Michael A. Sacchet (MN #0016949)
(Admitted Pro Hac Vice)
Ciresi Conlin LLP
225 S. 6th St., Ste. 4600
Minneapolis, MN 55402
Phone: (612) 361-8220
Fax: (612) 314-4760
Email: mas@ciresiconlin.com

Adam M. Evans (MO #60895)
(Admitted Pro Hac Vice)
Dickerson Oxton, LLC
1100 Main St., Ste. 2550
Kansas City, MO 64105
Phone: (816) 268-1960
Fax: (816) 268-1965
Email: aevans@dickersonoxton.com

Rebecca L. Phillips (TX #24079136)
(Admitted Pro Hac Vice)
Lanier Law Firm
10940 W. Sam Houston Pkwy. N., Ste. 100
Houston, TX 77064
Phone: (713) 659-5200
Fax: (713) 659-2204
Email: rebecca.phillips@lanierlawfirm.com

Co-Lead Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard Implanted Port Catheter Products Liability Litigation	MDL No. 3081 **JOINT MEMORANDUM RE: ISSUES TO BE ADDRESSED AT NOVEMBER 16, 2023 CASE MANAGEMENT CONFERENCE**

Pursuant to Case Management Order No. 2 ("CMO 2"), the parties submit the following Joint Memorandum in advance of the upcoming Case Management Conference ("CMC") on November 16, 2023. *See* Doc. 42.

I. Motions to Dismiss and Motion to Strike

The parties' positions regarding motions to dismiss and motions to strike are set forth below.

A. Defendants' Position

To preserve Defendants' rights and defenses and to avoid any issue of potential waiver, Defendants have moved to strike the port body allegations and the Peritoneal Titanium Port from the Master Complaint and Short Form Complaint pursuant to Federal Rule of Civil Procedure Rule 12(f). The Motion submitted herewith incorporates by reference Defendants' Position Statement on this issue. Defendants do not anticipate any further motions to dismiss in response to the Master Complaint at this time.

B. Plaintiffs' Position

Pursuant to the Court's instruction at the first CMC, Plaintiffs disclosed their draft Master Long-Form Complaint ("Master Complaint") to Defendants well in advance of the filing deadline. *See* Doc. 53 (Sept. 18, 2023 Tr.) at 21:17-22:16. Reserving all rights and waiving none, Plaintiffs circulated their drafts on October 20 (one week before the deadline) and again on October 26 (one day before the deadline). On October 27, Plaintiffs filed their 96-page, 17-count Master Complaint "seek[ing] judgment against Defendants for personal injuries . . . sustained from Defendants' unreasonably dangerous implanted port catheter ('IPC') devices." Doc. 93-1 at 2.

After inspecting Plaintiffs' well-pleaded Master Complaint, Defendants confirmed they will not move to dismiss Plaintiffs' claims as preempted by federal law. Defendants also confirmed they will not move to dismiss the Master Complaint for failure to state a claim under Rule 8 or even Rule 9's heightened pleading standard. Finally, heeding the Court's guidance, Defendants confirmed they will not move to dismiss on statute-of-limitations, learned-intermediary, or any state-specific grounds. *See* Doc. 53 at 25:9-26:6. Nor should they. *See In re Bard IVC Filters Prods. Liab. Litig. ("IVC")*, MDL 2641, Doc. 1481 at 3-5 (D. Ariz. Apr. 20, 2016).

Unable to dismiss any of Plaintiffs' claims, Defendants have "unilaterally" filed

a motion to "strike the port body allegations and the Peritoneal Titanium Port from the Master Complaint and Short Form Complaint pursuant to . . . Rule 12(f)." *See supra* at 2; *cf. infra* at 6. Defendants' sudden U-turn is improper. Although CMO 2 requested the parties' positions on "motions to dismiss," the spirit of the order calls for position statements on "*any*" motions "Defendants *propose to file* in response to the master complaint." *See* Doc. 42 at 3 (emphasis added). The Court's comments at the first CMC leave zero doubt. *See* Doc. 53 at 29:5-30:7 (describing "joint memo that . . . sets out the [D]efendants' proposals on what motions, if any, you think should be filed with respect to the complaint"). Undeterred, Defendants defy their own request to "set forth their position more fully in the Joint Memorandum due on November 9th and be heard on this issue at the November 16th conference," not to mention the Court's final instruction to "address their concerns about the proposed master complaint in the joint memorandum." Defendants' Master Answer to Plaintiffs' Master Complaint is the only responsive pleading the Court blessed for filing. *See* Doc. 42 at 3.

If any filing should be stricken, then, it is Defendants' *ultra vires* motion to strike, not a few paragraphs in the Master Complaint. *See Revive You Media LLC v. Esquire Bank*, 2018 WL 2164379, at *9 (D. Ariz. May 10, 2018) (Campbell, J.) ("Motions to strike are generally disfavored and should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.").

II. Master Complaint and Scope of the MDL

Pursuant to the Court's October 30, 2023 instruction, the parties' positions regarding the scope of the MDL are set forth below.

A. Defendants' Position

Defendants object to Plaintiffs' improper attempt to expand to the scope of the MDL to include port body allegations in the Master Complaint. *See* Compl. ¶¶ 267-93, 305-06, 326-331 355, 388, Doc. 93-1. The scope of this MDL, and thus by extension the scope of the Master Complaint, is limited to factual allegations and legal contentions related to whether Defendants' barium-sulfate-containing catheters are defective. The

Master Complaint's port body allegations, on the other hand, involve a different component part of Defendants' devices and different alleged defects. For the reasons set forth more fully below, this Court should reject the proposed Master Complaint and order Plaintiffs to strike the wholly unrelated port body allegations:

- ***First***, the MDL that the Judicial Panel on Multidistrict Litigation ("JPML" or "Panel") created relates to allegations of defects only in the catheter component of Defendants' implantable port devices, not the port body. Plaintiffs' novel allegations take issue with Defendants' alleged use of Delrin in manufacturing port body reservoirs, as well as the palpation bumps on the surface, or septum, of the port bodies—defects that they never asserted were within the scope of this MDL until the eve of their deadline to file the Master Complaint.
- ***Second***, an administrative Master Complaint cannot substantively expand the scope of an MDL to include factual allegations and legal contentions not presented to the JPML.
- ***Third***, the inclusion of allegations regarding an unrelated and previously undisclosed purported defect in a different component part will upend the Parties' ability to efficiently complete common issue discovery and engage in bellwether trials pursuant to the timeframe set by this Court.

In addition to Plaintiffs' improper attempt to expand the scope of the MDL to include port body allegations, Plaintiffs have also improperly listed a Peritoneal Titanium Port in Exhibit A to the Master Complaint and in the proposed Short Form Complaint as a relevant device. That device is implanted differently and has different indications for use than the devices that are the subject of the JPML's Order. The Peritoneal Titanium Port is indicated for patient therapy requiring repeated access to the peritoneal cavity, and the catheter is inserted into the peritoneal cavity in the abdomen. The devices that are the subject of this MDL are indicated for repeated access to the vascular system and contain a catheter that is inserted into a vein near the clavicle or

neck. Consequently, the Peritoneal Titanium Port falls outside the scope of the MDL, which is limited to "implantable vascular access devices." Mem. in Supp. of Pls.' Mot. to Transfer Actions, No. MDL 3081, ECF No. 1-1, at 1 (J.P.M.L. May 24, 2023). This Court should further order Plaintiffs to strike that device from the Master Complaint and Short Form Complaint.

1. This MDL Has Always Been About Alleged Defects in Defendants' Implantable Port Catheters

The proposed, and ultimately formed, MDL has always been about the catheter component of implantable port catheters. *See In re Bard Implanted Port Catheter Prod. Liab. Litig.*, No. MDL 3081, 2023 WL 5065100, at *1 (J.P.M.L. Aug. 8, 2023) ("All actions can be expected to share factual questions arising from allegations that defendants manufacture the *catheter component* of their port devices with a concentration of barium sulfate that is too high, which reduces the material integrity of the catheter, and can lead to injuries, including infection, fracture of the catheter, migration of the catheter, and thrombosis."); Mem. in Supp. of Pls.' Mot. to Transfer Actions, *In re Bard Implanted Port Catheter Prod. Liab. Litig.*, No. MDL 3081, ECF No. 1-1, at 7 (J.P.M.L. May 24, 2023) ("The Actions . . . allege that the design of the *catheter components* of Defendants' products are rendered unreasonably dangerous by a common design element, namely exposed barium sulfate on the catheter surface, and that said unreasonably dangerous condition caused Plaintiffs' injuries."). Neither the Movants before the JPML nor the Panel considered or addressed any allegations relating to the port body component of Defendants' devices.

Indeed, Plaintiffs made *no* representations about port body allegations as being within the scope of the MDL in their overview of the common issues in the Joint Memorandum submitted in advance of the Initial CMC. *See* Joint Mem., Doc. 23, at 3 ("All of the devices had the same indication for use and were defectively designed and/or manufactured in the same way: Defendants designed and manufactured the devices to include a polymer catheter that is impregnated with barium sulfate powder but which

fails to encapsulate, coat, or otherwise cover the barium-impregnated polymer surfaces of the catheter. . . ."). Nor did the issue come up at the Initial CMC.

The timing of Plaintiffs' inclusion of these allegations into the proposed Master Complaint also underscores the inappropriateness of the allegations. At the Initial CMC, the Court intimated to the Parties that the Master Complaint should be "exchang[ed] . . . along the way" so "that both sides understand what is being filed in this complaint." Sept. 18, 2023 Hr'g Tr. 21:23 to 22:2 (Doc 53). After initially taking the position that Defendants were not entitled to see a draft, Plaintiffs provided Defendants a draft that, consistent with the Parties' understanding, did not include port body allegations on October 20th. On October 22nd at 9:41 p.m. EST, Plaintiffs stated for the first time that they were "still evaluating whether to include allegations about port bodies in addition to catheter defects in the Master Complaint." On October 26th at 7:39 p.m.—the night before Plaintiffs' filing deadline—Plaintiffs first circulated a draft containing the disputed allegations.

In short, Plaintiffs cannot credibly argue that the port body allegations have always been part of this MDL. The record shows otherwise. Plaintiffs provide no explanation as to why they did not raise the port body allegations before the JPM, or before this Court in the initial Joint Memorandum or at the initial CMC.

2. Plaintiffs Cannot Expand the Scope of an MDL by Filing an Administrative Master Complaint

This Court should reject Plaintiffs' sweeping interpretation of CMO No. 2's provision that "the parties shall provide to the Court a master complaint drafted by Plaintiffs" provides them with unfettered discretion to expand the scope of this MDL to include claims regarding distinct alleged defects in a different component of a medical device. To the contrary, it is well-settled that "Plaintiffs may not unilaterally add to an MDL." *In re: Philips Recalled CPAP, Bi-Level Pap, and Ventilator Prods. Litig.*, No. 21-md-1230, 2023 WL 7019287, at *55 (W.D. Pa. Sept. 28, 2023) (dismissing claims related to device not "listed as a device at issue in this MDL"); *see also In re Jamster*

Mktg. Litig., No. 05-cv-819, 2008 WL 4482307, at *6 (S.D. Cal. Sept. 29, 2008) (stating that "[t]he primary purpose of MDL proceedings is to provide efficiencies in coordinated pretrial discovery and other pretrial matters—not to use the MDL proceedings as a means to expand the scope of the litigation beyond the core issues identified by JPML").

Defendants have consented to the adoption of a direct filing mechanism via a Master Complaint and Short Form Complaint to promote efficiencies in this MDL. *See* CMO No. 2, § V, Doc. 42. However, Plaintiffs cannot use the Master Complaint—which they intend to be an administrative summary of all the allegations and claims in this MDL—to expand the MDL's scope. The inclusion of the new allegations and claims in the Master Complaint improperly circumvents the JPML's role of vetting tag-along actions as having common questions of fact. As defined in the JPML's Rules of Procedures, a "'tag-along action' refers to a civil action pending in a district court which involves common questions of fact with . . . actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407." JPML Rule 1.1(h). Upon receipt of a notice of potential tag-along actions, the Clerk of the JPML may (A) enter a conditional transfer order ("CTO") "transferring that action to the previously designated transferee district for the reasons expressed in the Panel's previous opinions and order"; or (B) "determine[] that a potential tag-along action is not appropriate for inclusion in an MDL proceeding." JPML Rule 7.1(b). If the Clerk enters a CTO, any party opposing transfer may file a notice of opposition and motion in support of vacating the CTO. JPML Rule 7.1(c), (f).

Direct filing removes the requirement of going through the CTO process. *See Sykes v. Cook Inc.*, 72 F.4th 195, 202 (7th Cir. 2023). However, the direct-filing procedure must still ensure that all actions filed in the transferee court are "appropriate for inclusion in [the] MDL proceeding," which means that the allegations must fall within the purview of "the Panel's previous opinions and order." JPML Rule 7.1(b). As mentioned, the JPML's Transfer Order does not contemplate or include port body allegations, only those related to the use of barium sulfate in catheters. Allowing port

body allegations to be included in the Master Complaint would open the door to a plaintiff asserting ***solely*** port body allegations to be improperly included in the MDL. Such a case would lack common questions of fact with the cases in the MDL and—absent direct filing—would be the subject of a meritorious motion to vacate CTO, if not an initial determination by the Clerk that the action "is not appropriate for inclusion in an MDL proceeding." *Id.* If the Master Complaint contains allegations outside of the scope of this MDL, then there would be no mechanism to vet and exclude improper, direct-filed "tag-alongs." *See In re: Aqueous Film-Forming Foams Prod. Liab. Litig.*, No. 23-cv-2384, 2023 WL 6846676, at *4 (D.S.C. Oct. 17, 2023) ("[I]t is obvious that no party by unilateral fiat can include a civil action in an MDL without an opportunity for opposing parties to interpose objections, including whether the newly filed claim exceeds the scope of the transfer order of the JPML.").

None of Plaintiffs' cited decisions—most of which were issued by the JPML and not a transferee court—change the foregoing principles of MDL practice. First, Plaintiffs' reliance on *In re: Aqueous Film-Forming Foams Prod. Liab. Litig.*, MDL No. 2873, 2021 WL 755083, at *1 (J.P.M.L Feb. 4, 2021), is misplaced as that decision was issued by the JPML on a motion to vacate a CTO. Accordingly, it supports Defendants' position that the JPML, not the transferee court, resolves questions regarding whether particular facts or claims fall within the scope of a Transfer Order.

Plaintiffs then cite several decisions where the JPML created industry-wide, or near industry-wide, MDLs with multiple defendants and multiple products. *See In re: AndroGel Products Liab. Litig.*, 24 F. Supp. 3d 1378, 1379-80 (J.P.M.L. 2014); *In re Proton-Pump Inhibitor Products Liab. Litig. (No. II)*, 261 F. Supp. 3d 1351, 1354-55 (JPML 2017); *see also In re: Natl. Football League Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378, 1379 (JPML 2012) (including separate defendant in Transfer Order and stating that transferee court may remand those claims or actions if they are not sufficiently related). In all of those decisions, the Panel *included* the disputed actions, parties, claims, or products in its Transfer Order, and further held that the transferee

court had the discretion to *narrow* the MDL to exclude that did not in fact present common issues. *In re: AndroGel Products Liab. Litig.*, 24 F. Supp. 3d at 1380 (stating that "the transferee judge retains wide discretion as to how the MDL should be defined, and if, after close scrutiny, the transferee judge determines that remand of any claims or actions involving any particular product is appropriate, procedures are available whereby this may be accomplished with a minimum of delay").

Plaintiffs ask this Court to do the opposite. They ask this Court to *expand* the MDL to include new claims and allegations that were *not included* in the Panel's Transfer Order. Defendants respectfully submit that this Court lacks the authority to expand the MDL. Rather, this Court's authority and discretion is limited to "control[ling] the scope" of this MDL by severing, remanding, or striking improper cases, claims, or allegations. *In re Medtronic, Inc. Implantable Defibrillators*, No. 05-md-1726, 2007 WL 968436, at *1 (D. Minn. Mar. 7, 2007) (remanding cases involving claims related to devices not within scope of MDL and holding that "any unnecessary allegations concerning or references to any devices other than the [devices within the MDL's scope] shall be stricken from any complaint remaining in or that hereinafter becomes a part of [the MDL]").

Plaintiffs' reliance on *In re: Exactech Polyethylene Orthopedic Products Liability Litigation* and *IVC* is also misplaced. In *Exactech*, both parties in fact addressed the additional devices that were identified in the Master Complaint before the JPML. *See* Mem. in Supp. of Mot. to Transfer, MDL No. 3044, ECF No. 1-1, at 2 (J.P.M.L.); Resp. of Defs. to Mot. to Transfer, ECF No. 42, at 2, 5-6 (J.P.M.L.). Then, once the MDL was formed, the Parties agreed that "[w]hile each of these Devices is distinct, common among them is that they all incorporate Exactech's ultra-high molecular weight polyethylene ("UHMWPE") inserts or liner components," which Plaintiffs allege are "defective due to an alleged increased risk of accelerated wear and degradation, thereby necessitating early replacement of the components." *In re: Exactech Polyethylene Orthopedic Prod. Liab. Litig.*, Joint Statement of Case for Science Submission, No. 22-

md-3044, ECF No. 99-1, at 1 (E.D.N.Y.). Accordingly, there was a common alleged defect. Here, in contrast, Plaintiffs seek to expand the MDL to encompass entirely different alleged defects in a separate and distinct component of the devices at issue.

In *IVC*, this Court correctly ordered Defendants to "file a motion with the panel on multidistrict litigation to expand this MDL to include the [additional device] cases or to create a new MDL including [those] cases" before agreeing to oversee those cases. *In re: Bard IVC Filters Prod. Liab. Litig.*, No. 15-md-2641, CMO No. 38, ECF No. 12853 (D. Ariz.). Plaintiffs should follow that same procedure here if they intend to pursue their novel port body allegations and wish to include the Peritoneal Titanium Port in this MDL.

3. Plaintiffs' Port Body Allegations Are Not a Common Issue Suitable for Coordinated Proceedings in this MDL

Only the JPML, not Plaintiffs before the transferee court, can decide whether port body allegations belong in this MDL. *See In re: Philips Recalled CPAP, Bi-Level Pap, and Ventilator Prods. Litig.*, 2023 WL 7019287, at *55 (rejecting Plaintiffs' argument that the transferee court "has the authority to determine the scope of the MDL and include devices not originally included," and holding that "Plaintiffs are thus relegated to the accepted methodology to expand an MDL" by moving before the JPML). Plaintiffs' arguments regarding why these claims should be the subject of coordinated proceedings in a single MDL should be presented to the JPML in the first instance. That said, a comparison of the allegations concerning port bodies and catheters plainly shows that they are not amenable to common discovery.

Plaintiffs allege that Defendants' catheters are "comprised of a polymeric mixture containing barium sulfate." Compl. ¶ 230. According to Plaintiffs, "when barium sulfate dissociates [from the surface of the catheter], it causes injury, including but not limited to catheter fracture, infection, and thrombosis." *Id.* ¶ 266; *see also id.* ¶¶ 244-56. Plaintiffs (and presumably their intended experts) assert that Defendants could have employed alternative designs, which include using alternative radiopaque materials,

sheathing the catheters, or coating the catheters with a surface-modifying additive. *Id.* ¶¶ 257-59.

Plaintiffs' port body allegations are entirely different and have nothing to do with barium sulfate. Instead, Plaintiffs first target the utilization of "polyoxymethylene ("POM") [marketed as Delrin] in the construction of the port reservoir." *Id.* ¶ 267. According to Plaintiffs (and likely a different set of experts), Defendants' formulation of POM "is not compliant with the applicable specification standards for POM used in medical devices," and their "manufacturing process for the POM-containing [port bodies] lack adequate measures to stabilize the POM to prevent oxidative degradation." *Id.* ¶¶ 281-82. Plaintiffs assert that "[o]xidative degradation reduces the mechanical properties of the polymer," which in turn increases the risk of port body fractures, infections, and thrombosis. *Id.* ¶¶ 275, 283-84. Plaintiffs contend that Defendants could have used "more stable plastic materials." *Id.* ¶ 286.

Plaintiffs also allege a second, distinct issue with the port bodies. They claim that certain palpation bumps "cause undue compression stress on the tissue of the subcutaneous pocket in which the port is placed." *Id.* ¶¶ 287, 289. Plaintiffs allege that this "compression stress leads to ulceration and tissue necrosis, which causes erosion of the port through the patient's skin." *Id.* ¶ 291. Again, none of these port body allegations were presented to or considered by the JPML, nor are they part of the Panel's Transfer Order assigning MDL 3081 to this Court. Moreover, these allegations would require a separate track of fact discovery (limited to only a subset of Plaintiffs), as well as a whole set of new experts or, at the very least, distinct topics for expert discovery.

* * *

For the foregoing reasons, this Court should not enter the Master Complaint and should order Plaintiffs to strike the port body allegations from any amended pleading submitted for the Court's approval. Any plaintiff who alleges solely a port body injury should not be part of this MDL. To the extent that any plaintiff alleges an injury caused by the port body in addition to an injury caused by an implantable port catheter, that

plaintiff should set forth those allegations in her Short Form Complaint. Those issues will then be resolved on remand. In addition, this Court should further order Plaintiffs to strike the Peritoneal Titanium Port from the Master Complaint and Short Form Complaint.

B. Plaintiffs' Position[1]

Defendants contend that the Master Complaint's allegations regarding port-body defects and the Peritoneal Titanium Port fall outside the scope of this MDL. *See, e.g.*, Doc. 93-1 at 3, 29-30, 44-47. If Defendants had their way, this MDL would "always" be frozen in time as of the JPML's transfer order, forever pigeonholing Plaintiffs to the one defect they managed to uncover before discovery had even started. *See supra* at 5. That is not how it goes. This Court is empowered to define the MDL's scope, which properly includes catheter *and* port-body defects, as well as all 25 Bard IPC models in the Master Complaint. *See In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 2021 WL 755083, at *1 (J.P.M.L. Feb. 4, 2021) ("MDLs can naturally expand to encompass other claims involving the products at issue and presenting similar factual questions.").

Defendants' objection hinges on the false premise that the JPML alone decides the scope of an MDL. *See supra* at 7-8. Not so. The law is clear that the transferee court has "wide discretion as to how the MDL should be defined." *In re AndroGel Prods. Liab. Litig.*, 24 F.Supp.3d 1378, 1380 (J.P.M.L. 2014); *see, e.g.*, *In re Proton-Pump Inhibitor Prods. Liab. Litig.*, 261 F.Supp.3d 1351, 1354-55 (J.P.M.L. 2017) (noting MDL judge's "substantial discretion to refine the litigation's parameters"); *In re Medtronic, Inc. Implantable Defibrillators*, 2007 WL 968436, at *1 (D. Minn. Mar. 7, 2007) ("This Court has express authority from the JPML to exercise its discretion to

[1] The Court's October 26 email invited "*brief* position statement[s]" (emphasis in original), yet Defendants' statement is anything but "*brief*." Unfortunately for the Court, Defendants rebuked Plaintiffs' repeated efforts to stipulate to a word limit (e.g., 500 or 750 words per statement), objecting to any word limit as "arbitrary." Plaintiffs respectfully request that the Court institute a word limit moving forward. *See, e.g.*, *IVC*, Doc. 1471 at 2-10 (matrix setting forth defendants' sub-500-word position statements).

control the scope of [the] MDL."). This Court—not the JPML—is in the "best position" to define which "claims are sufficiently related . . . to remain in centralized proceedings." *In re Nat'l Football League Players' Concussion Inj. Litig.*, 842 F.Supp.2d 1378, 1379 (J.P.M.L. 2012); *see* David F. Herr, *Multidistrict Litigation Manual* § 5:44.[2]

Plaintiffs' Master Complaint is no different than in *IVC*. There, too, the Master Complaint enumerated six models as the "subject IVC filters," *see IVC*, Doc. 364 at 2, elaborating on the JPML's transfer order that had addressed only "retrievable inferior vena cava filters," *In re Bard IVC Filters Prods. Liab. Litig.*, 122 F.Supp.3d 1375, 1376 (J.P.M.L. 2015). Nonetheless, the MDL eventually expanded beyond the terms of the transfer order to include an additional model, the Simon Nitinol Filter ("SNF"), even though that filter was permanent not retrievable. *See In re Bard IVC Filters Prods. Liab. Litig.*, 2019 WL 3928657, at *4 n.3 (D. Ariz. Aug. 20, 2019).

Exactech is also instructive. There, the JPML's transfer order spoke only of "knee or hip replacement devices" and named just three models. *See In re Exactech Polyethylene Orthopedic Prods. Liab. Litig.*, 637 F.Supp.3d 1381, 1382 (J.P.M.L. 2022). The Master Complaint, however, identified four additional hip and knee devices; it also "unilaterally add[ed]," *cf. supra* at 6, an entirely new category for ankle devices, *see In re Exactech Polyethylene Orthopedic Prods. Liab. Litig.*, MDL 3044, Doc. 94 at 5 (E.D.N.Y. Jan. 26, 2023). Neither the MDL court nor the defendants blinked. *See id.*; *see also, e.g.*, *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*,

[2] To the extent the JPML has addressed the proper scope of an MDL, those cases usually involve the addition of an entirely new defendant or type of claim, unlike here. *See, e.g.*, *supra* at 8 (citing *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 2023 WL 6846676, at *3-4 (D.S.C. Oct. 17, 2023) (holding "inclusion of insurance coverage disputes in an MDL involving underlying tort claims . . . has traditionally been, and should be, reserved to the JPML")). Defendants lean on an unpublished report and recommendation in *In re Philips*, but that was a unique case where the JPML had delimited the 19 recalled models included in the MDL. *See supra* at 10 (citing *In re Philips Recalled CPAP, Bi-Level PAP, & Ventilator Prods. Liab. Litig.*, 2023 WL 7019287, at *55 (W.D. Pa. Sept. 28, 2023)); *In re Philips Recalled CPAP, Bi-Level PAP, & Mech. Ventilator Prods. Liab. Litig.*, 568 F.Supp.3d 1408, 1410 n.4 (J.P.M.L. 2021).

787 F.Supp.2d 1358, 1360 (J.P.M.L. 2011) (deferring to "transferee judge . . . regarding the inclusion of metal-on-metal [devices] and other configurations").

Compared to *IVC* and *Exactech*, Plaintiffs' Master Complaint does not come close to "circumvent[ing] the JPML's role." *See supra* at 7. Consistent with the "common questions of fact" in the transfer order, the Master Complaint alleges that "[D]efendants manufacture the catheter component of their port devices with a concentration of barium sulfate that is too high." Doc. 1 at 1; *see, e.g.*, Doc. 93-1 at 48. That the Master Complaint alleges *another* common issue of fact regarding port-body defects—implicating the *same* devices and causing the *same* injuries—is of no moment. *See* Doc. 93-1 at 44-47 (identifying two IPCs utilizing plastic port bodies); *id.* at 22 (identifying 13 IPCs with palpation bumps). In fact, the JPML noted still other commonalities that transcend the catheter defect. *See* Doc. 1 at 1 ("All actions share common issues of fact regarding . . . whether [D]efendants adequately tested the devices, and whether [D]efendants adequately monitored and reported adverse events relating to product failures."). The Master Complaint therefore coheres with the transfer order. Defendants' attempt to read between the lines of that order does not, however. Nowhere did the JPML preclude Plaintiffs from raising an additional port-body defect, as Defendants represent. *Cf. supra* at 4 (claiming the transfer order "relates to allegations of defects *only* in the catheter component . . . *not* the port body") (emphasis added).

Stuck with the same products causing the same indivisible injuries, Defendants capitulate that MDL Plaintiffs may bring port-body claims "in addition to" catheter claims. *See supra* at 11-12. Still, Defendants strangely argue that differences in the injury mechanism warrant striking port-body allegations and severing those claims for resolution on remand. *See id.*But just as Defendants argued in *IVC*, there is no sense in "re-litigation of the same issues in different courts," which would "significantly impact the parties and the judiciary." *IVC*, Doc. 12700 at 7 (quoting *In re Bard IVC Filters*, 122 F.Supp.3d at 1376). Litigating both defects together in this MDL—rather than relegating port-body claims to parallel lawsuits outside this MDL—will "streamline pretrial

proceedings," "reduce duplicative discovery," "as well as prevent inconsistent rulings." Doc. 1 at 1; *see, e.g.*, *In re Stryker Orthopaedics LFIT V40 Femoral Head Prods. Liab. Litig.*, 249 F.Supp.3d 1353, 1355 (J.P.M.L. 2017) (concluding that "individualized factual issues" did not "negate the efficiencies to be gained by centralization"); *In re Kugel Mesh Hernia Patch Prods. Liab. Litig.*, 493 F.Supp.2d 1371, 1372-73 (J.P.M.L. 2007) (rejecting Bard's argument that cases involving "different models" and "various types of defects" should not be consolidated given availability of "discovery with respect to any non-common issues").

At bottom, all that is required here is a common product and a common injury. *See In re Valsartan Prods. Liab. Litig.*, 433 F.Supp.3d 1349, 1352 (J.P.M.L. 2019) ("A complete identity of factual issues . . . is not a prerequisite . . . where, as here, the actions arise from a common factual core."); *e.g.*, *In re Aqueous Film-Forming Foams*, 2021 WL 755083, at *1-2 (noting the MDL had already "naturally expand[ed]" to include multiple mechanisms of injury); *In re Stryker*, 249 F.Supp.3d at 1356 (consolidating "substantially similar" devices because plaintiffs "experience[d] similar problems"). And this Court has already confirmed that the common thread connecting all products and defect theories is that "Plaintiffs in these cases allege that Defendant[s] . . . are liable for *injuries caused by implantable port catheters*." Doc. 7 at 1 (emphasis added).

Though the Peritoneal Titanium Port is an "implantable port catheter," *see id.*, Defendants attempt to distinguish it from the other IPCs because it is not an implantable *vascular* access device. *See supra* at 5. But Defendants inexplicably ignore that the Peritoneal Titanium Port also contains a "radiopaque catheter" made of barium sulfate[3]—the very defect highlighted in the JPML's transfer order that Defendants hyperfixate on. *See* Doc. 93-1 at 39. To be sure, discovery may reveal still more commonalities, especially since the Peritoneal Titanium Port shares a model number with the BardPort Titanium Implantable Port. *See id.* at 94.

[3] *See* https://www.bd.com/en-us/products-and-solutions/products/product-page.0603000#overview.

The ultimate irony is Defendants' change of heart since *IVC*. There, Defendants recognized that even distinct categories of products (retrievable and permanent filters) "involve[d] overlapping discovery concerning many of the same scientific studies, common expert witness issues, and duplicative pretrial motions." *IVC*, Doc. 12700 at 3; *see also In re Bard IVC Filters Prods. Liab. Litig. ("IVC JPML")*, Doc. 483-1 (J.P.M.L. Nov. 1, 2018). In Defendants' words, "expand[ing]" the MDL to "include one additional [product]" and two related defects is "the *most convenient and efficient path forward*." *IVC JPML*, Doc. 483-1 at 6 (emphasis added).

Equally hypocritical is Defendants' criticism of the "timing" of Plaintiffs' allegations. *See supra* at 6.[4] In *IVC*, Defendants delayed until three years into the MDL to include the SNF. *See IVC*, Doc. 12700 at 4. Three months into this MDL, the time is now for the parties and the Court to "ma[ke] early efforts to define the scope of this litigation." *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 2010 WL 2134275, at *1 (W.D. Mo. May 26, 2010). Plaintiffs expeditiously and carefully drafted their Master Complaint, cataloguing over two dozen models of IPCs after Defendants refused to define the universe of model names and numbers. *See* Doc. 93-1 at 3-4. Because "other devices may be added once . . . discovery proceeds," Doc. 23 at 3; Doc. 93-1 at 4 n.2, the Court should "not limit the scope of this MDL docket" at this embryonic stage, *see In re DePuy*, 787 F.Supp.2d at 1360.

For all these reasons, the Court should approve the Master Complaint, including its allegations involving port-body defects and the Peritoneal Titanium Port.

III. Successor Liability

The parties' positions regarding successor liability are set forth below.

[4] Heeding the Court's instruction, Plaintiffs disclosed several drafts of their Master Complaint to Defendants before the filing deadline. Defendants' attempt to use Plaintiffs' work product against them defies the Court's instruction. *See supra* at 6.

A. Plaintiffs' Position[5]

The Court directed Defendants to disclose whether "the potential liability of one or more Defendants is limited to a particular period of time, a particular product, or a particular category of successor liability, or is limited in some other way related to the concept of successor liability." Doc. 42 at 4. Defendants' answer is no less mysterious today than eight weeks ago. Suffice it to say, the parties are far from "reach[ing] agreement" on the potential liability of each Defendant in this MDL. *See* Doc. 53 at 46:2-4.

As Plaintiffs explained at the first CMC, successor liability is a "hot topic" in modern mass torts. *Id.* at 44:19-45:19. Historically, when MDL plaintiffs sued multiple corporate defendants, the defendants operated as—and were ultimately treated as—a monolithic entity. *See, e.g.*, *IVC*, Doc. 17567 at 2-4 (collapsing all defendants as "Bard" on the verdict form). Plaintiffs certainly "hope" it could be so straightforward here, but that is "more hope than likelihood" given the burgeoning trend. *Cf. infra* at 25 (quoting *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 566 (D. Ariz. 2016)).

In recent years, MDL defendants have attempted to capitalize on their individual identities, especially in conjunction with pre-litigation mergers or post-litigation bankruptcies. In the *Talcum Powder* MDL, defendants deployed the "Texas two-step" to limit their tort liability, seeking shelter in bankruptcy court instead of litigating the MDL's merits. *See In re LTL Mgmt., LLC*, 64 F.4th 84, 94-97 (3d Cir. 2023).[6] Similarly, in the *Earplugs* MDL, defendants "devised a scheme" involving a "funding and indemnity agreement" in which 3M's subsidiaries assumed all liabilities and declared bankruptcy, while 3M paradoxically funded the bankruptcy. *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2022 WL 17853203, at *3 (N.D. Fla. Dec. 22, 2022).

[5] Despite promising not to address the merits, Defendants spill their ink on four pages of irrelevant summary-judgment briefing on successor liability. *See infra* at 21-23.

[6] Notably, the debtor's counsel in that bankruptcy proceeding also represent Defendants here. *See In re LTL Mgmt., LLC*, Case No. 3:21-bk-30589, Doc. 414 (W.D.N.C. Bankr. Nov. 15, 2021) (application to employ McCarter & English).

Because defendants' bad-faith conduct "upend[ed]" that MDL and "derailed [plaintiffs'] efforts to litigate . . . on the merits," the MDL court wielded its inherent powers to prohibit 3M from shifting blame to its subsidiaries. *Id.* at *6-7. The MDL court nonetheless lamented 3M's abuse of the judiciary as it "would have organized th[e] litigation very differently" had it known successor liability was at issue. *Id.* at *6 (discussing missed opportunity for "common discovery on successor liability").

Against that disturbing backdrop, the parties' views on Defendants' potential liability radically diverge at the outset: Defendants believe CMO 2 requires them to address the liability of *only* Becton, Dickinson and Company ("BD") as the successor to C.R. Bard, Inc. ("C.R. Bard"); Bard Access Systems, Inc. ("BAS"); and Bard Peripheral Vascular, Inc. ("BPV"). Plaintiffs, on the other hand, rely on CMO 2 itself, which plainly requires Defendants to address whether "*one or more* Defendants" have liability limited in time, by product, or otherwise. *See* Doc. 42 at 4 (emphasis added).

Even as to BD alone, Defendants have barely scratched the surface of successor liability. Plaintiffs cannot hold BD liable for the conduct of C.R. Bard, BAS, or BPV, Defendants say, because "BD did not expressly or impliedly assume any of C.R. Bard's liabilities as part of the 2017 acquisition." *Infra* at 23. But this bare-bones statement tells Plaintiffs nothing more than what is already in the public domain.[7] Defendants go so far as to say that "BD cannot be held liable for any claims related to [Bard IPCs]," even post-merger. *Infra* at 21, 26. Apparently, Defendants believe BD is somehow immune for its own IPC-related conduct, even though BD touted that "Bard has joined BD" and the remaining Defendants' "product offerings were taken over by and integrated into BD's Interventional and Medical segments." *E.g.*, Doc. 93-1 at 8-13. When Plaintiffs pressed for an explanation as to BD's involvement in designing, manufacturing,

[7] *See, e.g.*, BD, Registration Statement (Form S-4) (May 23, 2017), https://www.sec.gov/Archives/edgar/data/10795/000156761917001094/s001711x1_s4.htm#tTMA; BD, Annual Report (Form 10-K) (Nov. 22, 2017), https://investors.bd.com/sec-filings/annual-reports##document-42-0000010795-17-000021-1.

labeling, and/or selling Bard IPCs, Defendants refused to engage and punted to their Master Answer.

After nearly two months of meeting and conferring, only one thing is clear: Defendants know much more than they let on. When commenting on the draft DPF, for example, Defendants assured Plaintiffs that they "doubt there will be much question [about liability] with regard to [BAS] or C.R. Bard in most cases." Plaintiffs pushed for clarification on what "most cases" meant, but Defendants refused to demarcate "a particular period of time, a particular product, or a particular category." *See* Doc. 42 at 4. Similarly perplexing, Defendants declared that they "will be unable to assess whether there is a potential for liability [with respect to BPV] until [they] have more detailed information about a case." Yet again, Defendants failed to explain what additional information they supposedly require to ascertain BPV's exposure in this MDL, despite their involvement in drafting the Short-Form Complaint and PPF.

Given BD's efforts to evade legal and financial responsibility[8] and the other Defendants' refusal to pin down who bears potential responsibility, Plaintiffs' Master Complaint pleaded successor liability. *See* Doc. 93-1 at 87-89. Plaintiffs also intend to explore this subject in general discovery. *See infra* at 40. But regardless of that discovery, the Court should order each Defendant to identify the parameters of its potential liability (*i.e.*, "particular period of time," "particular product," and "particular category" of conduct or claims for which it may be liable) and crystalize its position on the liability of the other Defendants. *See* Doc. 42 at 4. They should do so by the next CMC. After all, Defendants have already had two months to resolve these very issues.

Sidestepping CMO 2, Defendants relegate successor liability to the close of the case, claiming it is a post-judgment issue that only becomes ripe if Plaintiffs are unable "to collect a judgment against an entity found directly liable." *See infra* at 24-25. If

[8] After purporting to confer with Plaintiffs about successor liability for numerous weeks, Defendants disclosed for the first time in their draft position statement that BD engineered a "reverse triangular merger" to dodge successor liability. *See infra* at 23.

Defendants had their way, Plaintiffs would be "forced to litigate these issues on a piecemeal basis following remand to transferor courts, substantially increasing their costs and unfairly subjecting them to the risk of inconsistent rulings." *In re 3M*, 2022 WL 17853203, at *6. Those inefficiencies are entirely avoidable here "given the Court's mandate to resolve common questions," including both direct and successor liability, "in this consolidated proceeding." *Id.* (citing 28 U.S.C. § 1407). This Court should therefore "organize[] this litigation" to address successor liability through "common discovery." *Id.* Until Defendants clear the air on who is potentially liable and the solvency of those entities, "common-issue discovery" is essential for both direct and successor liability. *See infra* at 25.[9]

Plaintiffs will also seek case-specific discovery on successor liability, *see infra* at 34-36, culminating in "summary judgment and/or bellwether trials" to determine which Defendant(s) are legally and financially liable for Plaintiffs' injuries, *cf. In re 3M*, 2022 WL 17853203, at *6. Even then, Defendants could upend this MDL at the eleventh hour by restructuring, entering into indemnity agreements, or filing for bankruptcy. *See id.* at *3; *In re LTL*, 64 F.4th at 93-99; *In re Aearo Techs. LLC*, 2023 WL 3938436, at *2-6 (S.D. Ind. Bankr. June 9, 2023). Such strategies typically fail, but they still threaten to derail the Court's plan "to resolve this case in three years." Doc. 53 at 5:18-19.

B. Defendants' Position

Plaintiffs raised the issue of successor liability at the initial CMC to see whether BD would "agree[] that it is the successor in liability to C.R. Bard, [BAS], [and] [BPV] so there's no debate about if C.R. Bard was liable for something, whether [BD], the parent company now, would be liable for that same conduct." Sept. 18, 2023, Hr'g Tr. 45:12-19 (Doc 53). After meeting and conferring, Defendants advised Plaintiffs that the

[9] Knowing common discovery is appropriate (if not inevitable) on this seminal issue, Defendants ask the Court to shadow *Smith*. *See infra* at 26. But *Smith* is readily distinguishable, involving neither an MDL nor successor liability. *See Smith v. Unum Life Ins. Co. of Am.*, 2022 WL 1136639, at *1 (D. Ariz. Apr. 18, 2022). The Court ordered "limited discovery" because "discovery in ERISA cases is limited." *Id.* at *4.

answer is no: BD cannot agree to such a stipulation. For the reasons that follow, BD cannot be held liable for any claims related to any products identified in the Master Complaint under any theory of successor liability or veil-piercing. BD did not assume C.R. Bard, BAS, or BPV's liabilities as part of BD's acquisition of C.R. Bard in 2017, and Plaintiffs do not assert in the Master Complaint that C.R. Bard, BAS, and BPV are insolvent or at risk of being unable to satisfy any judgment.

Conducting or prioritizing discovery into successor liability and veil-piercing at the outset of this MDL would put the "cart before the horse" and distract the Parties from the core issues at stake: whether any alleged defect related to the concentration of barium sulfate in Defendants' catheters caused Plaintiffs' injuries, and whether any Defendant (BD, C.R. Bard, BAS, and/or BPV) can be held *directly* liable for those alleged injuries. For the reasons set forth herein, such discovery should be set on a separate schedule and limited to Court-approved requests and deposition topics in advance of a motion for a summary judgment.

With respect to *direct* liability, Plaintiffs may serve discovery related to questions such as which Defendants designed, manufactured, and distributed particular devices, and when. This Court should reject Plaintiffs' request that at the outset of this litigation this Court order "each Defendant to identify the parameters of its potential liability" in this MDL involving a Master Complaint that identifies dozens of devices implanted into Plaintiffs over an at-least fifteen-year period.

1. Plaintiffs Cannot Rely on Principles of Successor Liability or Veil Piercing to Hold BD Liable for its Subsidiaries' Conduct

Successor liability becomes a relevant issue in a product liability case when a plaintiff is injured by a product manufactured by a liable company that no longer exists due to a merger, acquisition, or other corporate transaction. *See Restatement (Third) of Torts: Prod. Liab.* § 12 (1998) ("Almost all of the reported decisions applying the bases of successor liability stated in this Section involve predecessors that transfer all of their assets to successors and then dissolve or otherwise cease operations."); *Stalwart Capital,*

LLC v. iCap P. N.W. Opportunity and Income Fund, LLC, 762 F. App'x 367, 369 (9th Cir. 2019) ("[B]ecause there was no liability to [plaintiff], there was no need to engage in an analysis of successor liability . . . ."). In that circumstance, the plaintiff may look to a successor company to obtain a recovery. However, "[t]he well-settled general rule, adopted in virtually every State, is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor." *Ronnoco Coffee, LLC v. Westfeldt Bros., Inc.*, 939 F.3d 914, 920 (8th Cir. 2019) (internal quotation marks omitted).

Most states recognize only four exceptions to this general rule of non-liability. These exceptions may apply when the acquisition:

> (a) is accompanied by an agreement for the successor to assume such liability; or
>
> (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
>
> (c) constitutes a consolidation or merger with the predecessor; or
>
> (d) results in the successor becoming a continuation of the predecessor.

Restatement (Third) of Torts: Prods. Liab. § 12 (1998). A minority of states recognize a fifth exception called the product-line exception. *See Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 825 (N.J. 1981) (adopting exception in New Jersey); *Winsor v. Glasswerks PHX, L.L.C.*, 63 P.3d 1040, 1049-50 (Ariz. App. 2003) (rejecting exception in Arizona). None of these exceptions applies to BD's 2017 acquisition of C.R. Bard and its subsidiaries.

First, Plaintiffs cannot rely on any contractual assumption of liabilities. "When a company acquires another corporation and the target continues to operate as a separate entity, the purchasing corporation will not assume the liabilities of the acquired corporation unless it expressly agrees to do so." *Jurista v. Amerinox Processing, Inc.*, 492 B.R. 707, 766 (D.N.J. 2013). The Master Complaint contains no facts or non-conclusory allegations that reflect an express assumption of liabilities pursuant to the publicly available merger agreement. *See, e.g.*, Compl. ¶¶ 58, 62-63, 566-67; *see also In*

re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig., No. 13-md-2445, 2017 WL 4810801, at *7 (E.D. Pa. Oct. 25, 2017) (noting that "this exception requires an interpretation of the parties' agreement"); *Rice v. First Energy Corp.*, 339 F. Supp. 3d 523, 537 (W.D. Pa. 2018) ("A statement in SEC filings in which the parent consolidates by description its subsidiary's efforts and its own 'is not atypical, and certainly does not suggest that, via fraud or its equivalent, the parent corporation has become indistinguishable from the subsidiary.'" (quoting *Suboxone*, 2017 WL 4810801, at *11)). That is so because BD did not expressly or impliedly assume any of C.R. Bard's liabilities as part of the 2017 acquisition. To the contrary, BD acquired C.R. Bard through a reverse triangular merger, which is a transaction "specifically designed to preclude the imposition of successor liability." *Norfolk S. Ry. Co. v. Pittsburgh & W. Virginia R.R.*, 153 F. Supp. 3d 778, 808 (W.D. Pa. 2015), *aff'd*, 870 F.3d 244 (3d Cir. 2017). "In a reverse triangular merger, the acquiring corporation . . . forms a new subsidiary, which is merged into the target corporation . . . so that the target corporation is a surviving corporation that continues to own its assets." *N. Valley Mall, LLC v. Longs Drug Stores California, LLC*, 238 Cal. Rptr. 3d 368, 371 (Cal. App. 3d Dist. 2018).

Next, with respect to the merger and continuation exceptions, an "essential characteristic" of these exceptions "is that one corporation survives while another ceases to exist." *Pub. Serv. Elec. & Gas Co. v. Cooper Indus., LLC*, -- F. Supp. 3d --, 2023 WL 4173010, at *9 (D.N.J. June 26, 2023) (quoting *U.S. v. Gen. Battery Corp., Inc.*, 423 F.3d 294, 308 (3d Cir. 2005)). Plaintiffs cannot rely on these exceptions given that the C.R. Bard, BAS, and BPV still exist. Similarly, the product line exception is inapplicable because there remains a remedy against the original manufacturer. *See Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F. Supp. 2d 501, 510 (D.N.J. 2011) (holding that exception "does not apply where the claimant had a potential remedy against the original manufacturer but failed to exercise all available means to assert his or her claim"). Finally, the fraud exception is inapplicable as Plaintiffs assert in a conclusory fashion

that BD acquired these allegedly liable entities to escape its own liability. *See, e.g.*, Compl. ¶ 570.

Nor can Plaintiffs rely on the "conceptually distinct," equitable remedy of veil-piercing to impose liability on BD. 1 Fletcher Cyc. Corp. § 48; *see also Specialty Companies Group, LLC v. Meritage Homes of Arizona, Inc.*, 492 P.3d 308, 310 (Ariz. 2021) ("[A]n attempt to pierce the corporate veil is not itself a cause of action but is raised in the context of another cause of action"); *Hillman Power Co., LLC v. On-Site Equip. Maint., Inc.*, 632 F. Supp. 3d 736, 738 (E.D. Mich. 2022) (stating that veil piercing is a "post judgment remedy" under New Jersey law). Pursuant to the doctrine of veil-piercing, "a parent company [can be] held liable for the acts of its subsidiary, if (1) there is unity of control between parent and subsidiary such that one is the 'alter ego' of the other, and (2) observing the corporate form's privileges and protections would be unjust." *Specialty Companies Group, LLC*, 492 P.3d at 310. "Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil." *Richard A. Pulaski Const. Co., Inc. v. Air Frame Hangars, Inc.*, 950 A.2d 868, 877–78 (N.J. 2008) (quoting *Dept. of Envtl. Prot. v. Ventron Corp.*, 468 A.2d 150, 164 (N.J. 1983)). Plaintiffs fail to allege facts that establish the requisite showing of control or domination by BD of its subsidiaries in the Master Complaint. Plaintiffs also fail to plead facts that suggest that BD used its subsidiaries to perpetuate any type of fraud or injustice. Indeed, following BD's acquisition of C.R. Bard, C.R. Bard resolved prior cases asserting the same defects as alleged in this MDL without issue.

Accordingly, neither successor liability nor veil-piercing are meritorious or relevant theories of liability in this MDL.

2. Discovery into Issues Related to Successor Liability and Veil-Piercing Should be Narrowly Circumscribed and Should Proceed on a Separate Schedule

If this Court is inclined to allow any discovery on successor liability and veil-piercing to proceed in this MDL, the discovery should be staggered, and Plaintiffs should be required to propose to the Court the specific discovery requests they intend to serve

to ensure that discovery remains appropriately limited. *See Smith v. Unum Life Ins. Co. of Am.*, No. 21-cv-01858-PHX-DGC, 2022 WL 1136639, at *1 (D. Ariz. Apr. 18, 2022).

Prioritizing discovery into these issues at the outset of this MDL does not "promote the just and efficient conduct of such actions," 28 U.S.C. § 1407(a), or satisfy Rule 26(b)(1)'s relevance standard. Beyond the fact that discovery will uncover no evidence sufficient to overcome summary judgment on these issues, the entire exercise is academic in nature absent any risk that Plaintiffs are unable to recover against BD, C.R. Bard, BAS, or BPV on any theory of direct liability. Plaintiffs may seek discovery regarding each entity's direct liability in the ordinary course of common-issue discovery. On the other hand, the relevance of Plaintiffs' successor liability and veil-piercing discovery rests on conditions precedent that Plaintiffs have not satisfied: the inability to collect a judgment against an entity found directly liable. Accordingly, at this time, "the discovery appears to be only potentially relevant—more hope than likelihood." *In re Bard IVC Filters Products Liab. Litig.*, 317 F.R.D. 562, 566 (D. Ariz. 2016).

Nor will Plaintiffs' proposed discovery be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). These concepts rank low on importance relative to the other issues in this MDL—namely, direct liability. Furthermore, the burden of this discovery will far outweigh its benefit under the circumstances. During the parties' conferrals, Plaintiffs proposed to serve additional Interrogatories beyond Rule 33's limit of twenty-five on these issues. Accompanying these Interrogatories will be document requests and deposition notices, including, very likely, notices for apex depositions. The subject matter at issue will likely engender disputes over privilege and objections to certain depositions and topics for depositions, among others. Expanding the scope of discovery into such a tangential and contentious topic will risk delay of the fact discovery period, pose significant hardship to Defendants, and—in all likelihood—provide no return to Plaintiffs given that all named Defendants are in operation and actively participating in this litigation. Absent any need for this discovery, the discovery will be nothing more than a costly and harassing fishing expedition into Defendants' corporate structure.

In light of the foregoing, Defendants respectfully request this Court stagger this discovery until the parties have substantially completed discovery into direct liability issues. Requiring the parties to take discovery on direct liability first may obviate the need for successor liability discovery or, at the very least, may allow the parties to hone in on the key issues for discovery at the appropriate time. Should the parties agree that successor liability and/or veil-piercing remain an issue following additional conferrals, this Court should adopt a procedure similar to the one adopted in *Smith*. This procedure, modified from *Smith*, would provide:

> [T]he Court will review the actual interrogatories, requests for production, and requests for admission that Plaintiff[s] wish to serve rather than granting blanket permission for discovery to proceed on these topics. This procedure will help limit discovery, prevent additional discovery disputes from coming before the Court, and . . . promote [the] primary goal[s] of [this MDL in accordance with 28 U.S.C. § 1407 and Fed. R. Civ. P. 26(b)(1)].
>
> Plaintiff[s] shall file, [on a date to be determined at a future case management conference], the particular interrogatories, requests for production, and requests for admission that [they] wish[] to serve regarding [successor liability and veil-piercing]. [Plaintiffs] should also provide the Rule 30(b)(6) notice [they] intend[] to serve . . . . Defendants will submit any objections they have to Plaintiff's proposed discovery [three] week[s] after [Plaintiffs] files [their] proposal. Plaintiff[s] shall not file a reply unless requested by the Court.
>
> IT IS ORDERED that limited discovery regarding [successor liability and veil-piercing] will be permitted. The parties shall follow the procedures set forth above, and the Court will issue an order on the specific discovery that is allowed. The parties' filings shall not exceed 7 pages each.

Smith, 2022 WL 1136639, at *4 (alterations added).

3. Common-Issue Discovery will Address the Potential Liability of Defendants for Particular Devices and Time Periods

CMO No. 2 requires the Parties to "discuss and describe their views on th[e] issue[s] [of potential and successor liability] and a procedure for resolving disagreements." Defendants complied with that directive. Defendants advised Plaintiffs that BD cannot be held liable for any claims related to any products under any theory of successor liability; and that questions of direct and successor liability, including questions related to particular devices and time periods, will be the subject of common-

issue discovery.

This Court should not be distracted by Plaintiffs' lamentations that Defendants were unable to answer unduly broad and open-ended questions of potential liability that were untethered to any fact pattern via e-mail or telephone calls during their conferrals. This is a multi-defendant MDL involving a Master Complaint that identifies dozens of devices that, per the individual complaints that have been filed to date, have been implanted and explanted into plaintiffs for at least a fifteen-year period from 2008 to 2023. Formal discovery tools properly employed by the Parties should be used to answer such questions.

This Court should also reject Plaintiffs' demand that this Court "order each Defendant to identify the parameters of its potential liability (*i.e.*, 'particular period of time,' 'particular product,' and 'particular category' of conduct or claims for which it may be liable), and crystalize its position on the liability of the other Defendants . . . by the next CMC." Plaintiffs cite no authority for such a sweeping order. Nor do they endeavor to explain why exploration of these subjects in general discovery is insufficient, or warrants immediate attention. Plaintiffs are not entitled to what are, in essence, unbounded contention interrogatories prior to the service of any other discovery requests in this MDL. *Cf.* Fed. R. Civ. P. 33(a)(2) (prescribing that courts can defer answers to contention interrogatories "until designated discovery is complete, or until a pretrial conference or some other time"); *Fredrics v. City of Scottsdale*, No. -21-cv-001, 2022 WL 60546, at *1 (D. Ariz. Jan. 6, 2022) ("Contention interrogatories are generally considered overbroad and unduly burdensome because they call for an answering party 'to provide a narrative account of its case.'" (quoting *Gov't Benefits Analysts, Inc. v. Gradient Ins. Brokerage, Inc.*, 2012 WL 3238082, at *9 (D. Kan. Aug 7, 2012))).

This MDL is in its nascent stages. No discovery has been taken in any case. Yet, Plaintiffs effectively demand that Defendants provide them with immediate and complete narratives of the corporate and regulatory histories of each Defendant and device at issue in this MDL. In Defendants' view, those questions may be explored in

the ordinary course of discovery and may be the subject of appropriately phrased contention interrogatories served by a potential bellwether plaintiff. *See In re Dealer Mgt. Sys. Antitrust Litig.*, MDL No. 2817, No. 18-cv-864, 2019 WL 6498081, at *5–6 (N.D. Ill. Dec. 3, 2019) ("[C]ontention interrogatories often are most-appropriate toward the close of discovery, or even after the close of discovery, to eliminate the possibility that [the responding party] has not yet had time to gather the information to support its claim [or defense]."); *B. Braun Med. Inc. v. Abbott Laboratories*, 155 F.R.D. 525, 527 (E.D. Pa. 1994) (explaining that "[c]ontention interrogatories ask a party . . . to take a position, and explain or defend that position, with respect to how the law applies to facts" and that "courts may defer them until a later stage of discovery" because "if Defendants are forced to respond, they may have to articulate theories of their case not yet fully developed"). After discovery and in advance of trial, the Parties may revisit whether any agreement or stipulation as to potential liability of one or more Defendants is warranted.

IV. Bellwether Selection, Discovery, and Trial

Attached hereto as Exhibit A is a proposed Case Management Order regarding Bellwether Selection, Discovery, and Trial. The parties have agreed to the great majority of the CMO, but disputes remain as to some issues in Section V. The parties' positions regarding those disputes are set forth below.

A. Plaintiffs' Position

1. Consolidated Trials

The same common questions of fact that supported consolidated pretrial proceedings, *see* 28 U.S.C. § 1407(a), support consolidated bellwether trials, *see* Fed. R. Civ. P. 42(a)(1). Consistent with the purpose of this MDL, consolidated trials would "promote the just and efficient conduct of such actions." *See* 28 U.S.C. § 1407(a); *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *3 (N.D. Ga. Mar. 3, 2010). Indeed, MDL courts are "urged to make good use of Rule 42(a) in order to expedite the trial and eliminate unnecessary repetition." *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1314 (11th Cir. 2017). The "substantial savings of time and

money that consolidation offers" is a boon to "both plaintiffs and defendants," not to mention the judiciary and jury. *Campbell v. Bos. Sci. Corp.*, 882 F.3d 70, 76 (4th Cir. 2018). These efficiencies are particularly meaningful here given the Court's intention "to resolve this MDL within 3 years." Doc. 7 at 4; *see* David F. Herr, *Manual for Complex Litigation* § 22.93 (4th ed. 2023) (stating that "consolidated trials" can "achieve greater efficiency and expedition in resolving mass tort cases"). Even Defendants' caselaw recommends consolidating cases involving "the same medical device." *See, e.g.*, *McCoy v. Biomet Orthopedics, LLC*, 2019 WL 6324558, at *7-8 (D. Md. Nov. 25, 2019).

Defendants aver that "few MDLs" have consolidated cases for bellwether trials. *See infra* at 34. But not a single one of their unpublished cases—*Leeds*, *Coleman*, *Taylor*, *Johnson*, *McCoy*, *Barraza*,[10] or *Crabtree*—involved MDL bellwether trials. The only other "authority" that defense counsel cites—an unvetted pamphlet penned by their like-minded brethren, *infra* at 34—is unsurprisingly one-sided, omitting cases old and new that were consolidated for trial. *See, e.g.*, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2021 WL 2783898, at *1-2 (N.D. Fla. July 2, 2021); *In re Syngenta AG MIR 162 Corn Litig.*, 2017 WL 2876767, at *4 (D. Kan. July 6, 2017); *In re Mentor Corp.*, 2010 WL 797273, at *4; *In re Air Crash Disaster on Nov. 15, 1987*, 720 F. Supp. 1455, 1461 (D. Colo. 1988). The inescapable truth is that consolidation is "frequently" ordered in MDLs and cases involving "a common product." *See, e.g.*, 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2384 (3d. ed. 1998) (collecting cases).

Defendants' "gloomy, 'the sky is falling' forecast" on consolidation, *In re Mentor Corp.*, 2010 WL 797273, at *4, ignores the reality that any potential prejudice and confusion can be remedied through jury instructions and verdict forms, *e.g.*, *Eghnayem*, 873 F.3d at 1315; *Campbell*, 882 F.3d at 74-75; *see also United States v. Stone*, 9 F.3d

[10] Defendants tout this Court's decision in *Barraza*, *see infra* at 33, but certification of a class action is "chalk and cheese" compared to consolidation of MDL cases for trial. *See Barraza v. C. R. Bard Inc.*, 322 F.R.D. 369, 373 (D. Ariz. 2017).

934, 938 (11th Cir. 1993) ("Few tenets are more fundamental to our jury trial system than the presumption that juries obey the court's instructions."). Defendants also surmise that different state laws preclude consolidation, but they misapprehend Rule 42's disjunctive language. *See* Fed. R. Civ. P. 42(a) (requiring "a common question of law *or* fact") (emphasis added).

If the Court harbors any doubts about ordering consolidation at this nascent stage, Plaintiffs request the opportunity to brief the issue during the bellwether process. When submitting their Bellwether Group 1 proposal on March 10, 2025, Plaintiffs could simultaneously move to consolidate some but not all cases depending on their commonalities. *See, e.g.*, *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, 2016 WL 10719395, at *1-2 (N.D. Tex. Jan. 8, 2016) (consolidating for trial five of "ten cases [that] were initially selected as bellwether cases"); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2021 WL 773018, at *2 (N.D. Fla. Jan. 5, 2021) (consolidating three of five cases for trial and trying remaining two individually).

2. Number of Bellwether Cases

Plaintiffs recommend a modest 10 bellwether cases. *Cf., e.g.*, *In re 3M*, 2022 WL 17853203, at *2 (19 bellwether cases). Adding a few cases beyond the six bellwethers in *IVC* adds another layer of insurance against attrition—a possibility that Defendants not only recognize, *see infra* at 31-32, but actually hope to achieve through statutes of limitation. Even assuming only two cases fall out of the pool, as in *IVC*, Defendants' proposal for seven cases would yield just five data points from five single-plaintiff trials. Plaintiffs' proposal for 10 cases, in contrast, could yield eight data points from the same number of trials (e.g., four single-plaintiff trials and one four-plaintiff trial; or three single-plaintiff trials, one two-plaintiff trial, and one three-plaintiff trial) or even fewer trials (e.g., two single-plaintiff trials and two three-plaintiff trials). By extending trial time by merely a few more days for each additional plaintiff, the parties and the Court could increase data by over 50% (from five to eight verdicts) to drive settlement.

Despite their team of "over 1,000 attorneys,"[11] Defendants bemoan the "undu[e] burden[]" of working up three more bellwethers, *see infra* at 32, even though much of the workup will occur in Discovery Group 1, *see IVC*, Doc. 4866 at 1-2. The added labor of taking a few additional case-specific depositions in three cases, *see IVC*, Doc. 5883 at 1-4, is offset by the substantial time and resources saved by multi-plaintiff trials, *see In re Joint E. & S. Dists. Asbestos Litig.*, 125 F.R.D. 60, 63 (E.D.N.Y. 1989) ("When six to eight claims are consolidated for trial, [common evidence] can be presented once rather than six to eight times in individual trials."). And more cases in the pool also permits more flexibility in selecting representative trials (single- or multi-plaintiff). Preserving that flexibility is critical as the parties and the Court cannot yet anticipate the docket's composition and which commonalities could be consolidated. *Cf. IVC*, Doc. 5770 at 1-2. Ultimately, more bellwether cases mean more verdicts, and more verdicts mean more information to "facilitate a global settlement." *See IVC*, Doc. 8871 at 1-2. Absent a global settlement, preparing three more cases for trial will simulate remand trials—some of which will surely be consolidated given the size of this MDL.

To the extent the Court is unsure about the appropriate number of bellwether cases, there is no need to decide on the number right now. When the parties submit their proposals on March 10, 2025, they can also address the appropriate number.

B. Defendants' Position

1. Number of Bellwether Cases

In the Bard IVC Filter MDL, the Court selected six bellwether cases. Here, Defendants proposed that the parties work toward developing a pool of seven bellwether cases. Defendants' reasoning is based on the fact that two cases eventually dropped out of the Filter MDL bellwether pool, one based on a summary judgment ruling and one based on a motion filed by Plaintiffs. In Defendants' view, adding one additional bellwether case to the group would provide some protection for the Court and the parties

[11] *E.g.*, https://www.nelsonmullins.com/culture.

in the event that one or more cases dropped out of the pool (for whatever reason) in this MDL. Plaintiffs' counsel do not take issue with that position, but advocate for the selection of ten bellwether cases. They appear to be doing so based on a desire to have sufficient bellwether cases for the consolidated trials they are requesting. Defendants, however, strongly oppose the notion of consolidated trials, and hence, do not believe that ten bellwether cases are needed. Even if the Court were to contemplate consolidation over Defendants' objection, Defendants still believe that ten bellwether cases (with the associated development of case-specific experts and the resulting motions practice) would be unduly burdensome for both the Court and the parties. Additionally, the work necessary to prepare that many cases would make it more difficult to complete all discovery and work on the cases within the time frame envisioned by the Court.

2. Consolidated Trials

Defendants strongly object to consolidated bellwether trials. This Court noted that it intended "to try four or five bellwether trials," and then "wrap up the MDL" by September 2026. Sept. 18, 2023 Hr'g Tr. 6:2-3; 8:24-25 (Doc. 53). The goal is not "'to try large numbers of bellwether trials' before the conclusion of this MDL," as Plaintiffs contend, but rather to produce "representative verdicts." Manual for Complex Litigation (Fourth) § 22.315. Specifically, "[t]he purpose of the bellwether trials is to give the parties insight into how their claims and defenses are received by juries, in the hope of helping facilitate a global settlement before the cases are remanded to their original jurisdictions." CMO 28 at 1-2, *In re Bard IVC Filter Prods. Liab. Litig.*, 2:15-md-2641, Doc. 8871 (D. Ariz. Nov. 21, 2017). "They enable courts and juries 'to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action.'" *Adams v. Deva Concepts, LLC*, No. 1:20-CV-9056-GHW, 2023 WL 6518771, at *2 (S.D.N.Y. Oct. 4, 2023) (citation omitted).

"Consolidation can tilt the playing field, undermining the goal of producing representative verdicts." Bolch Judicial Institute, Duke Law School, *Guidelines and Best*

Practices for Large and Mass-Tort MDLs (2d ed. 2018), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1004&context=bolch. This is because "if the unique details of each case were consolidated during a single trial, 'the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice,'" *Leeds v. Matrixx Initiatives, Inc.*, No. 2:10-CV-199DAK, 2012 U.S. Dist. LEXIS 47279, at *7-8 (D. Utah Apr. 2, 2012) (citation omitted), "created by the parade of [plaintiffs' witnesses] and the possibility of factual and legal confusion on the part of the jury." *Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1297 (9th Cir. 2000). This is especially true where the cases "involve the application of different, and likely distinct, state law, different [devices], different implanting and treating physicians, and a variety of alleged device failures," which will lead to untenable evidentiary problems. *Taylor v. C R Bard Inc.*, No. 5:19-CV-469-BR, 2020 WL 4805436, at *2 (E.D.N.C. Aug. 17, 2020). "A cumulative presentation of the evidence would risk that the jury would resolve the confusion by considering all the testimony to pertain to all the claims, despite any limiting instructions," and risk that the "jury would be unduly influenced by the facts of one case and respond in [all] cases accordingly." *Johnson v. Adv. Bionics, LLC*, No. 2:08-cv-02376-JPM, 2011 WL 1323883, at *5-6 (W.D. Tenn. April 4, 2011); *McCoy v. Biomet Orthopedics, LLC*, No. CV ELH-12-1436, 2019 WL 6324558, at *5–8 (D. Md. Nov. 25, 2019) ("[A] jury may be tempted to conclude that, in light of plaintiffs' similar complaints, [multiple] devices are defective. In other words, the jury may impute the flaws of one implant to the other, rending that device 'guilty by association.'").

Indeed, it was these very differences that persuaded this Court to decline to certify the *Barraza* class action where plaintiffs proposed to hold a single consolidated trial involving plaintiffs with different filters, implanted by different doctors, and from different states, implicating different state law. *See Barraza v. C. R. Bard Inc.*, 322 F.R.D. 369, 381 (D. Ariz. 2017) (acknowledging that "filter-by-filter inquiries into design and manufacturing defects will be required; at each step, the state of the art must

be examined; failures to disclose will vary from year to year and filter to filter; the knowledge possessed by each [plaintiffs'] physician must be established to resolve the learned intermediary defense; and each [plaintiffs'] knowledge of the risk and response to suggestions of removal … will be needed to resolve defenses of assumption of the risk and contributory or comparative negligence").

Further, "courts have recognized that where a group of cases is being ***tried for the first time***," as here, "the interests of efficiency would also be served by letting the cases proceed separately, as separate trials will help define the exact factual and legal contours of the claims and defenses and may allow the parties to better assess the value and strength of the remaining matters." *Crabtree v. Livanova, PLC*, No. CV 18-4588, 2022 WL 19517407, at *4 (E.D. La. Mar. 30, 2022) (cleaned up) (emphasis added). For that reason, few MDLs – including the Bard IVC Filter MDL – have consolidated cases for bellwether trials. *See* John Beisner, Jessica Miller & Nina Rose, et al., *Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings*, U.S. Chamber Institute for Legal Reform, at 2 (Oct. 2019), available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/Contending_with_Bellwether_and_Multi-Plaintiff_Trials_in_MDL_Proceedings.pdf (finding from review of the dockets of 135 MDL proceedings active between 2008 and 2019 that just 7 of 73 bellwether trials involved more than one plaintiff).

V. Affirmative Disclosures (Profile Forms)

Attached hereto as Exhibit B is a proposed Case Management Order regarding Profile Forms; Exhibit C is a proposed Plaintiff Profile Form ("PPF"), and Exhibit D is a proposed Defendants' Profile Form ("DPF"). The parties have agreed to the CMO and PPF, but a dispute remains as to Section V of the DPF. The parties' positions regarding that dispute are set forth below.

A. Plaintiffs' Position

The sole remaining dispute relates to Section V of Plaintiffs' proposed DPF (Exhibit D). That section relates to both direct and successor liability, asking Defendants

to identify which of its corporate entities have potential liability for Plaintiff's claims (given the product at issue, time of manufacture, etc.). Defendants' position is that it is simply too difficult a task to determine which corporate entities may be liable in a case based on the limited information provided in a PPF—conveniently ignoring that Defendants had a hand in drafting the PPF. Defendants also claim hardship due to the various entities' evolving roles in the production and distribution of the devices, but their argument is unconvincing for several reasons.

First, Defendants raise no objection to Section IV.3 of the DPF, which requires them to provide the date and location of manufacture of the device at issue in the particular case. At the time Defendants provide a response to this section of the DPF, they should—at a minimum—be able to disclose the entity that owned and operated the production facility and the entities that were party to a manufacturing contract with the production facility.

Second, Defendants raise no objection to the DPF's requirement to produce the Device History Record ("DHR") for the device at issue in the case. Pursuant to FDA regulations, the DHR must contain, *inter alia*, "[t]he acceptance records which demonstrate the device is manufactured in accordance with the [Device Master Record]." 21 C.F.R. § 820.184. In turn, the Device Master Record ("DMR"), that a manufacturer is required to maintain, must include:

> (a) Device specifications including appropriate drawings, composition, formulation, component specifications, and software specifications;
>
> (b) Production process specifications including the appropriate equipment specifications, production methods, production procedures, and production environment specifications;
>
> (c) Quality assurance procedures and specifications including acceptance criteria and the quality assurance equipment to be used;
>
> (d) Packaging and labeling specifications, including methods and processes used; and
>
> (e) Installation, maintenance, and servicing procedures and methods.

21 C.F.R. § 820.181. Defendants' production of the DHR will allow them to easily determine which entity was the holder of the DMR at the time of production and which

entities were responsible for maintaining the specifications and procedures in the DMR at the time of production.

Lastly, owners or operators of establishments involved in the production and distribution of medical devices intended for use in the United States are required to register such establishments annually with the FDA. *See* 21 C.F.R. § 807.3 *et seq.* For every IPC, then, Defendants were obligated to register any entity that, for example: "[i]nitiates or develops specifications for a device that is to be manufactured by a second party" or "[s]terilizes or otherwise makes a device for or on behalf of a specifications developer or any other person[.]" 21 C.F.R. § 807.20(a)(1)-(2). Assuming Defendants have complied with these requirements, they would simply have to consult the annual establishment registration submission for the year of manufacture of the device at issue.

In sum, identifying the entities that engaged in the various steps of designing, manufacturing, labeling, and distributing the IPCs—and who would have potential liability as a result—is far from the protean concept Defendants claim, and the investigation Defendants would have to undertake in order to provide the disclosures in Section V of Plaintiffs' proposed DPF is far from burdensome. Plaintiffs have also expressed a willingness to remove these questions from the DPF after Defendants have provided a satisfactory response to the successor-liability question. *See supra* at 19-20. Until they do, the Court should enter an Order adopting Plaintiffs' proposed DPF.

B. Defendants' Position

Defendants object to the three questions set forth in Section V of the draft profile form. The three questions seek to have Defendants provide definitive statements—at the outset of a case and with only skeletal knowledge about a claim—as to which corporate entities are properly named in the lawsuit, which have "potential liability," and which have "potential financial liability."

The fact that Defendants need additional information to be able to respond to such questions is not surprising, as Plaintiffs mistakenly claim. Both Plaintiffs and Defendants have a great deal of investigation to accomplish in order to understand the

respective roles of the various entities at a given point in time. The challenge is exacerbated by the fact that both Bard Access Systems and Bard Peripheral Vascular have had roles with these devices at various points in time, and those roles have changed and evolved. Additionally, various components of the devices are manufactured at different locations. The parties are going to have to explore those roles together during common issue discovery before any determinations can be made as to which entities are potentially liable in a given case. It is simply not possible to provide the sort of definitive statements that Plaintiffs are seeking at this premature juncture.

Finally, none of the technical FDA regulations cited by the Plaintiffs alter that fact. Identifying which entity (of obviously related entities) maintains a Device Master Record or which entity has registered an establishment may be factors that Plaintiffs will argue in determining which entities have potential tort liability in a given case, but those factors are by no means determinative. As previously noted, the involvement of these entities with implantable port catheters has evolved over time, and during some periods of time, may have even been overlapping. Common issue discovery will clarify those roles.

VI. Scope of Discovery and Common Fact and Expert Discovery

Attached hereto as Exhibit E is a proposed Case Management Order regarding Common Fact and Expert Discovery Schedule.

The parties have submitted an agreed-upon proposed CMO for bellwether selection, which includes the procedure for discovery in the Initial Plaintiff Pool, although the parties agree that procedures for case-specific discovery have not yet been fully negotiated.

The parties have also submitted an agreed-upon proposed CMO setting forth a schedule for common fact and expert discovery. The parties have agreed to negotiate a deadline by which Defendants shall substantially complete production of documents and ESI. To facilitate agreement on what the substantial-completion date should be, the parties will continue negotiations after Plaintiffs serve their initial written discovery

requests so that Defendants may more fully understand the scope of what Plaintiffs seek as well as what will be required of Defendants for compliance. If the parties cannot reach agreement, the parties agree to present the issue to the Court on December 22.

Regarding the parameters of general fact and expert discovery, broadly speaking, the parties have agreed that the Federal Rules shall apply, with limited exceptions as defined herein, as well as in other protocols negotiated by the parties and by this Court's orders. Some of those exceptions, as well as other miscellaneous discovery issues that have been discussed and agreed upon, include the following:

- **Initial Disclosures:** The parties have agreed to forego Rule 26(a) Initial Disclosures contingent on Defendants' production of relevant insurance information, if any, on or before the disclosure deadline.
- **Number of Interrogatories:** Plaintiffs expressed a concern that the Federal Rules may not provide enough interrogatories to complete common fact discovery unless Defendants would commit to answer each interrogatory with respect to each product design at issue to the extent that the interrogatory necessitates different answers for each product design. For example, Plaintiffs will undoubtedly seek information about which individuals were part of the team responsible for the design of IPCs. There are currently 25 IPC designs at issue in the Master Complaint. To the extent that different individuals were responsible for different product designs, Plaintiff will seek the identity of all of those individuals with information regarding the alleged defects. While Plaintiffs have not yet shared their interrogatories, Defendants agree in principle to respond to Plaintiffs' interrogatories for the products within scope of the litigation, which Defendants note is a seminal issue currently before the Court. Defendants do not waive their rights to assert objections to the interrogatories, and, to the extent Defendants believe an interrogatory is too burdensome, the parties will meet and confer regarding such burden. If resolution cannot be reached, Defendants shall request a call with the Court

for resolution as set forth in CMO 2.

- **Custodians & Search Terms:** The parties will meet and confer regarding Defendants' relevant Custodians and Non-Custodial Sources as well as the search methodologies that Defendants determine to apply to these Sources once Plaintiffs serve their document requests and the parties receive guidance from the Court on the Master Complaint and successor-liability issues.
- **Deposition Protocol:** The parties are negotiating a proposed deposition protocol that will increase the number of depositions permitted by the Federal Rules. Either an agreed, proposed protocol or remaining disputes regarding the proposed protocol will be submitted to the Court on November 22.
- **Available Production & Depositions:** Defendants have committed to meet and confer with Plaintiffs once discovery opens regarding Defendants' discovery in prior IPC product-liability litigation and the scope of what Defendants will reproduce in this MDL. Additionally, the parties will meet and confer regarding other cases concerning IPCs in which Defendants were parties, whether specific information in those cases is relevant to this MDL, and Defendants' ability to produce that information for use in this MDL. Finally, there are two broader issues that may affect the course of discovery. Those issues are 1) discovery related to port-body or peritoneal-port allegations in the Master Complaint, and 2) discovery related to successor liability and veil piercing.

With respect to port-body and peritoneal-port discovery, Defendants' position is that they will provide discovery relating to the allegations set forth in the JPML's transfer order; that is, discovery related to whether Defendants' implantable vascular access devices are defective based on the concentration of barium sulfate in the catheter component of the devices. To the extent Plaintiffs' discovery requests seek production of documents or information that relate to allegations involving a port body or a peritoneal port, Defendants will object to those requests until the issue is resolved by the

Court. Plaintiffs point out that, if common fact discovery moves forward while this Court or the JPML are deciding the issue, it may necessitate that some ESI and documents be re-collected and that some depositions be re-taken, limited to the port-body or peritoneal-port discovery.

With respect to successor liability and veil piercing, Defendants' position, as set forth in Section III, is that discovery on the issue should be staggered. Plaintiffs disagree. Relatedly, Plaintiffs may seek additional interrogatories beyond the twenty-five permitted under Rule 33(a) because of the need to investigate successor liability and veil piercing. Defendants *may* consent to an increase in the number of interrogatories upon receipt of (1) additional information from Plaintiffs regarding their proposed topics and handling of subparts, and (2) guidance from the Court on the Master Complaint and successor liability issues. The Parties have agreed to meet and confer regarding these issues pending the Court's decision on related matters. Plaintiffs reserve their right to seek leave to serve additional interrogatories.

VII. Common Document Depository

The parties have agreed to use MDL Centrality for the submission and processing of profile forms, fact sheets, and deficiency letters, as set forth in the proposed Case Management Orders.

Dated: November 9, 2023

Respectfully submitted,

/s/ Michael A. Sacchet
Michael A. Sacchet (MN #0016949)
(Admitted Pro Hac Vice)
Ciresi Conlin LLP
225 S. 6th St., Ste. 4600
Minneapolis, MN 55402
Phone: (612) 361-8220
Fax: (612) 314-4760
Email: mas@ciresiconlin.com

/s/ Adam M. Evans
Adam M. Evans (MO #60895)
(Admitted Pro Hac Vice)

McCARTER & ENGLISH, LLP

/s/ Edward J. Fanning, Jr.
Edward J. Fanning, Jr.
(Admitted Pro Hac Vice)
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
Phone: (973) 639-7927
Fax: (973) 297-3868
efanning@mccarter.com

Dickerson Oxton, LLC
1100 Main St., Ste. 2550
Kansas City, MO 64105
Phone: (816) 268-1960
Fax: (816) 268-1965
Email: aevans@dickersonoxton.com

/s/ Rebecca L. Phillips
Rebecca L. Phillips (TX #24079136)
(Admitted Pro Hac Vice)
Lanier Law Firm
10940 W. Sam Houston Pkwy. N., Ste. 100
Houston, TX 77064
Phone: (713) 659-5200
Fax: (713) 659-2204
Email: rebecca.phillips@lanierlawfirm.com

Co-Lead Counsel for Plaintiffs

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ Richard B. North, Jr.
Richard B. North, Jr.
(Admitted Pro Hac Vice)
Atlantic Station
201 17th St. NW, Ste. 1700
Atlanta, GA 30363
Phone: (404) 322-6155
Fax: (404) 322-6050
richard.north@nelsonmullins.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard Implanted Port Catheter Products Liability Litigation	MDL No. 3081 **[PROPOSED] CASE MANAGEMENT ORDER NO. ___** (Bellwether Selection)

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

I. Initial Plaintiff Pool

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

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

II. PFS/DFS Group 1

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

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

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

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

Defendants' counsel shall show cause why a Lexecon waiver is not being made in that particular case. Any party required to show cause must appear in person or by telephone before the Court to explain why a Lexecon Waiver may not be made in the particular case.

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

III. Plaintiff Fact Sheets and Defendants' Fact Sheets

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

A. Timing of Service of Fact Sheets

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

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

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

B. Completion of Fact Sheets

A completed PFS and DFS shall be considered interrogatory answers under Fed. R. Civ. P. 33, responses to requests for production under Fed. R. Civ. P. 34, and will be governed by the standards applicable to written discovery under Fed. R. Civ. P. 26, 33, 34 and 37. The PFS and DFS questions and document requests shall be answered without objection. This section does not prohibit a party from withholding or redacting information

based on a recognized privilege; however, if information is withheld or redacted, the party so withholding or redacting information shall contemporaneously provide opposing party with a privilege log.

The parties will provide a PFS or DFS that is substantially complete in all respects. "Substantially complete in all respects" requires that:

a. Every question in the PFS or DFS be answered, even if a party can only answer the question in good faith by indicating "not applicable" or "I don't know";

b. The parties shall provide all medical records relating to the Plaintiff at issue and the alleged damages in their possession or the possession of their attorneys at the time of completing the Fact Sheets, to the extent not previously provided with the Profile Forms. The parties will later submit another proposed case management order (by no later than July 1, 2024) governing the collection and production of medical records subsequently obtained from health care providers with the medical authorizations provided with the Fact Sheets.

c. Plaintiffs shall provide electronically signed copies of the requested records authorizations accompanying the PFS form;

d. The parties will produce the documents requested in the PFS and DFS, or provide a statement certifying that there are no responsive documents; and

e. Plaintiffs shall sign the PFS and provide verification that the information contained therein is true and correct to the best of Plaintiff's knowledge, information, and belief, formed after due diligence and reasonable inquiry. If a Plaintiff is suing in a representative or derivative capacity, the PFS shall be completed by the person with the legal authority to represent the estate or the person under legal disability. A Plaintiff's spouse with a claim for loss of consortium shall

also sign the PFS, attesting that the responses made to the loss-of-consortium questions in the PFS are true and correct to the best of his or her knowledge, information, and belief, formed after due diligence and reasonable inquiry.

C. Fact-Sheet Deficiencies

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

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

D. Records Discovery in PFS/DFS Group 1

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

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

IV. Discovery Group 1

A. Selection Process

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

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

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

V. Bellwether Group 1

A. Selection Process

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

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

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

[PLAINTIFFS' PROPOSAL] Because all ten (10) cases in **Bellwether Group 1** will involve "common questions of fact," Doc. 1 at 1, the Court intends to consolidate some but not all of those cases for trial, *see* Fed. R. Civ. P. 42(a); *see also* 9A Wright & Miller, Federal Prac. & Proc. § 2384 (3d. ed. 1998) ("[A]ctions by different plaintiffs arising out of … the use of a common product that is alleged to be defective in some respect, frequently are ordered consolidated under Rule 42(a)."). Given the Court's "limited time and resources

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[1] **[PLAINTIFFS' PROPOSAL]** ten (10)
[DEFENDANTS' PROPOSAL] seven (7)

to try large numbers of bellwether trials" before the conclusion of this MDL, "consolidation of multiple cases for trial in the MDL setting would provide the parties with an opportunity to obtain results for multiple claims without burdening the [C]ourt or the parties with the substantial costs of multiple separate trials." *See, e.g.*, *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *3 (M.D. Ga. Mar. 3, 2010). Following selection of the ten (10) cases in **Bellwether Group 1**, the parties will meet and confer in an effort to reach agreement on which cases should be consolidated for trial. If the parties are unable to reach agreement, the parties shall submit to the Court via email to chamber at a date to be determined, their proposals regarding consolidation. Within seven (7) business days of that submission, the parties may submit a response to the opposing party's proposal.

[DEFENDANTS' PROPOSAL] *See* Joint Memorandum Re: Issues to Be Addressed at November 16, 2023 Case Management Conference.

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

1. Should Plaintiffs withdraw, settle, or dismiss a case from **Discovery Group 1**, such case will be replaced by a case from **PFS/DFS Group 1**. The party that originally designated the eliminated case shall select the replacement. However, if the eliminated case was one of the cases chosen by the Court, the Court will select the substitute cases from a list of four (4) cases nominated by the parties (two from Plaintiffs and two from Defendants).

2. Should Plaintiffs withdraw, settle, or dismiss a case from **Bellwether Group 1**, such case will be replaced by a case from **Discovery Group 1**. The Court will select the substitute case from a list of two (2) cases nominated by the parties (one from Plaintiffs and one from Defendants).

VI. Future Discovery and Bellwether Groups

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

Dated this _____ day of _____, 2023.

David G. Campbell

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard Implanted Port Catheter Products Liability Litigation	MDL No. 3081 **[PROPOSED] CASE MANAGEMENT ORDER NO. ___** (Profile Forms)

The Court enters this Case Management Order No. ___ regarding the process for the use of Plaintiff Profile Forms and Defendants' Profile Forms.

The parties have agreed upon the use of an abbreviated Plaintiff Profile Form ("PPF") (the PPF approved by the Court is Exhibit 1 attached to this Order) and an abbreviated Defendants' Profile Form ("DPF") (the DPF approved by the Court is Exhibit 2 attached to this Order). Following the procedure below, the PPF and DPF shall be completed in each currently pending case and in all cases that become a part of this MDL by virtue of being filed in, removed to, or transferred to this Court on or after the date of this Order.

For any case filed in, removed to, or transferred to MDL 3081 on or before the date of this Order, the Plaintiff shall submit a completed PPF and all accompanying records to Defendants within 45 days of the date of this Order.

For any case filed in, removed to, or transferred to MDL 3081 after the date of this Order, the Plaintiff shall submit a completed PPF and all accompanying records to Defendants within 30 days of filing the Short-Form Complaint.

Plaintiffs and Defendants shall use the MDL Centrality online system accessible at www.mdlcentrality.com/BardPort to complete and serve Plaintiff Profile Forms and Defendants' Profile Forms, as follows:

(a) Each Plaintiff shall, by counsel or as *pro se*, establish a secure online portal with the MDL Centrality online system and obtain authorized usernames and secure login passwords to permit use of MDL Centrality by such counsel or Plaintiff. Except as set forth herein, counsel for a Plaintiff or each *pro se* Plaintiff shall be permitted to view, search, and download on MDL Centrality only those materials submitted by that Plaintiff and by Defendants relating to that Plaintiff only, and not materials submitted by or relating to other Plaintiffs.

(b) The Defendants shall establish a secure online portal with the MDL Centrality online system and obtain authorized usernames and secure login passwords to permit use of MDL Centrality by Defendants' counsel.

(c) Plaintiffs' Co-Lead Counsel and attorney designees in the Plaintiffs' Leadership Committee ("PLC"), as appointed by Plaintiffs' Co-Lead Counsel, shall have access to and be able to view, search, and download all materials submitted by all Plaintiffs and by all Defendants.

(d) Each Plaintiff and Defendants shall use MDL Centrality to obtain, complete, or upload data and serve the appropriate Profile Form online (including the upload of PDFs of documents required to be produced with the Profile Forms).

(f) Service of a completed Profile Form shall be deemed to occur when the submitting party has performed each of the steps required by MDL Centrality to execute the online submission of the materials and the submitting party has received confirmation on screen that the materials have been successfully submitted. Immediately upon submission of a PPF by a Plaintiff, MDL Centrality shall send notification of the submission to Defendants at ppf-pfs@nelsonmullins.com and ppf-pfs@mccarter.com. Immediately upon submission of a DPF by Defendants, MDL Centrality shall send notification of the submission to the Plaintiff's

counsel of record at the email address(es) provided upon registration for MDL Centrality, with a copy to the PLC by operation of an email distribution list provided to MDL Centrality by Plaintiffs' Co-Lead Counsel.

(g) If a party must amend a previously served Profile Form, all subsequent versions must be named accordingly ("First Amended Plaintiff Profile Form," "Second Amended Plaintiff Profile Form," etc.), and all iterations of a party's Profile Form must remain available and accessible to all parties to a case through trial, appeal (if any), or other resolution of the litigation. Immediately upon submission of an amended PPF, MDL Centrality shall send notification of the submission to Defendants at ppf-pfs@nelsonmullins.com and ppf-pfs@mccarter.com. Immediately upon submission of an amended DPF, MDL Centrality shall send notification of the submission to the Plaintiff's counsel of record at the email address(es) provided upon registration for MDL Centrality, with a copy to the PLC by operation of an email distribution list provided to MDL Centrality by Plaintiffs' Co-Lead Counsel.

(h) The Court may establish a secure online portal with the MDL Centrality online system and obtain an authorized username and secure login password to permit use of MDL Centrality by the Court.

The use of MDL Centrality by any party shall not alter or otherwise waive or affect any attorney-client privilege or work-product doctrine protection otherwise available that would otherwise apply to any reports run by MDL Centrality for a party. Any notations placed on materials, comments entered, or documents stored or uploaded to MDL Centrality by a user shall be considered to be the work product of such user unless and until the material is served on or purposefully disclosed to the opposing party through the use of MDL Centrality or otherwise. Pursuant to Rule 502(d) of the Federal Rules of Evidence, this Order with respect to privilege and work-product doctrine protection applies to any other federal or state proceeding.

Each Plaintiff is required to provide Defendants with a PPF that is complete in all respects, answering every question in the PPF and producing all accompanying records, even if a Plaintiff can answer the question in good faith only by indicating "not applicable," "N/A," or "unknown." The PPF shall be signed by the Plaintiff under penalty of perjury. If a Plaintiff is suing in a representative capacity, the PPF shall be completed by the person with legal authority to represent the estate or the person under legal disability. A Plaintiff's spouse with a claim for loss of consortium shall also sign the PPF under penalty of perjury.

A completed PPF shall be considered interrogatory responses under Fed. R. Civ. P. 33 and responses to requests for production under Fed. R. Civ. P. 34 and will be governed by the standards applicable to written discovery under Federal Rules 26 and 37. The questions and requests for documents in the PPF shall be answered without objections. This section does not prevent a Plaintiff from redacting information in produced documents based on a recognized privilege. However, if such information is redacted or withheld on the basis of privilege, Plaintiff shall provide Defendants with a privilege log that complies with Fed. R. Civ. P. 26(b)(5) simultaneously with the submission of the PPF.

If a Plaintiff does not submit a PPF within the time specified in this Order, Defendants shall send a communication through MDL Centrality stating that Defendants may move to dismiss if a complete PPF and the accompanying records are not received within 21 days. Immediately upon submission of the communication, MDL Centrality shall send notification of the submission to the Plaintiff's counsel of record at the email address(es) provided upon registration for MDL Centrality, with a copy to the PLC by operation of an email distribution list provided to MDL Centrality by Plaintiffs' Co-Lead Counsel. If no PPF is received within 21 days of the date of the communication being sent and Plaintiff fails to contact Defendants' counsel to explain why further time is needed to complete the PPF, no further contact is necessary, and Defendants may immediately move to dismiss the Plaintiff's case. Absent a showing of good cause for the failure to timely submit a fully completed PPF, the Plaintiff's case will be dismissed. Defendants shall be entitled to their reasonable attorneys' fees and expenses incurred in filing the motion to dismiss, unless the

Court finds that the failure to timely produce the completed PPF was substantially justified. No Plaintiff shall receive more than one extension to provide a completed PPF, absent written consent from Defendants.

If a Plaintiff serves a PPF that is not complete (including accompanying records requested), Defendants shall have 15 days from service of the incomplete PPF to identify deficiencies. Defendants' counsel shall send a deficiency letter through MDL Centrality identifying the alleged deficiencies. Immediately upon submission of the letter, MDL Centrality shall send notification of the submission to the Plaintiff's counsel of record at the email address(es) provided upon registration for MDL Centrality, with a copy to the PLC by operation of an email distribution list provided to MDL Centrality by Plaintiffs' Co-Lead Counsel. The Plaintiff shall have 15 days from the date of the email to serve a complete PPF. No further contact from Defendants is required. If the Plaintiff fails to resolve the deficiencies and serve a complete PPF within the time allowed or fails to contact Defendants' counsel to explain why further time is needed to complete the PPF, Defendants may immediately move to compel a fully complete PPF and seek other relief provided for in Fed. R. Civ. P. 37(b). If a completed PPF is received after Defendants file the motion, or if the Court grants Defendants' motion, Defendants shall be entitled to their reasonable attorneys' fees and expenses incurred in filing the motion, unless the Court finds that the failure to comply before the motion was filed was substantially justified. No Plaintiff shall receive more than one extension to provide a fully completed PPF, absent written consent from Defendants.

Within 45 days of receipt of a complete PPF, including accompanying records, the Defendants shall submit a completed DPF to the Plaintiff. The completed DPF shall be sent via MDL Centrality. Immediately upon submission of the DPF, MDL Centrality shall send notification of the submission to the Plaintiff's counsel of record at the email address(es) provided upon registration for MDL Centrality, with a copy to the PLC by operation of an email distribution list provided to MDL Centrality by Plaintiffs' Co-Lead Counsel. The parties agree that Defendants cannot comply with disclosure requirements of the DPF

pertaining to manufacturing information and the Device History Record ("DHR") until the Plaintiff provides proof of the product code and lot number for the device at issue in the Plaintiff's case. The parties further agree that a Plaintiff shall not initiate the DPF deficiency processes described *infra* as to those required disclosures of the DPF until 45 days after such Plaintiff has provided Defendants with a completed PPF that sets forth the product code and lot number for the device at issue in such case.

A completed DPF shall be considered interrogatory responses under Fed. R. Civ. P. 33 and responses to requests for production under Fed. R. Civ. P. 34 and will be governed by the standards applicable to written discovery under Federal Rules 26 and 37. The questions and requests for documents in the DPF shall be answered without objections. This section does not prevent Defendants from redacting or withholding information based on a recognized privilege. However, if such information is redacted or withheld on the basis of privilege, Defendants shall provide the Plaintiff with a privilege log that complies with Fed. R. Civ. P. 26(b)(5) simultaneously with the submission of the DPF.

If Defendants do not submit a DPF within the time specified in this Order, the Plaintiff's counsel and/or Plaintiffs' Co-Lead Counsel shall send a communication through MDL Centrality stating that the Plaintiff may move to compel if a substantially complete DPF is not received within 21 days. Immediately upon submission of the communication, MDL Centrality shall send notification of the submission to Defendants at portppf-pfs@nelsonmullins.com and portppf-pfs@mccarter.com. If no DPF is received within 21 days of the date of the email, the Plaintiff may immediately move to compel.

If Defendants serve a DPF that is not substantially complete, within 15 days of receipt of the DPF, the Plaintiff shall have 15 days from service of the incomplete DPF to identify deficiencies. The Plaintiff's counsel and/or Plaintiffs' Co-Lead Counsel shall send a deficiency letter through MDL Centrality identifying the alleged deficiencies. Immediately upon submission of the letter, MDL Centrality shall send notification of the submission to Defendants at portppf-pfs@nelsonmullins.com and portppf-pfs@mccarter.com. Defendants shall have 15 days from the date of the email to serve a

substantially complete DPF. If Defendants fail to serve a substantially complete DPF within the time allowed or fail to contact the Plaintiff's counsel to explain why further time is needed to substantially complete the DPF, the Plaintiff may immediately move to compel a substantially complete DPF and seek other relief as set forth in Fed. R. Civ. P. 37(b).

Dated this _____ day of _____, 2023.

_____

David G. Campbell
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL No. 3081
In Re Bard Implanted Port Catheter Products Liability Litigation

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In completing this **Plaintiff Profile Form**, you are under oath and must provide information that is true and correct to the best of your knowledge. The Plaintiff Profile Form shall be completed in accordance with the requirements set forth in the applicable Case Management Order.

1. CASE INFORMATION

Caption: _____ **Date:** _____

Docket No.: _____

Plaintiff's attorney name and contact information, including email:

_____

_____

_____

2. PLAINTIFF INFORMATION

Full legal name of Plaintiff/Decedent implanted with Bard Implanted Port Catheter Product ("Device"):

_____

Former name: _____

Address: _____

Date of birth: _____

Social security no. (last four digits only): _____

Occupation: _____

Spouse: _____

Is Spouse making a claim for loss of consortium?

☐ **Yes** ☐ **No**

Representative name, if applicable: _____

Representative relationship to Plaintiff/Decedent: _____

3. DEVICE INFORMATION

Name of Bard Implanted Port Catheter Product ("Device"): _____

_____

Model Number/Product Code: _____

Lot Number: _____

Date of implant: _____

Provide the medical record, your medical alert card, or other documentation showing your Device Product Code and Lot Number.

□ **Medical records attached**

□ **Medical alert card attached**

□ **Other documentation showing Product Code and Lot Number attached**

Please check all the reasons why you believe your Device was implanted:

□ **Blood draws**

□ **Blood transfusions**

□ **Chemotherapy delivery**

□ **Immunotherapy delivery**

□ **IV fluid delivery**

□ **IV antibiotics**

□ **Parenteral nutrition**

□ **Other – please describe below:**

_____

_____

Provide the name and address of the doctor who implanted the Device and the hospital/medical facility at which the Device was implanted:

Doctor: _____

Hospital/Medical Facility: _____

_____

Provide medical records for the implant of the Device.

□ **Medical Records attached**

***NOTE: If you are alleging injuries related to more than one Device, complete Sections 3-8 for each Device and attach additional pages as needed.**

4. FAILURE MODE ALLEGED

Please check all failure mode(s) that you allege apply to the Device and attach medical records that show the failure mode:

CATHETER-RELATED FAILURE MODES:

☐ **Catheter-related infection**

Type of infection: _____

☐ **Thrombosis in or around catheter**

☐ **Occlusion of the catheter**

☐ **Fracture of catheter without migration of a fragment**

☐ **Fracture of catheter with migration of a fragment to** _____ **(state location in your body)**

☐ **Other – state in detail:** _____

_____

☐ **None (not making a catheter-related claim)**

For each catheter-related complication above, state the date you were first diagnosed with such complication and state the name of the medical provider who diagnosed and/or treated the complication:

_____

_____

For each catheter-related complication referenced above, provide medical records relating to the first diagnosis of each complication.

☐ **Medical records attached**

PORT-BODY/RESERVOIR-RELATED CLAIMS:

(SUBJECT TO DEFENDANTS' OBJECTION THAT THESE CLAIMS SHOULD BE STRICKEN FROM THE MASTER COMPLAINT)

☐ **Port-body/reservoir-related infection**

Type of infection: _____

☐ **Thrombosis of port body/reservoir**

☐ **Occlusion of port body/reservoir**

☐ **Erosion or wound complications at the port-body site**

☐ **Other – state in detail:** _____

☐ **None (not making a port-body/reservoir-related claim)**

For each port-body/reservoir complication above, state the date you were first diagnosed with such complication and state the name of the medical provider who diagnosed and/or treated the complication:

_____

_____

_____

_____

For each port-body/reservoir complication referenced above, provide medical records relating to the first diagnosis of each complication.

☐ **Medical records attached**

5. REMOVAL INFORMATION

*** This Section is limited to removal of the Device as a whole. Information regarding fractures and removal of fracture remnants should be provided in Section 7.**

Has your Device identified in Section 3 been removed?

☐ **Yes** ☐ **No**

If yes, provide the name(s) and address(es) of the doctor(s) who removed your Device and the hospital/medical facility where the removal/attempted removal occurred:

Doctor: _____

_____

Hospital/Medical Facility: _____

_____

Date of removal: _____

Provide medical records for the removal/attempted removal and the procedure involved.

□ **Medical records attached**

Was the Device identified in Section 3 preserved after removal?

☐ **Yes** ☐ **No**

If yes, state the name and address of the person or institution in possession of the Device: _____

Do you have photographs and/or video of the removed Device or of the removal procedure?

☐ **Yes photographs. If yes, produce color copies of the photos.**

☐ **Photographs attached**

☐ **Yes video. If yes, retain the video.**

☐ **No**

6. SUBSEQUENT DEVICE

If your Device identified in Section 3 was removed, was a subsequent device implanted?

☐ **No**

☐ **Yes. State date of implant of replacement device: _____**

Was it replaced with a Bard Port Catheter Device? If yes, provide:

Product Name: _____

Product Code: _____ Lot Number: _____

If no, provide the name of replacement device:_____

7. CATHETER FRAGMENTS

Do you claim that the catheter of your Device fractured?

☐ **Yes**

☐ **No**

If you answered YES, answer the below questions in this Section.

If you answered NO, skip the rest of Section 7 and go below to Section 8 - "Outcome Attributed to Device."

Are any catheter fragments retained in your body?

☐ **Yes**

☐ **No**

☐ **Unknown**

If yes, identify the location(s) within your body of each retained catheter fragment.

_____

_____

Have any catheter fragments been removed from your body?

☐ **Yes**

☐ **No**

☐ **Unknown**

If any catheter fragment has been removed (or a doctor has attempted to remove it), please check all that apply regarding the removal procedure(s):

☐ Removed percutaneously

☐ Removed via open-chest procedure

☐ Removed via alternative open procedure

☐ Attempted but unsuccessful removal percutaneously

☐ Attempted but unsuccessful removal via open-chest procedure

☐ Attempted but unsuccessful removal via alternative open procedure

If any catheter fragment has been removed or if there has been an attempt to remove, state the following for each removal/attempt:

Doctor: _____

Hospital/Medical Facility: _____

Date: _____

Doctor: _____

Hospital/Medical Facility: _____

Date: _____

Doctor: _____

Hospital/Medical Facility: _____

Date: _____

Provide medical records that provide the date(s) of removal (or attempted removal), the location (in your body) of the fractured fragments, and the procedure(s) performed to remove (or attempt to remove) the fragments.

□ Medical records attached

Do you have photographs and/or video of the removed Device or fragments or of the removal procedure?

☐ Yes photographs. If yes, produce color copies of the photos.

☐ Photographs attached

☐ Yes video. If yes, retain the video.

☐ No

8. OUTCOME ATTRIBUTED TO DEVICE

Do you claim that you suffered or that you are currently suffering from any bodily injuries, including psychological injuries related to the Device identified in Section 3:

□ **Yes**

□ **No**

If your answer is "Yes," please list all symptoms and injuries you claim to have suffered and describe the medical treatment received to address them:

_____

_____

_____

_____

Of the injuries/symptoms you listed above, which do you claim to be suffering from at the current time:

_____

_____

_____

_____

***

Plaintiff reserves the right to supplement any and all responses upon the receipt of additional information.

I declare under penalty of perjury that the information in this Plaintiff Profile Form is correct:

_____	_____
Date	Signature of Plaintiff
_____	_____
Date	Signature of Plaintiff's Spouse (signature necessary only if loss of consortium is alleged)

THIS PROFILE FORM AND THE RECORDS SHOULD BE UPLOADED TO WWW.MDLCENTRALITY.COM/BARDPORT PURSUANT TO CMO NO.____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL No. 3081
In Re Bard Implanted Port Catheter Products Liability Litigation

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DEFENDANTS' PROFILE FORM

For each case, Becton, Dickinson and Company; C.R. Bard, Inc.; Bard Access Systems, Inc.; and Bard Peripheral Vascular, Inc. (collectively, "Defendants") must complete this Defendants' Profile Form ("DPF") in accordance with the requirements set forth in Case Management Order No. ____. In completing this DPF, you must answer every question. The requests for information and documents require Defendants to, at a minimum, conduct a reasonable and diligent search.

I. CASE INFORMATION

This Defendants' Profile Form pertains to the following case:

Case caption: _____

Civil action number: _____

Court in which action was originally filed: _____

II. CONTACTS WITH HEALTHCARE PROVIDERS

In each PPF served on Defendants, Plaintiff has identified each doctor and hospital/medical facility (collectively, "Healthcare Providers") who implanted, removed, and/or attempted to remove Defendants' Bard Implanted Port Catheter Product ("Device") that is subject to claims in this lawsuit. With respect to each of those Healthcare Providers, provide the following information:

A. CONSULTATION AGREEMENT

1. State whether Defendants have any consulting agreement(s) with the Healthcare Providers relating to Bard IPCs (as defined in the Master Complaint):

   _____
   _____
   _____

B. SALES REPRESENTATIVE AND OTHER RELATED CONTACTS

As to each sales representative, territory manager, and district manager who were assigned to the territory where the Healthcare Providers are located in the two-year period up to and including the date(s) of implant, set forth the name; the dates of employment; and if no

longer employed by Defendants, the last known personal address and telephone number. Please attach additional pages if necessary.

1. Territory Manager:

   Name: _____

   Employment Dates: _____

   If not currently employed, last known personal address:

   _____

   If not currently employed, last known personal phone number:

   _____

2. District Manager:

   Name: _____

   Employment Dates: _____

   If not currently employed, last known personal address:

   _____

   If not currently employed, last known personal phone number:

   _____

III. COMMUNICATION WITH PLAINTIFF

1. Identify any direct contact, either written or oral, between Plaintiff and/or Plaintiff's representative(s) and any employee and/or representative of Defendants, including but not limited to pre-implant inquiries and post-implant complaints. This request specifically includes, but is not limited to, calls to any hotline or Field Assurance Department affiliated with Defendants.

   _____

   _____

   _____

   _____

IV. MANUFACTURING INFORMATION

1. Identify the model number/product code/reference number for the Device(s) implanted in Plaintiff:

   _____

2. Identify the lot number for the Device(s) implanted in Plaintiff:

   _____

3. Identify the location and date of manufacture for the Device(s) listed in responses to A and B above:

   _____

   _____

V. DEFENDANTS' LIABILITY[1]

* To the extent some or all Defendants do not agree as to the answers to #1-3 below, attach additional sheets setting forth each Defendant's answers to those questions.

1. According to Defendants, which Defendant(s) are properly named Defendants in this lawsuit if Plaintiff proves the Device(s) caused his or her injuries:

   - ☐ Becton, Dickinson and Company
   - ☐ C.R. Bard, Inc.
   - ☐ Bard Access Systems, Inc.
   - ☐ Bard Peripheral Vascular, Inc.

2. According to Defendants, which Defendant(s) have potential liability regarding the Device(s) if Plaintiff proves the Device(s) caused his or her injuries:

   - ☐ Becton, Dickinson and Company
   - ☐ C.R. Bard, Inc.
   - ☐ Bard Access Systems, Inc.
   - ☐ Bard Peripheral Vascular, Inc.

3. According to Defendants, which Defendant(s) have potential financial liability regarding the Device(s) if Plaintiff proves the Device(s) caused his or her injuries:

   - ☐ Becton, Dickinson and Company
   - ☐ C.R. Bard, Inc.

[1] **[PLAINTIFFS' PROPOSAL]** Include Section V.
[DEFENDANTS' PROPOSAL] Omit Section V.

- ☐ Bard Access Systems, Inc.
- ☐ Bard Peripheral Vascular, Inc.

VI. DOCUMENTS AND OTHER PRODUCTION

Please produce the following:

1. The Device History Record ("DHR") for the Device(s) at issue, or, if already produced, provide the Bates numbers for the DHR.
2. The complaint file relating to Plaintiff, including but not limited any MedWatch, MAUDE Adverse Event Reports ("AER"), Alternative Summary Reporting ("ASR"), and any other documents submitted by Defendants to the FDA, or, if already produced, provide the Bates numbers.
3. Any consulting agreements and M. S. & S. data relating to Plaintiff's Healthcare Providers.
4. Any non-privileged document which refers to Plaintiff.
5. If the Device(s) has ever been in Defendant's possession, custody, or control after the explant procedure, Defendants shall produce the chain of custody for the Device(s).

_____ _____

Date Counsel for the Defendants

_____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard Implanted Port Catheter Products Liability Litigation	MDL No. 3081 **[PROPOSED] CASE MANAGEMENT ORDER NO. ____** (Common Fact and Expert Discovery Schedule)

The Court held a second case management conference with the parties on November 16, 2023. The conference was scheduled to address a number of issues identified in Case Management Order No. 2 ("CMO 2"). *See* Doc. 42.

The Court adopts the following schedule for all common fact and expert issues in this MDL. This scheduling order does not govern case-specific discovery in Discovery Group 1 or Bellwether Group 1, which will be governed by separate case management orders negotiated at the time those groups are selected. This scheduling order does not govern case-specific issues to be resolved in individual cases.

I. Common-Issue Fact Discovery

Common-issue fact discovery shall open on November 20, 2023. The deadline for completing common-issue fact discovery, including discovery by subpoena, shall be **January 31, 2025**. To ensure compliance with this deadline, the following rules shall apply:

A. Depositions

All depositions shall be scheduled to commence at least **three (3) working days**

prior to the discovery deadline. A deposition commenced days prior to the deadline may continue up until the deadline, as necessary. This condition may be altered by agreement of the parties.

B. Written Discovery

All interrogatories, requests for production of documents, and requests for admissions shall be served at least **forty-five (45) days** before the discovery deadline.

The parties may mutually agree in writing, without Court approval, to extend the time provided for discovery responses in Rules 33, 34, and 36 of the Federal Rules of Civil Procedure. Such agreed-upon extensions, however, shall not alter or extend the discovery deadlines set forth in this Order.

C. Substantial Completion

The Parties agree to meet and confer regarding the date by which Defendants will substantially complete their production of documents and ESI. If the Parties cannot reach agreement before December 22, 2023, as to the substantial-completion deadline, they will submit their positions to the Court to ask for guidance. The Parties shall meet and confer regarding prioritizing collection and production efforts of relevant Custodial Files and Non-Custodial Sources (as the terms are defined in the ESI Order, CMO __). Productions will be made on a rolling basis. Defendants reserve the right to supplement productions as necessary.

II. Common-Issue Expert Disclosures and Discovery

A. Plaintiffs shall provide full and complete expert disclosures as required by Rule 26(a)(2)(A)-(C) and (E) of the Federal Rules of Civil Procedure no later than **February 14, 2025**.

B. Defendant(s) shall provide full and complete expert disclosures as required by Rule 26(a)(2)(A)-(C) and (E) of the Federal Rules of Civil Procedure no later than **March 31, 2025**.

C. Rebuttal expert disclosures, if any, shall be made no later than **April 30, 2025**. Rebuttal experts shall be limited to responding to opinions stated by initial experts.

D. Expert depositions shall be completed no later than **June 30, 2025**.

E. Disclosures under Rule 26(a)(2)(A) must include the identities of treating physicians and other witnesses who will provide expert opinions under Federal Rules of Evidence 702, 703, or 705, but who are not required to provide expert reports under Rule 26(a)(2)(B), except that this provision shall not preclude Plaintiffs from designating additional experts in their case-specific disclosures. Rule 26(a)(2)(C) disclosures are required for such witnesses on the dates set forth above. Rule 26(a)(2)(C) disclosures must identify not only the subjects on which the witness will testify but must also provide a summary of the facts and opinions to which the expert will testify. The summary, although clearly not as detailed as a Rule 26(a)(2)(B) report, must be sufficiently detailed to provide fair notice of what the expert will say at trial.[1]

F. As stated in the Advisory Committee Notes to Rule 26 (1993 Amendments), expert reports under Rule 26(a)(2)(B) must set forth "the testimony the witness is expected to present during direct examination, together with the reasons therefor." Full and complete disclosures of such testimony are required on the dates set forth above; absent extraordinary circumstances, the parties will not be permitted to supplement expert reports after these dates. The Court notes, however, that it usually permits parties to present opinions of their experts that were elicited by opposing counsel during depositions of the experts. Counsel should depose experts with this fact in mind.

III. Motions to Exclude Common-Issue Experts

A. Any motions to exclude common-issue experts shall be filed by **July 21, 2025**.

[1] In *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011), the Ninth Circuit held that "a treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment." Thus, for opinions formed outside the course of treatment, Rule 26(a)(2)(B) written reports are required. *Id.* For opinions formed during the course of treatment, Rule 26(a)(2)(C) disclosures will suffice.

B. Any responses in opposition to those motions shall be filed by **August 25, 2025**.

C. Any replies in further support of those motions shall be filed by **September 8, 2025**.

Dated this _____ day of _____, 2023.

David G. Campbell
Senior United States District Judge