dismissal. Though they've taken root in a hazy space outside of the Federal Rules of Civil Procedure, these case management orders are frequently issued, and they play an important role in the contemporary litigation and resolution of mass torts. But although* Lone Pine *orders are common, potent, and increasingly controversial, they have mostly fallen under the academic radar. Even their key features are described inconsistently by commentators and courts. This Essay pulls back the curtain. Drawing on a unique hand-coded dataset, this Essay describes the origin and evolution of* Lone Pine *orders, sketches poles of the debate surrounding their use, and offers empirical evidence regarding their entry, content, timing, and effect.*

INTRODUCTION

A *Lone Pine* order is a case management order that typically requires plaintiffs to provide prima facie evidence of injury, exposure, and causation, generally on pain of dismissal. Originating in the 1986 New Jersey state court decision, *Lore v. Lone Pine Corp.*, these case management orders have become a familiar—and prominent—feature of the mass tort landscape.[1] *Lone Pine* orders have played a role in many of the most significant product liability

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1 Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

cases of all time, including litigation involving asbestos,[2] Vioxx,[3] Fosamax,[4] Rezulin,[5] Celebrex,[6] Nimmer Nexgen knee implants,[7] Baycol,[8] Avandia,[9] and Fresenius.[10] And the orders are currently much in vogue: a bill that would codify, and even *mandate*, the use of *Lone Pine* orders in multidistrict litigation (MDL) recently passed the House of Representatives.[11]

Yet, notwithstanding their practical importance and current prominence, these case management orders have somehow fallen under the academic radar. Aside from a couple of student notes, *Lone Pine* orders have been the subject of remarkably little academic scrutiny.[12] And courts vary widely in their descriptions—and use—of this potent procedural device.

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2 Amended Administrative Order No. 12, *In re* Asbestos Prods. Liab. Litig. (No. VI), 718 F.3d 236, 241 (3d Cir. 2013) (No. 01-0875).

3 *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 743 (E.D. La. 2008), *aff'd*, 388 F. App'x 391 (5th Cir. 2010).

4 *In re* Fosamax Prods. Liab. Litig., No. 06-1789, 2012 WL 5877418, at *4-5 (S.D.N.Y. Nov. 20, 2012).

5 Pretrial Order No. 370, *In re* Rezulin Prods. Liab. Litig., No. 00-2843, 2005 WL 1105067, at *1-2 (S.D.N.Y. May 9, 2005); Pretrial Order at 1-2, *In re* N.Y. Rezulin Prods. Liab. Litig., No. 0752000/2000 (N.Y. Sup. Ct. Aug. 11, 2004) [hereinafter N.Y. Rezulin Pretrial Order].

6 Pretrial Order No. 29 at 1-4, *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. 05-1699 (N.D. Cal. Aug. 1, 2008).

7 Pretrial Order No. 11 at 2-4, *In re* Zimmer Nexgen Knee Implant Prods. Liab. Litig., No. 11-5468 (N.D. Ill. June 10, 2016).

8 *In re* Baycol Prods. Liab. Litig., No. 01-1431, 2004 WL 626866, at *1-2 (D. Minn. Mar. 18, 2004).

9 Pretrial Order No. 121 at 2-4, *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 07-1871 (E.D. Pa. Nov. 15, 2010).

10 Pretrial Order No. 17 at 5-7, *In re* Fresenius Granuflo/Nautralyte Dialysate Prods. Liab. Litig., No. 13-2428 (D. Mass. Jan. 26, 2017).

11 Among other things, the bill provides that, within forty-five days of transferring a personal injury action into an MDL:

> counsel for a plaintiff . . . shall make a submission sufficient to demonstrate that there is evidentiary support . . . for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.

Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105 (2017).

12 This is changing, as Nora Freeman Engstrom very recently published a piece on *Lone Pine* orders in the *Yale Law Journal* and Elizabeth Chamblee Burch has penned a response. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE. L.J. 2 (2019); *see also* Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE. L.J.F. 64 (2019). Prior to those contributions, the most comprehensive treatments were authored by practitioners or students. *See, e.g.*, Cal R. Burnton, *Narrowing the Field in Mass Torts: The* Lone Pine *Solution*, 19 PROD. LIAB. LITIG. REP., Apr. 2008, at 15; James P. Muehlberger & Boyd S. Hoekel, *An Overview of* Lone Pine *Orders in Toxic Tort Litigation*, 71 DEF. COUNSEL J. 366 (2004); William A. Ruskin, *Prove It or Lose It: Defending Against Mass Tort Claims Using* Lone Pine *Orders*, 26 AM. J. TRIAL ADVOC. 599 (2003); John T. Burnett, Comment, Lone Pine *Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 J. LAND USE & ENVTL. L. 53 (1998); Michelle Sliwinski, Note, *Addressing the Fissures in Causation Claims: A Case Against the Use of* Lone Pine *Orders as Procedural Hurdles in Hydraulic Fracturing Litigation*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 77

Here, we begin the process of bridging those gaps. Our analysis proceeds in three Parts. Part I offers a primer on *Lone Pine* orders. It recounts the orders' 1986 invention, traces their early adoption, and describes their purpose. Part II then briefly sketches the poles of the debate surrounding the orders' use, focusing on recent criticism of the *Lone Pine* mechanism. Part III then draws on our unique, hand-coded dataset of ninety-seven *Lone Pine* orders, issued by both state and federal trial courts from 1986 to 2019, to offer a descriptive account. Our descriptive statistics permit us to offer new, and in some cases surprising, information concerning *Lone Pine* orders' use, content, timing, and effect.

Three of our conclusions are particularly noteworthy. First, although any conclusion regarding "trends" ought to be viewed with particular suspicion, we find evidence that, from 1989 until 2014, *Lone Pine* orders were on the rise. But we find some tentative evidence that, within the past few years, their popularity may have flagged.[13] Second, we find that *Lone Pine* orders' timing of entry varies considerably: Some *Lone Pine* orders are issued prior to discovery; some are issued once discovery is in full swing; and some are issued at the tail-end of litigation, once a global or mass settlement agreement has been at least preliminarily forged. Contrary to the views of several judges and commentators,[14] then, *Lone Pine* orders are not exclusively "prediscovery" procedural devices. Nor are they exclusively orders sought "after the settlement is consummated."[15] They are, for better or worse, case management orders issued at nearly any time throughout a litigation's lifecycle. Third and finally, we find that *Lone Pine* orders are potent: 61% of

(2016); Scott A. Steiner, Note, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 71 (1999).

13 For why this conclusion ought to be viewed with some suspicion, see *infra* note 78 and accompanying text.

14 *See, e.g.*, Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006) ("*Lone Pine* orders . . . are pre-discovery orders designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation by requiring plaintiffs to produce some evidence to support a credible claim." (citation omitted)); *In re* AET Inc. Ltd., No. 10-0051, 2018 WL 4203351, at *2 (E.D. Tex. Feb. 13, 2018) ("*Lone Pine* orders . . . are pre-discovery orders . . . ." (internal quotation marks and citation omitted)); Modern Holdings, LLC v. Corning Inc., No. 13-0405, 2015 WL 6482374, at *1 (E.D. Ky. Oct. 27, 2015) ("*Lone Pine* orders . . . are pre-discovery orders . . . ." (citation omitted)); 28 JILL GUSTAFSON & ERIC C. SURETTE, FEDERAL PROCEDURE, LAWYERS EDITION § 64:56 (2019) ("A *Lone Pine* order is a prediscovery order . . . ."); 6 STEPHEN LEASE, CYCLOPEDIA OF FEDERAL PROCEDURE § 19:25 (3d ed. 2019) ("'Lone Pine orders' are prediscovery orders . . . ." (footnote omitted)); DANA SHILLING & BARBARA DETKIN, LAWYER'S DESK BOOK § 16.01 (2019) ("A 'Lone Pine' order is a pre-discovery order . . . .").

15 *See, e.g.*, D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2186 (2017) (defining *Lone Pine* orders as orders sought "after the settlement is consummated"); *see also* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 100 (2017) (defining *Lone Pine* orders as filings issued late in litigation "that impose evidentiary production requirements on non-settling plaintiffs").

the *Lone Pine* orders in our dataset (or 74% of the eighty orders for which we were able to observe whether the order had an effect) were followed by at least partial summary judgment for defendants or the dismissal of at least some of plaintiffs' claims.

I. *LONE PINE* ORDERS: INVENTION, DEFINITION, AND PURPOSE

A. *The 1986 Invention of a Unique Case Management Device*

Lone Pine orders trace their origin to *Lore v. Lone Pine Corp.*, a state court case filed in April 1985 in Monmouth County, New Jersey.[16] Large and messy, the lawsuit arose when a motley crew of property owners sued 464 defendants alleging property depreciation and personal injury caused by water pollution reportedly emanating from the Lone Pine Landfill—a large waste site that had operated for two decades before it was eventually shuttered in 1979.[17]

The suit was filed with some fanfare. But soon after its initiation, plaintiffs' case seemingly ground to a halt. After seven months of litigation, plaintiffs had served only a "few" of the 464 defendants they had originally named in their complaint.[18] Then, nine months in, the court became aware that the Environmental Protection Agency (EPA) had prepared a report about the landfill that severely undercut plaintiffs' claims.[19] Ominously for plaintiffs, the EPA found that the environmental contamination that was the target of plaintiffs' complaint (and was, in plaintiffs' telling, to blame for their various ailments) was, in fact, "confined to the landfill and its immediate vicinity."[20] This finding was relevant—and, for plaintiffs, deeply troubling—because some plaintiffs alleging injury lived some distance away. In fact, one plaintiff lived twenty miles from the landfill, and two more of the allegedly affected individuals resided two miles from it "in different directions."[21]

Both the sluggish pace of the litigation and the shadow cast by the EPA report ultimately prompted Judge William T. Wichmann to take a novel step. Following a January 1986 status conference, Judge Wichmann entered an unusual case management order, prior to the start of discovery.[22] This order compelled the *Lone Pine* plaintiffs to provide, under penalty of dismissal, "basic facts . . . in order to support their claims of injury and property damage" including "[r]eports of treating physicians and medical or other

16 No. L-33606-85, 1986 WL 637507, at *1 (N.J. Super. Ct. Law Div. Nov. 18, 1986).
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.* at *3.
21 *Id.*
22 *Id.* at *1-2.

experts, supporting each individual plaintiff's claim of injury and causation by substances from Lone Pine Landfill," all "on or before June 1, 1986."[23]

The plaintiffs offered some information in response to Judge Wichmann's case management order, but it was far from satisfactory. As a defense lawyer put it: "With regard to the personal injuries, there is no evidence whatsoever of any toxic or chemical contamination of any of the bodies of the plaintiffs."[24] Judge Wichmann agreed, observing that plaintiffs' filings were "woefully and totally inadequate."[25] "Plaintiffs," Judge Wichmann complained, "merely listed a variety of illnesses such as allergies, itching, dryness of skin, and the like. No records were submitted to substantiate any physical problems, their duration or severity. No doctors' reports were provided."[26] The upshot was, although plaintiffs' lawsuit had been pending for over a year, "defendants were no better off" than when suit was first filed.[27] Accordingly, on November 18, 1986, an exasperated Judge Wichmann dismissed all of plaintiffs' claims with prejudice[28]—and, crucial for our purposes, the *Lone Pine* idea was born.

Within a few years of Judge Wichmann's ruling, the *Lone Pine* idea spread from Monmouth County, New Jersey to Niagara County, New York. There, as in *Lone Pine*, plaintiffs were alleging injury from their exposure to a noxious landfill (this time, the notorious Love Canal) and, also as in *Lone Pine*, their claims aroused judicial suspicion.[29] This time, suspicion arose because, among other oddities, "some plaintiffs not even born until 1980" alleged they "frequented" the contaminated area in 1980, while other plaintiffs alleged they were injured when they visited an area that was, in reality, closed and protected by an eight-foot-high fence on the dates in question.[30] Convinced that "a new approach to the handling of these . . . actions" was needed—and relying on both *Lone Pine* and the court's own inherent authority—on May 17, 1989, Judge Vincent Doyle issued an order similar to Judge Wichmann's novel submission.[31] In particular, Judge Doyle required plaintiffs to come forward with clear evidence of exposure and injury and also to file "[r]eports or affidavits of a physician or other qualified expert demonstrating that each

23 *Id.*
24 *Id.* at *4.
25 *Id.* at *2.
26 *Id.* at *3.
27 *Id.*
28 *Id.* at *4.
29 *In re* Love Canal Actions, 547 N.Y.S.2d 174, 175 (Sup. Ct. 1989), *modified*, 555 N.Y.S.2d 519 (App. Div. 1990).
30 *Id.* at 178-79.
31 *Id.* at 177-79.

injury of a plaintiff was, in fact, caused by the plaintiff's exposure to chemicals at or from the old Love Canal landfill."[32]

Soon thereafter, in 1991, Judge Franklin Battin of the United States District Court of Montana picked up the baton, issuing another *Lone Pine* order in another notable suit involving health effects allegedly traceable to the defendant's environmental contamination.[33] In *Eggar v. Burlington Northern Railroad Co.*, "twenty-seven plaintiffs filed suit against Burlington Northern" asserting that they suffered from various maladies stemming from their exposure to an assortment of chemicals seeping from Burlington Northern's Livingston shop,[34] a two-mile-long complex that contained a railyard alongside rail car maintenance and repair facilities.[35] Judge Battin expressed skepticism regarding any alleged link between Burlington and the plaintiffs' "multitude of ailments" and so, taking cues from *Lone Pine* and *Love Canal*, issued a case management order on March 6, 1991[36] demanding that six "test" plaintiffs file detailed affidavits from physicians.[37] The order further specified:

> The physicians [sic] affidavit shall specify, for *each* test plaintiff, the precise injuries, illnesses or conditions suffered by that plaintiff; the particular chemical or chemicals that, in the opinion of the physician, caused each injury, illness or condition; and the *scientific and medical bases* for the physician's opinions. It will not be sufficient for the affidavit to state a "laundry list" of injuries and chemicals; each injury, illness or condition must be itemized and *specifically linked* to the chemical or chemicals believed to have caused that particular injury, condition or illness. Moreover, the statement of scientific and medical bases for the opinion shall include *specific reference to the particular scientific and/or literature* [sic] *forming the basis for the opinion*.[38]

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32 *Id.* at 174. On appeal, the Appellate Division expressed uneasiness with the trial court's ruling and modified the trial court's discovery order, while cautioning "CPLR 3101(d)(1)(i) does not provide for the disclosure of expert reports as ordered by the Justice to whom the cases have been assigned for trial." *In re* Love Canal Actions, 555 N.Y.S.2d 519, 520 (App. Div. 1990).

33 Eggar v. Burlington N.R.R. Co., No. 89-0159, 1991 WL 315487, at *4 (D. Mont. Dec. 18, 1991), *aff'd sub nom*. Claar v. Burlington N.R.R. Co., 29 F.3d 499 (9th Cir. 1994).

34 *Id.*

35 *Burlington Northern Livingston Shop Complex CERCLA Facility*, MONTANA.GOV, http://deq.mt.gov/land/statesuperfund/bnlivingston [https://perma.cc/E2SN-Q8BB] (last visited Jan. 5, 2020).

36 *Eggar*, 1991 WL 315487, at *4; *see also Claar*, 29 F.3d at 500 (noting that the trial court issued the order "[o]ut of concern that plaintiffs might not be able to demonstrate a causal connection between their . . . chemical exposure and their injuries"). The court first issued a *Lone Pine* order on February 26, 1990 but issued a subsequent (and more substantial) order on March 6, 1991, after concluding that plaintiffs' original submissions in response to the February 1990 order were wanting as they "contained mere laundry lists of chemicals and injuries." *Eggar*, 1991 WL 315487, at *4.

37 *Id.*

38 *Id.* at *5. The March 1991 order did not contain italics. *Id.* at *4-5. Italics were added in the court's subsequent order, granting defendant's motion for summary judgment. *Id.*

The *Eggar* plaintiffs responded to the case management order by the court-imposed deadline.[39] But as in *Lone Pine*, the court found plaintiffs' submissions wanting. Though the plaintiffs submitted two physicians' affidavits that were "over 150 pages each," the affidavits, Judge Battin ruled, were unsatisfactory.[40] They "failed to *specifically* link *each* injury, illness, or condition to the specific chemical[s] believed to have caused it."[41] And neither affidavit "set forth the medical and scientific bases for their opinions regarding *each* plaintiff."[42] Thus, as in *Lone Pine*, Judge Battin terminated the plaintiffs' claims.[43]

B. *Contemporary Use*

In the decades since these initial forays, federal and state courts around the country have taken the *Lone Pine* idea and run with it. Many courts, in many states, have issued *Lone Pine* orders, leading some to suggest that *Lone Pine* orders have become "common"[44]—even "routine"[45]—in mass tort litigation.

In federal courts, though no specific rule authorizes their entry, the orders are generally issued under the auspices of Rule 16 of the Federal Rules of Civil Procedure, specifically, Rule 16(c)(2)(L), a vague and encompassing provision added to the federal rulebook in 1983 which empowers courts to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."[46] State courts'

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39 *Id.* at *5.

40 *Id.*

41 *Id.* (alterations in original).

42 *Id.*

43 *Id.* at *11. There were two notable differences, however. First, in *Eggar*, the court granted defendant's summary judgment motion (rather than a motion to dismiss). *Compare id.*, *with* Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507, at *4 (N.J. Super. Ct. Law Div. Nov. 18, 1986). Second, in *Eggar*, the court granted summary judgment for defendant regarding the six test cases. *Eggar*, 1991 WL 315487, at *11. Thus, in *Eggar*, the *Lone Pine* process did not immediately terminate the entire litigation. *Id.*

44 *See, e.g.*, Arias v. DynCorp, 752 F.3d 1011, 1014 (D.C. Cir. 2014) (referring to *Lone Pine* orders as a "common trial management technique").

45 *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 687 F. App'x 210, 214 (3d Cir. 2017) (referring to the orders as "routine"); *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 743 (E.D. La. 2008) (stating that the orders are "routinely used by courts to manage mass tort cases"), *aff'd* 388 F. App'x 391 (5th Cir. 2010).

46 FED. R. CIV. P. 16(c)(2)(L); *e.g.*, McManaway v. KBR, Inc., 265 F.R.D. 384, 384 (S.D. Ind. 2009) ("*Lone Pine* orders are permitted by Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure . . . ."); Ramos v. Playtex Prod., Inc., No. 08-2703, 2008 WL 4066250, at *5-6 (N.D. Ill. Aug. 27, 2008) ("Such orders are permitted by Rule 16(c)(2)(L) . . . ."); *cf.* McMunn v. Babcock & Wilcox Power Generation Grp., Inc., 896 F. Supp. 2d 347, 351 (W.D. Pa. 2012) (citing, instead, Rule 16(c)(2)(A), which authorizes courts to adopt procedures for the purpose of "formulating and simplifying the issues, and eliminating frivolous claims or defenses" (internal quotation marks omitted)).

authority to issue *Lone Pine* orders, meanwhile, is said to come from a range of sources, including courts' "inherent authority."[47]

For the most part, in actually crafting these orders, courts hew to the above early exemplars. Like the orders in *Lone Pine*, *Love Canal*, and *Eggar*, *Lone Pine* orders are typically issued only in cases involving multiple plaintiffs and complex problems of proof.[48] And the orders typically compel plaintiffs to offer evidence similar to what Judges Wichmann, Doyle, and Battin demanded. Namely, under a prototypical *Lone Pine* order, each plaintiff must adduce prima facie evidence: (1) that she was exposed to the defendant's product or contaminant and the circumstances surrounding this exposure, (2) that she has suffered, or is suffering, a bona fide impairment, and (3) proof of specific causation—which is to say, either an expert affidavit or expert report expressly connecting (1) with (2)—all by a court-imposed deadline.[49] In the event that a plaintiff fails to meet the court-imposed cutoff or fails to satisfy the order's requirements, the plaintiff's suit may be dismissed with prejudice.[50]

C. *Purpose*

In terms of their purpose, *Lone Pine* orders are, it is commonly said, "designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation."[51] In others' words, they "bring[] order to chaos"[52] and offer a "simpler, more expeditious means" of organizing, and possibly resolving, complex civil litigation.[53] *Lone Pine* orders offer this assistance by acting as a "procedural sieve."[54] Like a kitchen colander, they

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47 *See, e.g.*, Cottle v. Superior Court, 5 Cal. Rptr. 2d 882, 886-87 (Ct. App. 1992) (rejecting petitioners' argument that, in issuing what was, essentially, a *Lone Pine* order, the trial court "exceeded the scope of its inherent and discretionary powers"), *modified* (Mar. 20, 1992). *But see* Antero Res. Corp. v. Strudley, 347 P.3d 149, 153 (Colo. 2015) ("Colorado's Rules of Civil Procedure do not allow a trial court to issue . . . a *Lone Pine* order[] that requires a plaintiff to present prima facie evidence in support of a claim before a plaintiff can exercise its full rights of discovery under the Colorado Rules.").

48 There are exceptions, however. *See, e.g.*, Meyer v. Creative Nail Design, Inc., 975 P.2d 1264, 1268 (Mont. 1999) (entering a *Lone Pine* order in a products liability suit involving just two plaintiffs); Schelske v. Creative Nail Design, Inc., 933 P.2d 799, 800 (Mont. 1997) (concerning the entry of a *Lone Pine* order in a case with two plaintiffs).

49 Engstrom, *supra* note 12, at 20.

50 *Id.*

51 Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000).

52 Michelle Yeary, Lone Pine *by Any Other Name*, DRUG & DEVICE L., (Feb. 5, 2019), https://www.druganddevicelawblog.com/2019/02/lone-pine-by-any-other-name.html [https://perma.cc/N6ZP-ZVKX].

53 Gallagher v. FibreBoard Corp., 641 So. 2d 953, 955 (Fla. Dist. Ct. App. 1994).

54 Steiner, *supra* note 12, at 86; *accord* Burnett, *supra* note 12, at 74 ("*Lone Pine* orders can . . . be used to weed out claims that judges may consider to be frivolous or unsupported by fact.").

seek to isolate and wash away noncolorable claims, while preserving the claims of plaintiffs who can satisfy the order's requirements and, in so doing, make out a prima facie case.[55]

Beyond those bromides, there's an uncomfortable fact about mass tort litigation that makes *Lone Pine* orders—and their capacity to wash away noncolorable claims—particularly attractive. That fact is that, for a slew of reasons, certain mass tort suits are susceptible to being contaminated by, or even overrun with, the inclusion of plaintiffs who do not have a legitimate claim for relief. Mass tort litigation has a regrettable track record of attracting some cases that are, as plaintiffs' lawyer Paul Rheingold puts it, "junk."[56] Targeting that concern, *Lone Pine* orders are specially engineered to "shake the junk cases from the mass tort tree."[57]

II. PROS AND CONS OF THE *LONE PINE* MECHANISM

This Part sketches the normative landscape. The pro side of the *Lone Pine* ledger is, in large measure, implicit from the discussion above. Certain mass tort litigation is prone to being overrun by dubious claims. And in this unique, and uniquely charged environment, *Lone Pine* orders may act as a critical counterweight. By putting plaintiffs to an early test and purging those who don't make the grade (or, as in *Lone Pine*, terminating the entire case, if all plaintiffs' submissions fall short), *Lone Pine* orders may help courts to zero in on, and address, gaps in the plaintiffs' evidence. This early scrutiny can, in turn, promote a number of worthy objectives. It can save defendants time, money, and aggravation, oftentimes sparing defendants from having to

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55 *See* Baker v. Chevron USA, Inc., No. 05-227, 2007 WL 315346, at *1 (S.D. Ohio Jan. 30, 2007) ("The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims . . . .").

56 Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 961 (1995) (quoting plaintiffs' lawyer Paul D. Rheingold); *see also* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688 (1989) ("[M]ature mass torts generate an overabundance of plaintiffs . . . including a substantial number of false positive claims."). For more evidence of this reality and a discussion of why, exactly, certain mass torts might become overrun with nonmeritorious claims, see Engstrom, *supra* note 12, at 22-33; Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 660-66 (2017).

57 JOHN H. BEISNER & JESSICA D. MILLER, LITIGATE THE TORTS, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED 23 (2009), https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/beisner09.pdf [https://perma.cc/MRS3-RKFM]. Or, in another's equally colorful description: "They help clean house; shake off free-riders hoping to hang in until a settlement." Yeary, *supra* note 52; *accord* ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, ADVISORY COMMITTEE ON CIVIL RULES 149 (2018), https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf [https://perma.cc/D35M-VYLW] (observing that courts issue *Lone Pine* orders in response to an "abiding concern" that many MDL claimants "don't really have claims").

engage in costly, intrusive, and burdensome civil discovery.[58] It can conserve scarce judicial resources and streamline and expedite the resolution of litigation.[59] By extinguishing baseless claims, scrutiny can preserve the integrity of trial processes.[60] And *Lone Pine* orders can even benefit "deserving" plaintiffs, who might otherwise have to share court time, counsel table, or even scarce settlement funds with those with dubious entitlements.[61]

But just as *Lone Pine* orders are, in many quarters, lauded, they have also been subject to criticism. Many judges, in fact, have—particularly in recent years—voiced concerns about the "untethered use of the *Lone Pine* process."[62] Critics raise five main objections.

First, some worry about cost. *Lone Pine* orders generally require plaintiffs to prepare individualized expert reports, and experts—particularly scientific experts—are expensive. Thus, to enter a *Lone Pine* order is to impose a heavy (and lopsided) financial burden on plaintiffs.[63]

Second, critics worry that *Lone Pine* orders are "inconsistently applied."[64] The record of this inconsistency is plain: In our review, we found that some courts stressed that the orders ought to be rarely issued and reserved for "exceptional" circumstances,[65] while other courts, by contrast, seemed to issue *Lone Pine* orders almost as a matter of course.[66] Compounding the inconsistency, when *Lone Pine* orders *are* issued, they

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58 *See, e.g.*, Miller v. Metrohealth Med. Ctr., No. 13-1465, 2014 WL 12589121, at *1 (N.D. Ohio Mar. 31, 2014) (entering a *Lone Pine* order to "prevent needless expense and time consuming discovery . . . where the plaintiff has not offered any substantive information as to the basis for his or her claim"); Michelle M. Bufano, *Food for Thought: The Importance of the Early Disposition of Baseless Claims in New Jersey Products Liability Mass Tort Litigation*, N.J. LAW., Aug. 2011, at 36, 37 (suggesting that *Lone Pine* orders relieve defendants from having to "spend time and money defending claims that have no merit").

59 *See* David B. Weinstein & Christopher Torres, *An Art of War Lesson Applied to Mass Torts: The Lone Pine Strategy*, ENVTL. ENFORCEMENT & CRIMES COMMITTEE NEWSL. (Am. Bar Ass'n), Mar. 2011, at 19, 20, https://www.americanbar.org/content/dam/aba/publications/nr_newsletters/eecc/201103_eecc.pdf [https://perma.cc/DT6E-AZDT] ("*Lone Pine* orders can also . . . achiev[e] judicial economy by avoiding unnecessary discovery, expert work, *Daubert* challenges, or other evidentiary proceedings.").

60 *See* Bufano, *supra* note 58, at 36 (suggesting that *Lone Pine* orders "curtail and discourage baseless claims").

61 *See id*. at 37 ("[L]egitimate plaintiffs also benefit from *Lone Pine* orders. For those plaintiffs that truly have a colorable cause of action supported by basic proofs, unsupported claims filed by other plaintiffs in the mass tort are detrimental. Frivolous claims divert everyone's resources—including those of plaintiffs' counsel—and clog up the litigation.").

62 *In re* Digitek Prod. Liab. Litig., 264 F.R.D. 249, 257 (S.D. W. Va. 2010).

63 Engstrom, *supra* note 12, at 36.

64 *See, e.g.*, Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 350 (Ohio Ct. App. 2007) ("[M]any Lone Pine orders are inconsistently applied, which further confuses their purpose.").

65 *See, e.g.*, Hostetler v. Johnson Controls, Inc., No. 15-0226, 2017 WL 359852, at *4, *6 (N.D. Ind. Jan. 25, 2017) (calling the entry of a *Lone Pine* order a "dramatic imposition" that "should be issued only in exceptional cases").

66 *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 743 (E.D. La. 2008) (referring to the orders as "routinely used by courts to manage mass tort cases").

differ along myriad dimensions, including in regard to the precise evidence they demand and the penalties they trigger in the event of noncompliance.[67] This variability raises normative concerns, as it means that *Lone Pine* orders' utilization impairs horizontal equity and injects a degree of uncertainty, inconsistency, and unpredictability into court proceedings.[68] Like litigants are supposed to be treated alike by the court system. Contemporary application of *Lone Pine* orders threatens that principle.

Third, in many cases, *Lone Pine* orders demand what amounts to an impossible and unrealistic level of certainty. The orders, very often, ask plaintiffs to supply a yes-or-no, black-or-white answer to a question regarding specific causation: Did *X* contaminant actually cause plaintiff's *Y* injury? But this question calls for an answer that is, in many cases, invariably and inescapably grey.[69]

Fourth, there is a deep and legitimate worry that *Lone Pine* orders are sometimes used as pseudo-summary judgment motions.[70] As we explain in greater detail below, some *Lone Pine* orders function like summary judgment motions but simultaneously deprive plaintiffs of fundamental protections that Rule 56 generally affords.[71] As such, to quote the Ohio Court of Appeals, the orders can "give[] courts the means to ignore existing procedural rules and safeguards."[72]

Fifth and finally, as we also discuss in more detail below, there is a worry that other *Lone Pine* orders—and, in particular, those orders issued in

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67 Engstrom, *supra* note 12, at 37-42 (discussing the uncomfortable variability among individual *Lone Pine* orders in regard to whether an order should be issued; if so, at what point the order should issue; and what, exactly, the order should say).

68 *Cf*. Burnett, *supra* note 12, at 76 ("With no real guidelines to control the parameters and scope of *Lone Pine* orders, they are fertile grounds for inconsistency, personal prejudice, and ultra vires activity." (footnote omitted)).

69 *See, e.g.*, Cottle v. Superior Court, 5 Cal. Rptr. 2d 882, 902 (Ct. App. 1992) (Johnson, J., dissenting) (chastising the majority for affirming the case's dismissal pursuant to a *Lone Pine*-style order, while noting that "what the trial court sought was an *impossibility* in this as in virtually all toxic tort cases—evidence a given toxic or combination of toxics was the *cause in fact* of a given disease or other condition in a specific individual"), *modified* (Mar. 20, 1992); Engstrom, *supra* note 12, at 46-52 (criticizing *Lone Pine* orders for "engraft[ing] a binary filter onto a question that is not susceptible to a yes-or-no answer").

70 *Cottle*, 5 Cal. Rptr. 2d. at 897 (Johnson, J., dissenting) (explaining that a case's termination pursuant to a *Lone Pine* process may have "the purpose and effect of summary judgment but avoid[] the very procedures and protections the Legislature deemed essential"); Antero Res. Corp. v. Strudley, 347 P.3d 149, 159 (Colo. 2015) ("[I]f a *Lone Pine order* cuts off or severely limits the litigant's right to discovery, the order closely resembles summary judgment, albeit without the safeguards supplied by the Rules of Civil Procedure.").

71 These safeguards include access to discovery and the right to de novo appellate review. *See infra* notes 93–94 and accompanying text.

72 Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 350 (Ohio Ct. App. 2007).

MDLs at the twilight of litigation—might unduly strongarm claimants to accede to settlements they might rather refuse.[73]

III. OFFERING MORE DETAIL: OUR DATASET

In order to say more about *Lone Pine* orders—including when they are commonly issued and what their effect might be—we built a dataset of ninety-seven *Lone Pine* orders.[74] We assembled the dataset, comprised of both published and unpublished orders, from Westlaw searches, by conducting a comprehensive literature review, and by corresponding with—and obtaining information from—dozens of attorneys involved in potentially relevant litigation.[75]

We begin with a few notes regarding our methodology. First, because *Lone Pine* orders are themselves so variable, we struggled with the determination of whether a particular case management order fairly qualified as a *Lone Pine* order for purposes of inclusion within our dataset. We ultimately included in our dataset any case management order that either (1) required a plaintiff to provide prima facie evidence of exposure, injury, and causation under threat of some penalty, often dismissal,[76] or (2)

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73 *See infra* note 95 and accompanying text.

74 We have posted many of the orders included in our dataset online at *Lone Pine Orders*, STAN. L. SCH., https://lonepineorders.law.stanford.edu [https://perma.cc/XVR4-YJGW] (last updated Jan. 6, 2020).

75 We particularly benefited from, and are grateful to, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019); Ruskin, *supra* note 12; Michele Yeary, *Lone Pine Cheat Sheet*, DRUG & DEVICE L. (Nov. 30, 2012), https://www.druganddevicelawblog.com/2012/11/lone-pine-cheat-shee.html [https://perma.cc/W45U-6CZH]. Despite the hundreds of hours we have spent crafting our dataset from publicly and nonpublicly available sources, the dataset almost certainly fails to capture all *Lone Pine* orders issued since 1986. Furthermore, the subset of orders we have captured may be unrepresentative; "visible" orders might differ from invisible orders in important—but impossible-to-discern—ways. Because of these limitations, we do not suggest that our dataset is a representative sample of all *Lone Pine* orders issued nationally; as a consequence, the generalizability of our findings remains uncertain.

76 Thus, we include orders meeting these criteria that may have arisen independently of *Lore v. Lone Pine,* such as the order discussed in Cottle v. Superior Court, 5 Cal. Rptr. 2d 882 (Ct. App. 1992), and its progeny. At the outer limits of orders included in our dataset are orders requiring a narrower showing, where one or more of the elements of exposure, causation, and injury were not contested. However, we excluded various orders that failed to compel plaintiffs to make a prima facie showing. *E.g.*, Order to Show Cause, *In re* Human Tissue Prods. Liab. Litig., No. 06-0135 (D.N.J. July 22, 2010). Nor did we include within our dataset orders requiring the submission of plaintiff fact sheets. Usually answered under oath, plaintiff fact sheets typically require each plaintiff swept into an aggregate action to submit basic information about her background, her injury, any past claims she has lodged seeking compensation, and the identity of her diagnosing physician. Engstrom, *supra* note 12, at 20. Unlike *Lone Pine* orders, then, plaintiff fact sheets do not require a prima facie showing of causation. *Id.* at 21. For more on plaintiff fact sheets, see generally MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.83 (2004); MARGARET S. WILLIAMS ET AL., FED.

was referred to as a "*Lone Pine* order" by the trial or appellate court.[77] As noted, these efforts yielded a dataset of ninety-seven orders. After compiling these orders and associated explanatory information, we hand-coded relevant data, including the following:

1. The type of suit (e.g., product liability, environmental contamination, or other);
2. The date the *Lone Pine* order was issued;
3. Whether the order required a showing of specific causation;
4. Whether the order required a plaintiff to submit an expert report or affidavit and, if so, whether the court required a report or affidavit sufficient to survive a *Daubert* challenge;
5. When in the course of the litigation the order was issued, and, in particular, whether the *Lone Pine* order was issued (i) prior to discovery, (ii) during discovery, or (iii) in the "twilight" phase of litigation, which is to say, toward the end of litigation, when a settlement had been forged and the key question was whether each individual claimant would opt into that settlement; and
6. The observed effect or effects of the order. When available from the record or correspondance with attorneys involved in the litigation, we also recorded the number of plaintiffs affected by each order.

Our review yielded five key findings concerning *Lone Pine* orders' incidence, when in the course of litigation *Lone Pine* orders are issued, the content of the orders, and the orders' observed effects.

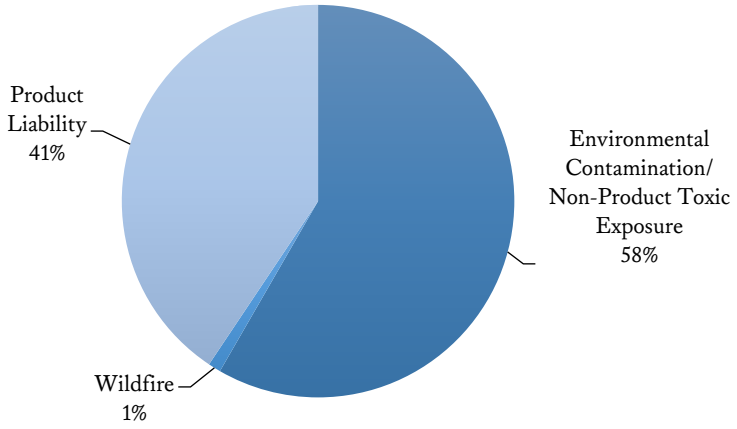
JUDICIAL CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION: PRODUCTS LIABILITY PROCEEDINGS 2008–2018 (2019), https://www.fjc.gov/sites/default/files/materials/49/PFS%20in%20MDL.pdf [https://perma.cc/8YVX-AVDT]; Engstrom, *supra* note 12, at 19-22. A final note is that we excluded from our dataset cases where the defendant's motion for a *Lone Pine* order was granted, but for one reason or another, the order never issued. *E.g.*, *In re* 1994 Exxon Chem. Plant Fire Litig., No. 94-MS-3-C-1, 2005 WL 6252291, at *1 (M.D. La. Apr. 29, 2005) (granting the defendant's motion for a *Lone Pine* order but declining to issue the order until the defendant identified those plaintiffs who would be subject to it); *cf. In re* 1994 Chem. Plant Fire, No. 94-MS-3-C-1, 2005 WL 6252290, at *1 (M.D. La. July 15, 2005) (declining to certify for interlocutory appeal the trial court's grant of defendant's motion for a *Lone Pine* order because "the order has not yet been entered").

77 In this circumstance, we included case management orders that do not clearly fit our formal definition of a *Lone Pine* order. *E.g.*, *In re* Jobe Concrete Prods., Inc., No. 08-01-00351-CV, 2001 WL 1555656, at *2-3, *5 (Tex. App. Dec. 6, 2001) (referring to the trial court's order for plaintiffs to "designate a group of 12 Plaintiffs" to be subject to a special inquiry as a "*Lone Pine* order").

A. *Case Type*

First, we found that the vast majority of *Lone Pine* orders were issued in mass tort litigation. In our dataset, 58% of *Lone Pine* orders were issued in lawsuits alleging environmental contamination or non-product toxic exposure, and 41% were issued in product liability lawsuits.

Figure 1: *Lone Pine* Orders by Case Type



B. *Frequency*

Second, it appears that, from 1986 through 2014, *Lone Pine* orders were issued with increasing frequency. Further, from 2015 through 2019, it appears possible that the orders' popularity has flagged. But as Figure 2 indicates, the data is noisy, and given the limitations of our dataset, any conclusion regarding relative incidence ought to be viewed with caution.[78]

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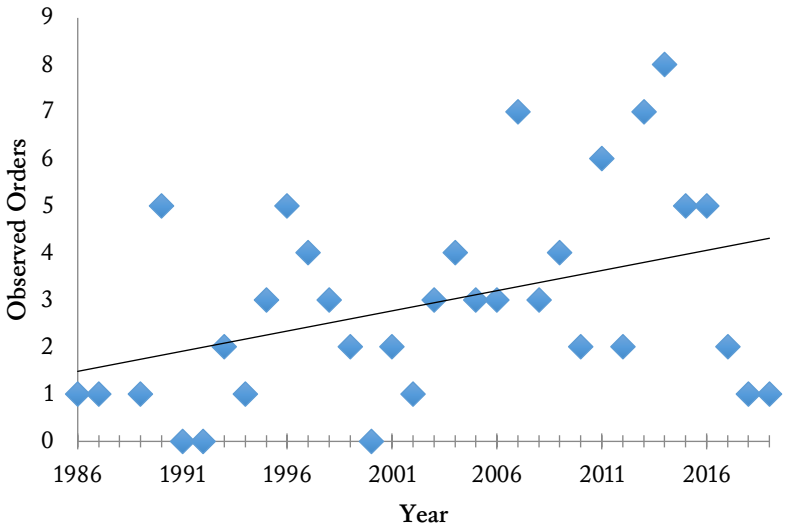
78 As of the time of writing (August 2019), we cannot be sure how many *Lone Pine* orders will issue during the latter half of 2019. Further, when looking for trends, it bears noting that recently filed *Lone Pine* orders are particularly likely to be missed by our data-collection procedures. That's so because some unpublished orders only became Westlaw "visible" due to subsequent commentary or subsequent litigation of the same case. More broadly, when assessing incidence, two additional caveats are in order. First, as noted above, because our sample is almost certainly incomplete, see *supra* note 75, any finding regarding incidence ought to be viewed with caution. It could conceivably be that *Lone Pine* orders' issuance has stayed relatively constant over the past thirty years, but that, over time, the orders have simply become more and then less "visible" to researchers. Second, in the vast majority of cases (ninety-one out of ninety-seven), we were able to identify the precise year of each order's issuance. In a small minority of cases, however, we could only place the issuance of a *Lone Pine* order within a range of dates. For those six orders, Figure 2 represents our best estimation of the year during which each *Lone Pine* order was issued.

Figure 2: Annual Entry of *Lone Pine* Orders



C. *Content of* Lone Pine *Orders*

Third, when it comes to what precisely *Lone Pine* orders say, approximately three-quarters of the orders in our dataset required at least some plaintiffs to offer expert testimony (typically, an expert affidavit or report) regarding specific causation (i.e., that product or contaminant *X* actually caused injury or ailment *Y*).[79]

Digging deeper, most *Lone Pine* orders mandated attestation of specific causation to "a reasonable degree" of scientific certainty.[80] Taking this tack, for example, in the *Fosamax* MDL, plaintiffs were required to offer a sworn expert report attesting "[w]hether the expert believes to a reasonable degree of medical certainty that Fosamax caused Plaintiff's alleged injury, and if so, the factual and medical/scientific bases for that opinion."[81]

Beyond that, some orders were satisfied by expert attestation that the defendant's product or contaminant "substantially contributed to the personal

79 Admittedly, this finding is in some ways circular, given our definitional screen described above.

80 *See, e.g.*, Order, *In re* AET Inc. Ltd., No. 10-0051, 2018 WL 4203351, at *2 (E.D. Tex. Feb. 13, 2018) (requiring the submission of "an [expert] opinion, based on a reasonable degree of medical or scientific probability, that any injury, illness, or condition suffered by the claimant was caused by the exposure to petroleum and/or petroleum-based products spilled from the Eagle Otome, or caused by the collision").

81 Order, *In re* Fosamax Prods. Liab. Litig., No. 06-1789, 2014 WL 12748902, at *2 (S.D.N.Y. July 30, 2014).

injury alleged by Plaintiff."[82] Demanding more, others sought a showing of specific causation without qualification.[83] A small minority went so far as to require the expert to rule out other possible causes of the plaintiff's injury.[84]

Interestingly, too, some *Lone Pine* orders that required an expert report further specified that the expert's testimony must be sufficiently reliable to survive a *Daubert* challenge.[85] Zeroing in, the vast majority of *Lone Pine* orders in our dataset did not address whether or not the plaintiff's expert needed to pass muster under *Daubert*. Of the twelve orders that did address this critical question, four explicitly disavowed the requirement. Judge Eldon Fallon ruled in the *Vioxx* MDL, for example: "[T]he Court is not requiring that Plaintiffs provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial."[86] Ratcheting up scrutiny, eight of the twelve orders required the plaintiffs' evidence to be sufficient to survive a *Daubert* challenge.[87]

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82 *E.g.*, Order Regarding Preservation of Records and Prima Facie Evidence of Usage, Injury and Causation Requirements for Pending Cases Not Participating in the Nuvaring Resolution Program and Newly Filed or Transferred Cases at 4, *In re* Nuvaring Prods. Liab. Litig., No. 08-1964 (E.D. Mo. Feb. 7, 2014).

83 *E.g.*, Pretrial Order No. 8 at 3, *In re* Tex. State Vioxx Litig., No. 2005-59499 (Harris Cty. Dist. Ct. Nov. 9, 2007) (requiring expert attestation "that the Plaintiff suffered an injury and . . . that Vioxx caused the injury").

84 Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 351 (Ohio App. Ct. 2007) (discussing the trial court's prediscovery order, which compelled plaintiffs to "provide sworn statements from experts that to a reasonable degree of medical probability, the [plaintiffs'] illnesses, injuries, and conditions could not have been caused but for that exposure"); Ruskin, *supra* note 12, at 609 (reporting a *Lone Pine* order as requiring an "affidavit of a physician or other expert, which shall include . . . [a] differential diagnosis which establishes that the physician or expert has formed an opinion that, more probably than not, the plaintiffs' illness did not have some etiology" other than exposure to defendant's contaminant (quoting Order, Wilson v. Pub. Serv. Co. of Okla., No. CJ-1996-564 (Tulsa Cty. Dist. Ct. 1997))).

85 In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court established that district court judges ought to be "gatekeep[ers]" to ensure that expert testimony is both relevant and reliable. 509 U.S. 579, 597 (1993). Essentially codifying *Daubert* and its progeny, Federal Rule of Evidence 702 now establishes that expert testimony is admissible if and only if

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

86 *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 744 (E.D. La. 2008), *aff'd*, 388 F. App'x. 391 (5th Cir. 2010); *see also, e.g.*, Abner v. Hercules, Inc., No. 14-0063, 2017 WL 4236584, at *9 (S.D. Miss. Sept. 25, 2017) ("The Court did not require Plaintiffs to provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial." (internal quotation marks omitted)).

87 *E.g.*, Avila v. Willits Envtl. Remediation Tr., 633 F.3d 828, 833-34, 836-40 (9th Cir. 2011) (affirming a dismissal, where the district court dismissed plaintiffs' claims because their *Lone Pine*

D. *Timing: Prior to Discovery, During Discovery, or During the Twilight Phase of Litigation*

Fourth, we examined *when* in the course of litigation *Lone Pine* orders are issued. We found great variation along this dimension.

We were able to pinpoint when in the litigation's lifecycle eighty of the ninety-seven *Lone Pine* orders in our dataset were entered. (For the remaining seventeen orders, timing was unclear.) Of those eighty orders, thirty (37.5%) were issued prior to discovery, thirty (37.5%) were issued during discovery, and twenty (25%) were issued during the twilight stage of litigation. Generally, these twilight orders were issued in the MDL context, after the lead plaintiffs' attorneys had hammered out a tentative settlement agreement and were, often in concert with the defendant, trying to corral the remaining plaintiffs to opt in.[88]

In some ways, the relative frequency of both prediscovery *Lone Pine* orders and twilight orders is, and ought to be, unsurprising. As to the former, as noted above, numerous courts and commentators *define Lone Pine* orders as "prediscovery" orders.[89] The orders' frequent issuance prior to discovery, then, is hardly revelatory. As to the latter, other courts and commentators have, similarly, come to conceive of—and describe—*Lone Pine orders* as "mop up procedure[s]"[90] or orders sought "after the settlement is consummated."[91] Yet, we find *Lone Pine* orders' incidence on both sides of the litigation continuum noteworthy as, in our view, both prediscovery and twilight orders raise significant—and, heretofore underappreciated—normative concerns.

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submissions were "wanting under Federal Rule of Evidence 702 and *Daubert*"); Order on PSO's Motion for Scheduling Order at 5, *Wilson*, No. CJ-1996-564 (Tulsa Cty. Dist. Ct. Apr. 8, 1997) ("[T]he court finds the *Daubert* test to be the appropriate test which will govern scientific evidence proffered in this matter.").

88 *See* Order, *supra* note 81, at *1 (reporting that *Lone Pine* orders "are frequently granted after the parties have agreed to a mass settlement program"); BURCH, *supra* note 75, at 33 (explaining that, in the *Yasmin/Yaz* MDL, the *Lone Pine* order was used to "fortif[y] attorneys' efforts to herd plaintiffs" into the global settlement); Burch, *supra* note 15, at 99-100 (explaining that, in the *Vioxx* MDL, Merck's motion for a twilight *Lone Pine* order was "unopposed" and likely helped lead to the settlement's high participation rate); Brian Amaral, *Judge Wants More Info From Fresenius Dialysis Patients*, LAW360 (Dec. 14, 2016, 6:19 PM), https://www.law360.com/articles/872889/judge-wants-more-info-from-fresenius-dialysis-patients [https://perma.cc/8PNC-SV6H] (quoting defense counsel as stating that Judge Woodlock issued a *Lone Pine* order at the tail end of the *Fresenius* litigation, in part, in order to "encourage some plaintiffs to settle").

89 *See supra* note 14 and accompanying text.

90 *E.g.*, Order, *supra* note 81, at *1 (recounting the *Fosamax* Plaintiffs' Steering Committee's argument that "*Lone Pine* is appropriately used as a 'post-settlement mop-up procedure utilized to address those cases which either were not eligible for compensation through the MDL settlement program or which had opted out of participation in the MDL settlement program'").

91 *E.g.*, Rave, *supra* note 15, at 2186 (defining *Lone Pine* orders as orders sought "after the settlement is consummated").

1. Prediscovery Orders

As noted above, prediscovery *Lone Pine* orders—which, again, comprised 37.5% of the orders in our sample—arguably permit the trial court to make an end-run around Federal Rule of Civil Procedure 56 (or state-court counterparts), while depriving plaintiffs of certain procedural protections that Rule 56 (or state-court counterparts) would otherwise afford. The problem arises because the rules are clear that summary judgment is not appropriate unless and until the party opposing the motion for summary judgment is afforded an adequate opportunity to conduct discovery.[92] Prediscovery *Lone Pine* orders function an awful lot like orders issued pursuant to Rule 56. But plaintiffs' prejudgment discovery rights, jealously guarded by Rule 56, are, in the *Lone Pine* context, infringed or nullified.

Add to that, a court's decision to grant summary judgment for a defendant pursuant to Rule 56 is reviewed de novo.[93] But a court's decision to terminate a case for noncompliance with a *Lone Pine* order is often reviewed pursuant to the far more lenient abuse of discretion standard.[94] That means that, by opting to extinguish a case via *Lone Pine* rather than Rule 56, a trial court can go a long way toward insulating its termination decision from meaningful appellate review.

Beyond the potential for procedural funny business, we fear that the significant expense of complying with *Lone Pine* orders and the difficulty of acquiring evidence of specific causation without access to discovery mean that the orders are apt to precipitate the premature and unwarranted dismissal of at least some meritorious claims.

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92 *See, e.g.*, Moore v. Shelby Cty., Ky., 718 F. App'x 315, 320 (6th Cir. 2017) (finding that "the district court abused its discretion by granting summary judgment for Defendants before permitting the parties any discovery" because "[c]ommon sense dictates that before a district court tests a party's evidence, the party should have the opportunity to develop and discover the evidence"); Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) ("[S]ummary judgment should only be granted if *after discovery*, the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." (alterations in original) (internal quotation marks omitted)).

93 *See, e.g.*, Brooks v. Roy, 776 F.3d 957, 959 (8th Cir. 2015) (stating that a grant of summary judgment is reviewed de novo).

94 *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 388 F. App'x 391, 397 (5th Cir. 2010) ("A district court's adoption of a *Lone Pine* order and decision to dismiss a case for failing to comply with a *Lone Pine* order are reviewed for abuse of discretion."); Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000) (reviewing for abuse of discretion); Atwood v. Warner Elec. Brake & Clutch Co., 605 N.E.2d 1032, 1037 (Ill. App. Ct. 1992) (same); Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 348 (Ohio App. Ct. 2007) (same).

2. Twilight Orders

Twilight orders—issued during the sunset of litigation, which comprise nearly a quarter of our sample—raise a different but equally troubling set of normative and ethical concerns. Twilight orders are often issued by transferee courts in MDL proceedings once a comprehensive settlement has been forged and individual plaintiffs are assessing whether or not to opt in to that settlement. As such, they affect those plaintiffs who are weighing whether to, on the one hand, accede to the negotiated deal, or, on the other, reject it, in favor of further litigation back in the transferor court. The problem is that, given the demands they impose and the circumstances surrounding their imposition, *Lone Pine* orders can put a heavy—and, in some instances, too heavy—thumb on the scale in favor of the former, unduly deterring plaintiffs from insisting on their day in court.[95]

The concern arises due to the combined influence of three stubborn facts. The first fact is that, as noted above, compliance with *Lone Pine* orders is expensive. Approximately three-quarters of the orders in our dataset required each plaintiff to hire an expert to attest to specific causation (among other things). Orders also frequently demanded that the plaintiff satisfy additional burdensome requirements, such as gathering years of pharmacy receipts and medical records.[96] Fact two is that, in many cases, plaintiffs must satisfy these onerous requirements on a short fuse: case-specific expert reports can be due in as few as thirty days.[97] The third and final fact is that twilight orders are sometimes issued alongside global settlement agreements that contain (1) attorney-recommendation provisions, wherein, as part of the settlement, plaintiffs' lawyers promise to "recommend that their clients enter the settlement program," (2) attorney withdrawal provisions, wherein, as part of

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95 The "thumb" may, in fact, become coercive, in arguable contravention of the Model Code of Judicial Conduct, which advises: "A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement." MODEL CODE OF JUDICIAL CONDUCT R. 2.6(B) (AM. BAR ASS'N 2011); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2013) ("A lawyer shall abide by a client's decision whether to settle a matter."). For further discussion of how twilight *Lone Pine* orders can coax plaintiffs to relinquish their claims, see Burch, *supra* note 15, at 68-78; Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 155 (2012); Rave, *supra* note 15, at 2185.

96 BURCH, *supra* note 75, at 33.

97 *See, e.g.*, Pretrial Order No. 236 at 3, *In re* Avandia Mktg., Sales Practices Prods. Liab. Litig., No. 07-1871 (E.D. Pa. Apr. 16, 2015) (imposing a thirty to sixty-day deadline depending on plaintiff's status plus a fourteen-day cure period); Case Management Order No. 78, at 5-6 *In re* Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig., No. 12-2385, (S.D. Ill. May 29, 2014) (imposing a thirty-day deadline with a twenty-day cure period); Pretrial Order No. 4F at 3, *In re* Chantix (Varenicline) Prods. Liab. Litig., No. 09-2039 (N.D. Ala. Mar. 12, 2013) (imposing a thirty-day deadline with no cure period); N.Y. Rezulin Pretrial Order, *supra* note 5, at 3 (imposing a sixty-day deadline with no cure period).

the settlement, plaintiffs' lawyers pledge to withdraw from representing nonsettling plaintiffs, and also (3) nonsolicitation provisions, wherein, as part of the settlement, the lawyer agrees not to recruit or accept any new client.[98]

Putting those three facts together means that some plaintiffs who wish to refuse a settlement offer will face a *Lone Pine* order that demands detailed and expensive proof, at the very moment they've lost their old lawyer and cannot find new qualified counsel. In such a situation, a claimant who prefers not to release her claims is put in an awkward and arguably impossible position: she may reluctantly acquiesce to the settlement or, alternatively, reject it, which means she has limited time to scramble to try to comply with a *Lone Pine* order with no lawyer to assist her in locating a qualified scientific expert or compiling requisite proof.[99]

E. *Observed Effects*

Last but not least, we examined the effect or effects that each *Lone Pine* order appeared to have upon the litigation. This investigation proved challenging. The difficulty arose because, although the effects of *Lone Pine* orders were crystal clear in some cases (*e.g.*, *Lone Pine* order *X* triggered the entire case's termination or *Lone Pine* order *Y* had no discernable effect), in many other cases, an order could have a range of effects, impacting different plaintiffs differently. For example, in a given case, Plaintiff *A* might be able to muster enough proof to comply with the *Lone Pine* order rendering the order's entry little more than a pricey speedbump, while Plaintiff *B*'s submission might fall short, triggering *B*'s dismissal.

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98 These "closure mechanisms," made famous in the *Vioxx* litigation, are ethically dubious but according to Elizabeth Chamblee Burch, quite common. BURCH, *supra* note 75, at 44-45; Burch, *supra* note 12, at 73-74 (describing the use of "clauses that require plaintiffs' attorneys to recommend that all of their clients settle and to withdraw from representing clients who refuse" and further noting that "these mandatory recommendation and withdrawal provisions tend to appear alongside simultaneous agreements for attorneys not to solicit or accept new clients"); Burch, *supra* note 15, at 99-101 (describing the recommendation and attorney-withdrawal mechanisms in the *Fosamax*, *Vioxx*, *Propulsid*, and *Pelvic Mesh* settlement agreements).

99 *See* BURCH, *supra* note 75, at 118 (explaining that, after the settlement is inked, "both sides use *Lone Pine* orders to send a pointed message to nonsettling plaintiffs: accept the deal or prepare for what may be a short-fused evidentiary burden"); *see also* Burch, *supra* note 12, at 74 (describing how plaintiffs may be forced to proceed pro se if they opt out of a settlement agreement which contains a mandatory withdrawal clause); Grabill, *supra* note 89, at 154-55 (noting that the additional burdens on nonsettling plaintiffs "deter additional litigation and maximize the degree of closure that defendants obtain through settlement"). For a fuller discussion of these normative and ethical considerations, see generally Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) (defining certain mass tort settlements as "lawyer-empower[ing]," as opposed to litigant-empowering, using *Vioxx* as a case study); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1076 (1984) (discussing the asymmetric balance of power in settlement situations).

Further, the orders may also have *invisible* or *contested* effects. Thus, we strongly suspect that twilight *Lone Pine* orders have caused some plaintiffs to accede to settlements that they (1) would have preferred to refuse and (2) actually would have refused, in the orders' absence. But proving that Plaintiff *C*'s decision to settle was driven by the twilight order, Plaintiff *D*'s decision was gently influenced by the twilight order, while Plaintiff *E*'s decision was made independently of that twilight order is not possible, at least with the data we have.

With those caveats, however, we can make a few tentative claims regarding *Lone Pine* orders' observed effects. We were able to observe whether the *Lone Pine* order had an effect in eighty of the orders in our dataset. Of these eighty ("effect-coded") orders, forty-five orders (56%) precipitated the dismissal of at least some claims, and twenty orders (25%) precipitated summary judgment for at least some defendants on at least some claims. Once we eliminated double-counting, we observed that 74% of the eighty effect-coded orders (or 61% of all orders in our dataset) resulted in the dismissal of some plaintiffs' claims or the grant for defendants of at least partial summary judgment.[100] In only 19% of the eighty effect-coded orders (or, 16% of all cases in our dataset) does it appear that the court found that plaintiffs had substantially complied with the order.

Then, when we examined the "when" question, addressed above in Section E, alongside the effect question, we found that the likelihood that a *Lone Pine* order would result in the dismissal of some plaintiffs' claims varied with the stage in litigation when the *Lone Pine* order was issued. As noted above, the most common observed consequence of a *Lone Pine* order's entry was the dismissal of at least some plaintiffs' claims. However, the observed dismissal rate of the eighty effect-coded orders was higher when a *Lone Pine* order was issued during the prediscovery (57%) and twilight (77%) phases than when the order was entered in the midst of discovery (43%).[101] Meanwhile, the observed rate of settlement was significantly higher when a *Lone Pine* order was issued in the twilight phase of litigation (35%). Settlements were, it appears, less frequent when the order was issued before or during discovery (which yielded observed settlement rates of 7% and 4%, respectively).

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100 This figure counts an order resulting in both dismissal and summary judgment *once*, meaning it avoids the double-counting that would arise were one to add the observed dismissal rate with the observed summary judgment rate. All our calculations of dismissals exclude one case that was dismissed for lack of personal jurisdiction for reasons unrelated to the *Lone Pine* order's entry.

101 We calculated these figures by, first, identifying each order for which we observed some effect and categorizing these "effect-coded" orders by the stage of litigation during which they issued. Then, we divided the number of orders in each "stage-category" that precipitated the dismissal of some claims by the total number of effect-coded orders in the same stage-category. We were able to determine the effect of twenty-eight of the thirty prediscovery and discovery orders and seventeen of the twenty orders issued during the twilight phase.

CONCLUSION

Since their inception, *Lone Pine* orders have become, by some accounts, "routine."[102] Yet we have found that case management orders imposed under the auspices of *Lore v. Lone Pine* admit of considerable variation in their terms and conditions of their issuance. *Lone Pine* orders are also very powerful: 74% of the effect-coded orders (or 61% of all orders in our study) were followed by a grant of at least partial summary judgment for defendants or by the dismissal of at least some of the plaintiffs' claims. Given the power they hold, and the few rules that constrain (or even govern) their use, we recommend that courts proceed cautiously and consider carefully the equity of imposing *Lone Pine* orders, especially in the prediscovery and twilight phases of litigation.[103]

Preferred Citation: Nora Freeman Engstrom & Amos Espeland, Lone Pine *Orders: A Critical Examination and Empirical Analysis*, 168 U. PA. L. REV. ONLINE 91 (2020), http://www.pennlawreview.com/online/168-U-Pa-L-Rev-Online-91.pdf

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102 *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 687 Fed. App'x. 210, 214 (3d Cir. 2017) (deeming the filing of a *Lone Pine* order "routine").

103 For further concrete guidance regarding *Lone Pine* orders' future use, see Engstrom, *supra* note 12, at 52-60.

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION This Document Relates to All Cases on Exhibit A	Case No. 3:19md2885 Judge M. Casey Rodgers Magistrate Judge Gary R. Jones

ORDER

On March 23, 2022, the Court directed any plaintiff in the litigation who is a veteran to submit a Form DD214 or DoD Military Service Information Report (colloquially referred to as the "Blue Button") by certain deadlines. *See* Case Management Order No. 40, ECF No. 2911. The Order warned that a plaintiff's failure to timely submit the requisite form or report would result in dismissal of the plaintiff's case without prejudice. *See id*. at 3. The plaintiffs identified on Exhibit A were required to submit the requisite form or report by April 22, 2022, and failed to do so.[1]

Rules 16(f) and 37(b)(2)(A) of the Federal Rules of Civil Procedure authorize a court to sanction a party, up to and including dismissal of a case, for failing to

[1] The deadlines set forth in CMO 40 are staggered based on the number of plaintiffs represented by a particular law firm. Beginning March 23, 2022, each law firm was (and is) required to submit at least 3,000 DD214s every 30 days. *See* CMO 40, ECF No. 2911 at 3. Consequently, the deadline for law firms with 3,000 or fewer plaintiffs was April 22, 2022. Exhibit A identifies the plaintiffs from that group who failed to meet that deadline.

comply with pretrial orders. This authority has particular significance in the MDL context. An MDL judge bears the "enormous" task of "mov[ing] thousands of cases toward resolution on the merits while at the same time respecting their individuality." *In re Phenylpropanolamine (PPA) Prod. Liab. Litig*., 460 F.3d 1217, 1231 (9th Cir. 2006). To carry out this task in an organized and efficient manner, an MDL court must define and strictly adhere to case management rules. *See id.* at 1232 ("[T]he district judge must establish schedules with firm cutoff dates if the coordinated cases are to move in a diligent fashion toward resolution by motion, settlement, or trial."); *see also* Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"). Pretrial orders—and the parties' compliance with those orders and their deadlines— "are the engine that drives disposition on the merits." *Id*. at 1232. "A [court's] willingness to resort to sanctions in the event of noncompliance can ensure that that the engine remains in tune, resulting in better administration of the vehicle of multidistrict litigation." *In re Cook Medical, Inc. Pelvic Repair Sys. Prof. Liab. Litig*., 2018 WL 4698953, at *2 (S.D. W. Va. Sept. 28, 2018) (citing *Freeman v. Wyeth*, 764 F.3d 806, 810 (8th Cir. 2014) ("The MDL judge must be given 'greater discretion' to create and enforce deadlines in order to administrate the litigation effectively. This necessarily includes the power to dismiss cases where litigants do not follow the court's orders.")).

Applying these rules, the Court concludes that dismissal without prejudice is appropriate in the cases identified on Exhibit A. This MDL has been pending for over three years. All veterans who allegedly wore the CAEv2 during their military service, and their counsel, have been on notice—for nearly as long—that a DD214 would be a fundamental requirement for pursuing a claim in this litigation. *See* Pretrial Order No. 18, ECF No. 775 & 775-2.[2] This is because the DD214 constitutes official proof of a veteran's military service and provides essential details about the veteran's service record, information which is critical to the claims and defenses involved in virtually every veteran's claim.[3] The Court reemphasized the importance of a DD214 at the February 16, 2022 Case Management Conference, and, at that time, advised the parties that an order requiring its production by all veterans would be forthcoming. *See also* Case Management Order No. 35, ECF No. 2789 at 4. That Order (again, CMO 40) was entered on March 23, 2022, and identified two different ways for a plaintiff veteran to establish his or her military service—either (1) by producing a DD214; or (2) by producing a DoD Military Service Information Report which is readily and easily accessible to every veteran (and/or a legal representative with the veteran's credentials) on the VA's health

[2] Indeed, the DD214 is the very first item on the list of required initial census documents. *See* PTO 18, Exhibit B, ECF No. 775-2.

[3] For example, the DD214 includes information regarding dates of service, military occupational specialties held, awards, education, and separation information (i.e., date and type of separation, character of service, and the authority and reason for separation).

management portal, MyHealtheVet.[4] Given the advanced stage of this litigation and the importance of veterans' military service information to the various claims and defenses in this litigation, it was—and is—entirely reasonable to require veterans to show basic proof of military service.

Accordingly:

1. The plaintiffs' cases identified on Exhibit A are hereby **DISMISSED WITHOUT PREJUDICE** for failure to comply with a court order.[5]

2. The Clerk is directed to enter a copy of this Order on the main MDL docket and on the individual dockets, and close the cases in their entirety for all purposes.

SO ORDERED, on this 6th day of May, 2022.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

[4] CMO 40 even included a link to the VA's public website for the "Blue Button," as well as a sample Blue Button form.

[5] To the extent a Request for Dismissal from Administrative Docket (RFD) was filed in a particular case *before* CMO 40 was entered, the case will be dismissed pursuant to the RFD, and not pursuant to CMO 40.

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION	**Case No.: 2:18-md-2846** **JUDGE EDMUND A. SARGUS, JR.** **Magistrate Judge Kimberly A. Jolson**

This document relates to:
ALL CASES

[PROPOSED] CASE MANAGEMENT ORDER NO. ___

In accordance with Federal Rule of Civil Procedure 16, this Court hereby enters the following Case Management Order ("CMO") in order to "identify and cull potentially meritless claims and streamline [this] litigation." *Baker v. Chevron USA, Inc.*, Case No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007).

I. Scope of this Order

Absent a superseding Order, this Order applies to all current and future Plaintiffs and their counsel in: (a) all actions transferred to MDL 2846 by the Judicial Panel on Multidistrict Litigation pursuant to its Order of August 2, 2018, including those cases subsequently transferred as tag-along actions; and (b) all related actions originally filed in or removed to this Court. The obligation to comply with this CMO and to provide Counsel Certifications and Medical Declarations shall fall solely to the individual counsel representing a Plaintiff.

II. Plaintiffs' Production

In accordance with the schedule set forth in section IV below, all Plaintiffs shall serve on Defendants the following items:

1. Medical record(s) or other documentation establishing that the Plaintiff was

implanted with a one of the 24 Bard hernia mesh devices at issue in this MDL;

2. A 28 U.S.C. § 1746 declaration from a qualified physician or other medical expert ("the expert") that includes the following:

a. The name, professional address, and curriculum vitae of the expert;

b. A list of the Plaintiff's medical records reviewed by the expert prior to the preparation of the declaration;

c. The name of the Bard hernia mesh device(s) implanted in Plaintiff and the date(s) of implantation;

d. The date(s) the above-referenced Bard hernia mesh device(s) was explanted from Plaintiff (if applicable);

e. Whether the expert believes to a reasonable degree of medical certainty that the above-referenced Bard hernia mesh device(s) caused Plaintiff to suffer a symptomatic physical injury, and if so, the precise nature of that injury and the factual and medical/scientific basis for the expert's opinion; and

f. The date, at least by month and year, when the expert believes to a reasonable degree of medical certainty that Plaintiff first developed the symptomatic physical injury/injuries caused by the above-referenced Bard hernia mesh device(s).

III. Certification of Plaintiffs' Counsel

In accordance with the schedule set forth in section IV below, all Plaintiffs' counsel shall serve on Defendants a certification of counsel, after an inquiry that is reasonable under the circumstances, that counsel believes in good faith that: (1) Plaintiff is pursuing a claim in this MDL alleging compensable injury caused by a Bard hernia mesh device that is within the scope of this MDL; (2) Plaintiff has not filed another lawsuit asserting claims relating to the devices and/or

injuries that are the subject of the Plaintiff's claims in this MDL; and (3) Plaintiff's claims in this MDL are not barred by the applicable statute of limitations and/or statute of repose.

IV. Staggered Schedule for Compliance

The deadlines for compliance with the requirements set forth in Sections II and III above shall be staggered according to the dates upon which each case was first filed in this Court or transferred to this Court, as follows:

1. Plaintiffs whose cases were filed in this Court or transferred to this Court into this MDL on or before December 31, 2019: 150 days from entry of this Order.

2. Plaintiffs whose cases were filed in this Court or transferred to this Court into this MDL between January 1, 2020, and December 31, 2020: 120 days from entry of this Order.

3. Plaintiffs whose cases were filed in this Court or transferred to this Court into this MDL between January 1, 2021, and the date of entry of this Order: 90 days from entry of this Order.

4. Plaintiffs whose cases were filed in this Court or transferred to this Court into this MDL after the date of entry of this order: 60 days from the filing of the complaint in this Court or from the date upon which this case was transferred to this Court, whichever is earlier.

V. Enforcement

1. In the event one or more Plaintiffs fail to comply with these one or more provisions by the prescribed deadline, Defendants may file a motion to show cause identifying the non-compliant Plaintiffs and briefly describing the nature of the non-compliance; a single motion may address non-compliance by more than one Plaintiff, subject to general filing and service requirements.

2. Within 14 days of the filing such a motion to show cause, Plaintiff(s) subject to the

motion shall file a response demonstrating timely and complete compliance, including the records, declaration(s), and certification(s) required by sections II and III.

3. Upon written request within three days of the filing of any response, Defendants will be permitted to file a reply within seven days of the filing of the response.

4. In the event that a Plaintiff does not file any response to a motion to show cause within the prescribed deadline, the case will be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b), subject to a timely motion under Fed. R. Civ. P. 60.

5. In the event that a timely response to a motion to show cause does not, in the Court's judgment, demonstrate timely and complete compliance with the requirements of this Order, the case will be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b), subject to a timely motion under Fed. R. Civ. P. 60.

IT IS SO ORDERED.

_____ _____

DATE **EDMUND A. SARGUS, JR.**
UNITED STATES DISTRICT JUDGE

_____ _____

DATE **KIMBERLY A. JOLSON**
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ETHICON PHYSIOMESH FLEXIBLE COMPOSITE HERNIA MESH PRODUCTS LIABILITY LITIGATION	:	**MDL DOCKET NO. 2782** **ALL CASES** **CIVIL ACTION NO. 1:17-MD-02782-RWS**

PRACTICE AND PROCEDURE ORDER No. 26
Requirements for Record Preservation and *Prima Facie* Evidence of Implant, Injury and Causation

This Order applies to all Plaintiffs with personal injury claims filed in, removed to, or transferred to this MDL on or after the date of entry of this Order. This Order requires all such Plaintiffs to comply with certain preservation obligations and to produce certain specified information regarding their claim. Plaintiffs who represent themselves *pro se* in this proceeding shall be bound by the requirements of this Order and shall fully comply with all obligations required of counsel by this Order, unless otherwise stated.

I. PRESERVATION NOTICE REQUIREMENT

A. For all cases filed on or after the date of entry of this Order, after the case is docketed in this Court (either through direct filing or JPML transfer), counsel for Defendants shall serve upon counsel for Plaintiff (or if a Plaintiff is proceeding *pro se*, the Plaintiff) a copy of this Order. Within fourteen (14) days of receipt of notice of this Order from counsel for Defendants, counsel for Plaintiff (or if a Plaintiff is proceeding *pro se*, the Plaintiff) shall send a Notice to the following individuals or entities, advising that the individual or entity may have records relevant to the Plaintiff's Claim in

this MDL proceeding and that any records relating to the Plaintiff must be preserved pending collection by Plaintiff:

1. All pharmacies that dispensed any medication to the Plaintiff related to any and all claims and/or alleged injuries for the period from five (5) years prior to the date of the alleged injury claimed to the present; and

2. All physicians, medical facilities, other healthcare providers and/or other persons who implanted or explanted Physiomesh in or from Plaintiff or otherwise treated the Plaintiff related to any and all claims in the case, including abdominal surgeries and/or hernia-related pain or injuries.

B. Counsel for Plaintiff (or if a Plaintiff is proceeding *pro se*, the Plaintiff) shall serve a signed certification verifying that Notices were sent and attach copies of the Notices with the certification. This will be done within thirty (30) days of receipt of notice of this Order from counsel for the Defendants.

1. Plaintiffs shall serve the certification required by this Paragraph by one of the following methods:

   a. By email to PhysiomeshPreservation@ButlerSnow.com; or

   b. By United States Mail or other carrier, post-marked on or before the deadlines set forth in this Paragraph (with return receipt) to the following: Catherine Mason, Butler Snow, LLP, P.O. Box 6010, Ridgeland, MS, 39158-6010.

II. DISCOVERY REQUIREMENTS

A. All Plaintiffs subject to this Order shall produce the following documents and/or information:

1. A Plaintiff Fact Sheet ("PFS") and authorizations in the forms previously approved by the Court that comply with the requirements of Practice and Procedure Order No. 10;

2. All medical records relating to the Plaintiff from all healthcare providers who received notice pursuant to paragraphs I.A.1. and I.A.2. above, and which must further include product identification, implant and explant records, and any records relating to Physiomesh, the claims and/or alleged injuries; and

3. An affidavit signed by the Plaintiff or his/her counsel (i) attesting that, to the best of his/her knowledge, all medical records described in subparagraph II.A.2. have been collected; and (ii) attesting that all records collected have been produced pursuant to this Order.

B. If any of the documents or records described in Section II.A.2 above do not exist, the signed affidavit by Plaintiff or Plaintiff's counsel shall state that fact and the reasons, if known, why such materials do not exist, and shall make every effort to provide a "No Records Statement" from the healthcare provider, where available.

C. Plaintiffs shall produce the items required in Sections II.A. and II.B. above within sixty (60) days of receipt of notice of this Order from counsel for Defendants.

D. All Plaintiffs shall also produce expert reports in compliance with Federal Rule of Civil Procedure 26 as follows:

1. A Rule 26(a)(2) case-specific expert report concerning the specific causation of the Plaintiff's alleged injury. The case-specific expert report should include, at a minimum, a precise identification of the Plaintiff's implant with Physiomesh, the reasons for the implant, and the nature of the Plaintiff's alleged injury, along with

the details of any medical exams, testing, diagnosis or treatment relied upon to support any claimed injury; a statement that the expert believes to the appropriate degree of medical certainty that Physiomesh caused Plaintiff's alleged injury, along with a description of all facts, medical and scientific literature or other authorities relied upon by the expert to support such opinion; and the medical records relied upon in forming the expert's opinion. Nothing in this Order shall preclude, upon leave of Court or in accordance with other applicable law or Order, amendment of case-specific expert reports prior to trial.

2. Plaintiffs shall produce expert reports required in Section II.D.1 above within ninety (90) days of receipt of notice of this Order from counsel for the Defendants.

E. Plaintiffs shall serve the items required in Section II in accordance with the service procedures set forth in Practice and Procedure Order No. 10.

F. Any Plaintiff may seek relief from the obligations of this Order by motion to the Court. Absent relief being granted by the Court, any Plaintiff who fails to comply with the requirements of Section II shall be given notice of such failure by email or fax from Defendants' counsel and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period") to be calculated from the receipt of such notice of deficiency from counsel for the Defendants. If Plaintiff fails to cure the deficiency within the Cure Period, Defendants may file any appropriate dispositive motions. Plaintiff shall thereupon have fourteen (14) days to respond to the Motion and show why the requested relief should not be granted.

G. To the extent that this Order conflicts with any deadlines or provisions of PPO 10, this Order shall govern.

H. Within forty-five (45) days of the service of the expert report required in Sections II.D.1 and II.D.2 of this Order, Plaintiff's counsel shall present Plaintiff for deposition at a time and

place reasonably agreed by the parties.

SO ORDERED this 13th day of May, 2021.

RICHARD W. STORY
United States District Judge

EXHIBIT 5

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC COUNTY
MASTER CASE NO. ATL-L-2122-18

IN RE PHYSIOMESH LITIGATION
(Flexible Composite Mesh)

CASE NO. 627
Civil Action

CASE MANAGEMENT ORDER NO. 20 [REQUIREMENTS FOR RECORD PRESERVATION AND *PRIMA FACIE* EVIDENCE OF IMPLANT, INJURY AND CAUSATION]

This matter having been opened to The Court by the Defendants; and good cause appearing,

IT IS on this 13th day of May, 2021,

This Order applies to all Plaintiffs with personal injury claims filed in, removed to, or transferred to this MCL on or after the date of entry of this Case Management Order. This Case Management Order requires all such Plaintiffs to comply with certain preservation obligations and to produce certain specified information regarding their claim. Plaintiffs who represent themselves *pro se* in this proceeding shall be bound by the requirements of this Case Management Order and shall fully comply with all obligations required of counsel by this Order, unlessotherwise stated.

I. PRESERVATION NOTICE REQUIREMENT

A. For all cases filed on or after the date of entry of this Case Management Order, after the case is docketed in this Court (either through direct filing in the New Jersey In re Physiomesh Litigation MCL ("Physiomesh MCL") or transferred to the Physiomesh MCL), counsel for Defendants shall serve upon counsel for Plaintiff (or if a Plaintiff is proceeding *pro*

se, the Plaintiff) a copy of this Case Management Order. Within fourteen (14) days of receipt of notice of this Case Management Order from counsel for Defendants, counsel for Plaintiff (or if a Plaintiff is proceeding *pro se*, the Plaintiff) shall send a Notice to the following individuals or entities, advising that the individual or entity may have records relevant to the Plaintiff's Claim in this Physiomesh MCL proceeding and that any records relating to the Plaintiff must be preserved pending collection by Plaintiff:

1. All pharmacies that dispensed any medication to the Plaintiff related to any and all claims and/or alleged injuries for the period from five (5) years prior to the date of the alleged injury claimed to the present; and
2. All physicians, medical facilities, other healthcare providers and/or other persons who implanted or explanted Physiomesh in or from Plaintiff or otherwise treated the Plaintiff related to any and all claims in the case, including abdominal surgeries and/or hernia-related pain or injuries.

B. Counsel for Plaintiff (or if a Plaintiff is proceeding *pro se*, the Plaintiff) shall serve a signed certification verifying that Notices were sent and attach copies of the Notices with the certification. This will be done within thirty (30) days of receipt of notice of this Case Management Order from counsel for the Defendants.

1. Plaintiffs shall serve the certification required by this Paragraph by one of the following methods:
    a. By email to PhysiomeshPreservation@ButlerSnow.com; or
    b. By United States Mail or other carrier, post-marked on or before the deadlines set forth in this Paragraph (with return receipt) to the following: Catherine Mason, Butler Snow, LLP, P.O. Box 6010, Ridgeland, MS, 39158-6010.

II. DISCOVERY REQUIREMENTS

A. All Plaintiffs subject to this Case Management Order shall produce the following documents and/or information:

1. A Plaintiff Fact Sheet ("PFS") and authorizations in the forms previously approved by the Court that complieswith the requirements of Case Management Order No. 11 [Plaintiff Fact Sheet and Defendant Fact Sheet] entered and filed on October 4, 2019;

2. All medical records relating to the Plaintiff from all healthcare providers who received notice pursuant to paragraphs I.A.1 and I.A.2. above, and which must further include product identification, implant and explant records, and any records relating to Physiomesh, the claims and/or alleged injuries; and

3. An affidavit signed by the Plaintiff or his/her counsel (i) attesting that to the best of his/her knowledge, all medical records described in subparagraph II.A.2. have been collected; and (ii) attesting that all records collected have been produced pursuant to this Case Management Order.

B. If any of the documents or records described in Section II.A.2 above do not exist, the signed affidavit by Plaintiff or Plaintiff's counsel shall state that fact and the reasons, if known, why such materials do not exist, and shall make every effort to provide a "No Records Statement" from the healthcare provider, where available.

C. Plaintiffs shall produce the items required in Sections II.A. and II.B. above within sixty (60) days of receipt of notice of this Case Management Order from counsel for Defendants.

D. All Plaintiffs shall also produce expert reports in compliance with New Jersey Court Rules as follows:

1. A New Jersey Court Rule 4:17-4(e) case-specific expert report concerning the specific causation of the Plaintiff's alleged injury. The case-specific expert report should include, ata minimum, a precise identification of the Plaintiff's implant with Physiomesh, the reasons for the implant, and the nature of the Plaintiff's alleged injury, along with the details of any medical exams, testing, diagnosis or treatment relied upon to support any claimed injury; a statement that the expert believes to the appropriate degree of medical certainty that Physiomesh caused Plaintiff's alleged injury, along with a description of all facts, medical and scientific literature or other authorities relied upon by the expert to support such opinion; and the medical records relied upon in forming the expert's opinion. Nothing in this Case Management Order shall preclude, upon leave of Court or in accordance with other applicable law or Order, amendment of case-specific expert reports prior to trial.
2. Plaintiffs shall produce expert reports required in Section II.D. above within ninety (90) days of receipt of notice of this Case Management Order from counsel for the Defendants.

E. Plaintiffs shall serve the items required in Section II in accordance with the service procedures set forth in Case Management Order No. 11 [Plaintiff Fact Sheet and Defendant Fact Sheet] entered and filed on October 4, 2019.

F. Any Plaintiff may seek relief from the obligations of this Order by motion to the Court. Absent relief being granted by the Court, any Plaintiff who fails to comply with the requirements of Section II shall be given notice of such failure by email or fax from Defendants' counsel and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period") to be calculated from the receipt of such notice of deficiency from counsel for the Defendants.

If Plaintiff fails to cure the deficiency within the Cure Period, Defendants may file any appropriate dispositive motions. Plaintiff shall thereupon have fourteen (14) days to respond to the Motion and show why the requested relief should not be granted.

G. To the extent that this Case Management Order conflicts with any deadlines or provisions of Case Management Order No. 11 [Plaintiff Fact Sheet and Defendant Fact Sheet] entered and filed on October 4, 2019, this Case Management Order shall govern.

H. Within forty-five (45) days of the service of the expert report required in Sections II.D.1 and II.D.2 of this Case Management Order, Plaintiff's counsel shall present Plaintiff for deposition at a time and place reasonably agreed by the parties.

HONORABLE JOHN C. PORTO, J.S.C.

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In Re: COOK MEDICAL, INC., IVC FILTERS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	Case No. 1:14-ml-2570-RLY-TAB MDL No. 2570
This Document Relates to All Actions	

CASE MANAGEMENT ORDER # 28
SCREENING FOR TIME-BARRED CASES

The Court entered dispositive orders addressing the statute of limitations in *Valerie Graham v. Cook Incorporated, et al.* (Filing No. 5575) and in *Brenda Helms, Bankruptcy Trustee for the Estate of Arthur Gage v. Cook Medical, Inc., et al.* (Filing No. 7715), among others. The Court also recently addressed the statue of repose in *David McDermitt v. Cook Incorporated, et al.* (Filing No. 13187). In addition, the Plaintiffs Steering Committee and counsel for the Cook Defendants raised at the May 11, 2020, MDL Status Conference concerns related to pending cases barred by the statute of limitations or statute of repose.

The Court therefore enters the following Order:

1. Plaintiffs' counsel with cases pending in the MDL shall conduct a reasonable screening inquiry into their cases and shall voluntarily dismiss any case barred by the applicable statute of limitations or the applicable statute of repose. A reasonable screening inquiry requires, at a minimum, communicating with the plaintiff, reviewing the plaintiff's

pleadings, and reviewing the plaintiff's Profile Sheet and Categorization Form submitted via Fourth Amended Case Management Order #4.

2. Counsel for Plaintiffs shall report the results of their reasonable screening inquires to the Plaintiffs' Steering Committee ("PSC") **within 30 days** of the entry of this Order, including confirmation of compliance with paragraph 1 for all cases in which he/she is counsel of record. The PSC shall report the results of the reasonable screening efforts to the Court at the first monthly status conference in MDL that occurs thereafter.

3. Plaintiffs will have **60 days** after the entry of this Order to voluntarily dismiss any case identified as barred by the applicable statute of limitations or repose as part of the screening inquiry outlined above with prejudice. Any voluntary dismissal filed within this time frame shall note that each side will bear its own costs and attorney's fees.

4. After the deadline set forth in paragraph 3 of this Order has expired, if the Cook Defendants wish to seek dismissal or judgment in a case they believe is barred by the statute of limitations or statute of repose, they shall file via ECF and serve on the relevant Plaintiff's counsel by email a motion of no more than three (3) pages referring to this Order and briefly stating why that Plaintiff's case should be dismissed.

5. Each Plaintiff whose counsel receives such a motion shall have **fifteen (15) days** to respond by:

a. Filing a notice of voluntary dismissal with prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure. Plaintiff's counsel should include a brief explanation as to why the case was not voluntarily dismissed in

accordance with Paragraph two (2). Counsel need not disclose information subject to the attorney-client privilege;

b. Filing a response with the Court, and serving said response on counsel for the Cook Defendants, of no more than three (3) pages, demonstrating why Plaintiff's claim should not be dismissed by setting forth the specific facts and/or law distinguishing Plaintiff's case from the Court's prior rulings; or

c. Filing a motion and affidavit or declaration with the Court of not more than three (3) pages pursuant to Federal Rule of Civil Procedure Rule 56(d), and serving said motion and affidavit or declaration on counsel for the Cook Defendants, attesting or declaring as to why the plaintiff cannot present facts essential to justify its opposition. Any affidavit or declaration shall set forth (1) the facts necessary to oppose summary judgment that are unavailable; (2) how those facts could demonstrate the impropriety of summary judgment; (3) why these facts cannot be presented without additional time, (4) what would be necessary to obtain those facts, and (5) how additional time would allow for rebuttal of the Cook Defendants' argument for summary judgment.

6. The Cook Defendants shall file a reply of no more than three (3) pages within **fifteen (15) days**. The Court will then apply the standard of review articulated in its prior orders to determine whether (a) dismissal is appropriate on the basis of the briefing alone, (b) a decision can be made only after additional briefing, in which case the Court may set a briefing schedule; or (c) in the case of submission of an affidavit or declaration pursuant to Rule 56(d), the Court may deny the request for additional

time, defer considering the Cook Defendants' summary judgment request, or allow additional time to obtain affidavits or declarations or to take the limited case-specific discovery necessary to oppose the request for summary judgment.

7. The Cook Defendants may submit a proposed Order of dismissal with prejudice for any Plaintiff who does not act under paragraph five (5) within **twenty (20) days** of being served with a motion under paragraph four (4).

SO ORDERED this 26th day of October 2020.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

EXHIBIT 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE COOK MEDICAL, INC. IVC FILTERS MARKETING, SALES PRACTICES, AND PRODUCT LIABILITY LITIGATION

Case No: 1:14-ml-2570-RLY-TAB
MDL No. 2570

This Document Relates to All Actions

CASE MANAGEMENT ORDER NO. 30
SCREENING ORDER FOR SYMPTOMATIC PERFORATION

Pursuant to (1) the Court's Order on the Cook Defendants' Motion for Screening Order and Bellwether Plan (Filing No. 9322) and (2) the Court's Order Regarding Case Categorization and Census (Filing No. 9638) (collectively, the "Court's Categorization Orders"), Plaintiffs in MDL 2570 were required to provide medical evidence of their alleged injuries in seven specific categories (Category Nos. 1-7).[1] (Filing No. 10617). The Court's requirement that each plaintiff submit specific medical records supporting his or her alleged injury has remained unchanged since the Court's Categorization Orders were entered on October 2, 2018.

The Court has relied heavily on the Plaintiffs' self-categorization in adopting bellwether plans and in charting a forward trajectory in the MDL. The Court's Categorization Orders set forth Category 7 cases are "**Symptomatic Injury Cases**," and

[1] The Court's Categorization Orders were incorporated and entered as part of Fourth Amended Case Management Order No. 4 (Party Profile, Fact Sheet and Case Categorization Protocol) on March 13, 2020 (Filing No. 13046).

Category 7(e) – the largest alleged injury type in this MDL – defines Penetration or Perforation as follows:

> (e) penetration or perforation – consisting of a filter strut or anchor extending 3 or more mm outside the wall of the IVC as demonstrated on imaging

(Filing No. 13046). Category 7(e)'s definition of Penetration or Perforation is consistent with the testimony of Plaintiffs' expert witnesses in the MDL.[2] (Filing No. 8591 at 15). No party or expert witness in this MDL has claimed that filter protrusion less than 3 mm is a legally cognizable injury or a "perforation." Furthermore, cases in Category 7(e) are intended to be "symptomatic" cases, *i.e.*, cases where the protrusion has caused a present physical impairment or physical harm.

IT IS THEREFORE ORDERED:

1. Plaintiffs who categorized as Category 7(e) shall review the medical evidence submitted with his/her Case Categorization Form and confirm he/she has provided a medical record or expert report supporting (a) IVC filter protrusion "3 or more mm outside the wall of the IVC as demonstrated by imaging," and (b) that the documented protrusion has caused a present physical impairment or physical harm. If a Plaintiff has not previously submitted such evidence with his/her Case Categorization Form, Plaintiff must do so promptly. Plaintiffs shall confirm compliance by emailing

[2] *See* Deposition Testimony of Dr. Gregory Gordon, January 4, 2018, 124:19-23; Dr. David Kessler, June 30, 2017, 265:3-16; and Trial Testimony of Dr. Harlan Krumholz, Brand Trial, 396:12-17.

Cook Defendants at CookFilterMDL@faegredrinker.com stating they have confirmed the record submitted meets the requirement within 60 days of the date of this Order.

2. Within 90 days of the date of this Order, the Cook Defendants shall submit to the Court and the Plaintiffs Steering Committee a list of all cases in which a Plaintiff has failed to comply with Paragraph 1 (the "Non-Compliant Cases"). The Plaintiffs Steering Committee will have 10 days thereafter to provide any edits or updates to the list to the Court.

3. Should a Plaintiff fail to comply with Paragraph 1 (the "Non-Compliant Cases"), the Cook Defendants may file a Motion to Show Cause why the case should not be dismissed.

SO ORDERED this 29th day of March 2022.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

EXHIBIT 8

MINUTE ENTRY
FALLON, J.
OCTOBER 11, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: VIOXX	*	**MDL Docket No. 1657**
	*	
PRODUCTS LIABILITY LITIGATION	*	**SECTION "L"**
	*	
	*	**JUDGE FALLON**
	*	
	*	**MAGISTRATE JUDGE KNOWLES**
	*	
* * * * * * * * * * * * * * * * * * *		

THIS DOCUMENT RELATES TO ALL CASES

The monthly status conference was held on this date in the Courtroom of Judge Eldon E. Fallon. The Court first met with members of the Plaintiffs' Steering Committee ("PSC") and the Defendants' Steering Committee ("DSC") to discuss agenda items for the conference. At the conference, counsel reported to the Court on the topics set forth in Joint Report No. 28 of Plaintiffs' and Defendants' Liaison Counsel. This conference was transcribed by Cathy Pepper, Official Court Reporter. Counsel may contact Ms. Pepper at (504) 589-7779 to request a copy of the transcript. A summary of the monthly status conference follows.

I. STATE COURT TRIAL SETTINGS

The following is the updated current listing provided by Merck of state court cases set for trial through March 31, 2008: The *Record* case in the Florida Circuit Court, Palm Beach County, Florida, is currently set on a trial docket that runs from December 10, 2007 to January

JS10(00:40)

18, 2008. In January, the Turner case is set for January 7, 2008 in the Alabama Circuit Court, Bullock County, Alabama; the *Appell/Arrigale* case is set for January 8, 2008 in the California Coordinated proceeding, in the California Superior Court, Los Angeles County; and a date of January 22, 2008 has been set in the New Jersey Coordinated proceeding, in the New Jersey Superior Court, Atlantic County, for four trials with up to 2-3 plaintiffs each. In February, the *Zajicek* case is set for February 11, 2008 in the Texas District Court, Jackson County, Texas. Finally, the *Frederick* case is set for March 10, 2008, in the Alabama Circuit Court, Jefferson County, Alabama.

II. FURTHER PROCEEDINGS IN THE EARLY FEDERAL COURT CASES

On September 14, 2007, Merck filed a Notice of Appeal from the Judgment entered in the *Barnett* case. At today's conference, the Court discussed the potential of selecting a procedure for trying several stroke cases in 2008. The Court also informed the parties that it would be focusing on the purchase claims cases that are part of this MDL.

III. CLASS ACTIONS

The Court has under advisement Defendants' Rule 12 Motions to Dismiss the Master Complaints for Medical Monitoring and Purchase Claims. On February 16, 2007, the Defendants filed a Motion to Strike Class Allegations in Plaintiffs' Medical Monitoring Master Class Action Complaint. The Court has advised the parties that it will address these issues at a later date.

IV. DISCOVERY DIRECTED TO MERCK

On August 14, 2007, the Court entered an Order and Reasons regarding Special Master Paul R. Rice's Report and Recommendations on a representative sampling of documents as to

which Merck has asserted privilege and Merck's motion to adopt in part the Special Master's Report and Recommendations and Merck's objections that were filed under seal. Documents that are discoverable are to be produced to plaintiffs in accordance with an agreed schedule, with the production concluding on or about November 30, 2007. Merck advises it has already produced documents relating to Dr. Reicin for which it withdrew or modified its privilege claims and further advises that it will produce on October 15, 2007 documents relating to Drs. Morrison or Barr for which Merck is withdrawing or modifying its privilege claims. The parties informed the Court that they have reached agreements concerning upcoming deposition dates in light of these productions.

V. DISCOVERY DIRECTED TO THIRD PARTIES

PLC has advised the Court and DLC that the PSC continues to issue third-party notices of depositions for the production of documents.

On July 31, 2007, the Court issued an Order regarding Special Master Rice's Second Report regarding the DDB and Ogilvy documents which were the subject of the letter from the PSC dated March 16, 2006 requesting intervention by the Court on whether Merck should have the right to review documents produced by Ogilvy and DDB in response to discovery requests by the PSC. On August 17, 2007, Merck filed objections to the Special Master's Second Report, the PSC then filed a response, and Merck filed a reply. By Order dated September 21, 2007, the Court instructed Special Master Rice to issue rulings with respect to individual documents subject to Merck's objections to the Special Master's recommendations regarding the DDB/Ogilvy privileged documents. On September 27, 2007, the parties participated in a conference call with Special Master Rice and Special Counsel Barriere and agreed on a

procedure and schedule for the review. Pursuant to the schedule, Merck has submitted additional materials and briefing, the Special Master will issue tentative rulings on October 9, Merck will submit any materials in response to those tentative rulings by October 16, and the PSC will submit any response by October 23.

VI. DEPOSITION SCHEDULING

Merck has noticed the *de bene esse* depositions of the following current Merck employees on the below listed dates: Dr. Alise Reicin for November 14 and 15, 2007; Dr. Briggs Morrison for November 29 and 30, 2007; and Dr. Eliav Barr for November 29 and 30, 2007. The PSC has noticed the discovery deposition of Dr. Reicin for October 16, 2007; however, upon receipt of the Reicin production (see Section IV above), the PSC requested that this deposition date be reset. Furthermore, the PSC has communicated with Merck regarding the scheduling of Dr. Barr's discovery deposition. The parties continue to discuss the scheduling of depositions.

VII. PLAINTIFF PROFILE FORM AND MERCK PROFILE FORM

Following the September 6, 2007 monthly status conference, Merck filed three additional Rules to Show Cause Why Cases Should Not Be Dismissed for failure to submit PPFs in contravention of Pre-Trial Order 18C. In addition, several Rules heard at the July 27, 2007 and September 6, 2007 monthly status conferences were continued until today. All of these Rules were taken up following today's conference, and the Court will issue separate orders resolving these issues.

Issues relating to the completeness of PPFs and the requirement of specific authorizations by certain providers were discussed at the September 6, 2007 status conference. In accordance

with the Court's instructions, the parties have attempted to address these issues in a proposed new Pre-Trial Order. On October 9, 2007, Merck submitted the parties' competing drafts to the Court. At today's conference, the Court directed the parties to once again try to reach an agreement on these issues.

VIII. STATE/FEDERAL COORDINATION - STATE LIAISON COMMITTEE

Representatives of the PSC and the State Liaison Committee continue to communicate on various issues. At today's conference, the State Liaison Committee called the Court's attention to one particular case in which a remand motion is pending, *Montgomery v. Merck & Co., Inc.*, No. 05-1176. Plaintiff's counsel in this case requested that the matter be brought to the Court's attention due to medical hardships. The Court also directed counsel in the *Flippin v. Merck & Co., Inc.* case, No. 05-1797, to provide convenient dates for a hearing on the pending remand motion in that case.

IX. *PRO SE* CLAIMANTS

From time to time, as the Court issues additional Orders directing PLC to take appropriate action regarding filings made by various *pro se* individuals, PLC will continue to communicate with the various pro se claimants and advise them of attorneys in their respective states and other pertinent information regarding the MDL. DLC will continue to discuss with PLC Merck's obligation to respond to complaints filed by *pro se* individuals in those instances where the complaints have not been served.

On July 5, 2007, the Court entered Pre-Trial Order No. 25, which sets forth the terms of *pro se* plaintiffs' access to the PSC document depository. Since the entry of PTO 25, the PSC has received a number of communications from various *pro se* claimants. The Pre-Trial Order is

located at http://vioxx.laed.uscourts.gov.

X. IMS DATA

Counsel for IMS and the parties continue to discuss further production of IMS data. The PSC has been advised that Orders were issued in New Jersey state court regarding the IMS data and the PSC is reviewing the Orders further.

XI. MERCK'S MOTION FOR SUMMARY JUDGMENT

On July 3, 2007, the Court denied Merck's Motion for Summary Judgment in the *Lene Arnold* and *Alicia Gomez* cases, in which Merck asserted that plaintiffs' claims were preempted by federal law. On July 12, 2007, Merck filed a Motion to Alter or Amend the Court's July 3, 2007 Order denying Merck's Motion for Summary Judgment to Include Certification for Interlocutory Review Pursuant to 28 U.S.C. § 1292(b). Oral argument was held on August 9, 2007, and the Court took the matter under advisement.

XII. TOLLING AGREEMENTS

On October 27, 2006, PLC communicated with DLC regarding Claimant Profile Forms submitted with Tolling Agreements and requested that a stipulation be worked out regarding Tolling Agreement claimants that have completed Claimant Profile Forms in filed cases so that re-filing a Plaintiff Profile Form can be accomplished by a mere addendum. On March 13, 2007, Merck provided a proposed Pre-Trial Order and Conversion Form. The PSC is reviewing the information and will be providing a response to DLC.

XIII. ISSUES RELATING TO PRE-TRIAL ORDER NO. 9

On February 9, 2007, the PSC received an Agreement letter with the State of Texas MDL PSC regarding the right of state court litigants to cross-notice expert depositions in Federal MDL

1657 proceedings or use MDL 1657 depositions in trial or in motion practice. The PSC is attempting to secure agreements from other states similar to the agreement reached with the State of Texas MDL PSC.

XIV. VIOXX SUIT STATISTICS

Merck advises that as of June 30, 2007, it has been served or was aware that it had been named as a defendant in approximately 26,950 lawsuits, which include approximately 45,225 plaintiff groups alleging personal injuries resulting from the use of Vioxx, and in approximately 266 putative class actions alleging personal injuries and/or economic loss. Of these lawsuits, approximately 8,575 lawsuits representing approximately 23,450 plaintiff groups are or are slated to be in the federal MDL and approximately 16,400 lawsuits representing approximately 16,400 plaintiff groups are included in a coordinated proceeding in New Jersey Superior Court. In addition, as of June 30, approximately 14,450 claimants had entered into Tolling Agreements with the company, which halt the running of applicable statutes of limitations for those claimants who seek to toll claims alleging injuries resulting from a thrombotic cardiovascular event that results in a myocardial infarction or ischemic stroke.

In addition, Merck advises that the claims of more than 4,620 plaintiff groups have been dismissed as of June 30, 2007. Of these, there have been more than 1,170 plaintiff groups whose claims were dismissed with prejudice, either by plaintiffs themselves or by the courts, and more than 3,450 plaintiff groups have had their claims dismissed without prejudice.

Merck advises that it defines a "plaintiff group" as one user of the product and any derivative claims emanating from that user (such as executor, spouse, or other party). Further, Merck advises that there are more Plaintiffs identified than lawsuits because many lawsuits

include multiple Plaintiffs in the caption.

XV. MERCK INSURANCE

Since the 30(b)(6) deposition regarding insurance took place on May 23, 2007, the PSC is further reviewing materials and will advise Merck with respect to issues involving the PSC's request for discovery concerning Merck insurance coverage and the arbitration/dispute resolution matters.

XVI. MOTION TO CONDUCT CASE SPECIFIC DISCOVERY

On May 29, 2007, the PSC filed a Motion to Conduct Case Specific Discovery in 250 cases to be designated by Plaintiffs to be completed within the next six (6) months. The matter is not yet set for hearing. Merck advises that it intends to file responsive pleadings.

XVII. OXFORD/VICTOR DATA

The PSC has requested that Merck and Oxford provide information relative to Protocol 203 and other items related to VICTOR. On July 3, 2007, Merck's counsel sent correspondence to PLC enclosing a comprehensive index memorializing productions and copies of transmittal letters regarding same. On July 25, 2007, Oxford provided Merck with the data that supported Oxford's publication on the VICTOR study. That data was produced to the PSC. Merck has agreed to produce to the PSC any additional data received from Oxford when it is received by Merck.

XVIII. PSC MDL TRIAL PACKAGE

On September 27, 2007, the Court issued Pre-Trial Order No. 27 regarding submission of the PSC's trial package. On October 3, 2007, the trial package was presented to the Court for review.

XIV. NEXT STATUS CONFERENCE

The next monthly status conference will be held on November 9, 2007, at 9:00 a.m. Counsel unable to attend in person may listen-in via telephone at 1-866-213-7163. The access code will be 20713894 and the Chairperson will be Judge Fallon.