UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Case No.: 2:18-md-2846

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

This document relates to:
ALL CASES

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF A CASE MANAGEMENT ORDER GOVERNING THE FUTURE MANAGEMENT OF CASES AND POTENTIAL REMAND

Bard responds here both to the PSC's above-referenced motion, which is premature, unreasonable, and counter-productive to its stated goals, as well as the Court's concern about continuing the bellwether trial plan with the *Bryan* case discussed at the January 10, 2024, Case Management Conference. Since the early days of this MDL, the Court and parties have worked to establish and carry out a bellwether trial process that dovetails with other aspects of the MDL, including standardized Short Form Complaints and Plaintiff Profile Forms to facilitate data collection, and fact and expert discovery focused on the products at issue in the bellwether pool cases. While Bard agrees that core discovery is substantially complete and that the bellwether process and trials have provided useful information for both possible resolution of cases and the eventual trials of cases in transferee courts, Bard disagrees that it is time to abandon the bellwether process and the fourth trial, *Bryan*.

Bryan presents important issues not present in the prior trial cases and their resolution, either by the Court or a jury, would greatly assist the parties and transferee courts as the litigation goes forward. By contrast, the slanted and confusing order that the PSC proposed with its motion

would simply burden the parties and transferee courts with no appreciable benefit. After the conclusion of the *Bryan* case, the parties and Court will be in a better position to evaluate the entire hernia litigation landscape and determine next steps.

Less than five months ago, the Court reiterated "We're going to try four of these. We're going to have them all done within a few months." 8/29/23 CMC Tr., ECF No. 779 at PageID 8865. In terms of the overall plan for the MDL, the Court stated:

> My hope is not to remand any case. My hope is to finish the trials, have a mediator. I understand there's some things happening. I would hope I give you a drop-dead date. It would be a few months after. I'm not looking at finishing the fourth trial and telling you, you have two weeks. I know the cases are complicated. But I think every lawyer I've ever met and every Judge I've ever met needs a deadline. So I'll consult with you but I'm thinking three, four months after the last trial could be enough time but I'm willing to consider alternatives.

Id. Since that time, the wisdom of the Court's stated approach has been reinforced, not undercut. In *Stinson*, the third bellwether trial—the second of the two plaintiff picks—the PSC failed to achieve its desired verdict of "many, many, many millions of dollars" in compensatory damages and an award of punitive damages. 11/8/23 Trial Tr., *Stinson* ECF No. 406 at PageID 18210. In addition, discovery in the *Bryan* case, which will be the fourth overall and second defense-pick bellwether trial, has reinforced the weakness of plaintiffs' recurring attacks on Bard's most-used devices. Viewing the course of the litigation as a whole, including patterns of filings, the Court's rulings, and the juries' verdicts, it makes sense to stay the course and assess where things stand after the bellwether process is completed.

ARGUMENT

I. The *Bryan* Case Should Be Decided On Its Merits Before Next Steps Are Decided

This MDL is unusual in that it concerns more than twenty different devices, almost all of which are still on the market in the United States. Some of the devices were launched as early as the 1960s, while others were developed not long before the MDL started. Implant dates for individual plaintiffs—and thus the relevant time period for various liability issues—range over thirty years or more. Plaintiffs come from around the country and, collectively, implicate the laws of every state. Although the MDL was founded based on the commonality of allegations about polypropylene as the base material in these devices, it has seen plaintiffs offer a range of often contradictory allegations about the devices to meet the needs of individual cases. For example, Bard offers both permanent barrier composite devices and resorbable barrier composite devices for intraperitoneal ventral hernia repair. In one case, plaintiffs criticize Bard for selling permanent barrier devices when it also marketed purportedly superior resorbable barrier devices. In another, plaintiffs claim the resorbable barrier was defective and a permanent barrier should have been used instead. Bard also offers both laparoscopic and open inguinal hernia repair options. In one case, plaintiffs claim open repair with mesh has more chronic pain and, in another case, plaintiffs claims laparoscopic repair with mesh has more chronic pain.

Both flat composite devices and curved single-material devices are accused of having a propensity to "buckle" because of their respective basic designs. The Marlex and Pro-fax polypropylene resins that Bard has used in its hernia devices are each criticized as being inferior to the other, along with other allegedly available resins, depending on the particular case. The wide range of devices and claims stems from the fact that the litigation was generated by undifferentiated advertising seeking all comers, regardless of device, injury, or timing. Compared

with the prototypical product liability litigation, there was no regulatory action or landmark study to propel it, only funding ventures for advertising and litigating. This business model works on the principle that more pending cases means more pressure on the defendant to settle.

Out of this background, it was never going to be possible to have decisions on the merits as to every device, plaintiff theory, or issue while the cases were in the MDL. Looking at the range of issues and the rate of filings, early on, the Court invited the parties input on what sort of bellwether process would provide the most useful information to aid in possible resolution, orderly disposition of cases, and efficient remand of unresolved cases down the road. The bellwether process put in place reflected the Court's stated interest in "ensur[ing] the integrity of the bellwether process" and the desire to focus discovery and trials on the most prevalent products and theories, with cases nominated by the parties and subject to Court's approval at each step. *See* CMOs No. 10, 10-A, and 10-B, ECF Nos. 62, 207, and 217; *see also* CMOs No. 15 & 20-A, ECF Nos. 125 & 274.

The plan was for four trials in the following order: 1) defense pick, 2) plaintiff pick, 3) plaintiff pick, and 4) defense pick. The devices at issue in these cases, as they were from the start of the bellwether discovery pool—Ventralight ST, Ventralex, PerFix Plug, and 3DMax—collectively accounted for more than half of the pending cases. *See* CMO No. 25, ECF No. 318 at PageID 3480-81. They also addressed the logical divisions within hernia repair and Bard's product lines: two ventral repair devices—one with a permanent barrier and one with a resorbable barrier—and two inguinal repair devices—one designed to be placed in an open fashion and one designed to be placed in a laparoscopic fashion.[1] *See id.*

[1] Of the ventral products, the Ventralight ST is usually but not always placed in a laparoscopic fashion (the *McCourt* case from the bellwether trial pool involves an atypical open repair with Ventralight ST) and the Ventralex is usually but not always placed in an open fashion (the Technique Guide presented at the *Milanesi* trial discussed both options). Given the nature of the inguinal anatomy, Bard's inguinal hernia repair devices do not include permanent or resorbable

As discussed at length in briefing and rulings concerning challenges to representativeness of trial cases, including the *Miller* case that *Bryan* was selected to replace after the plaintiff in *Miller* terminated his relationship with his PSC counsel, the cases cover a range of common injuries and fact patterns that the parties wanted to have evaluated by the Court and juries. *See, e.g.,* CMO 25-A, ECF No. 514; 6/20/23 Order, ECF No. 763.

This is the case with *Bryan*. The fourth trial was always slated to be another 3DMax case. The PSC unsuccessfully challenged *Miller*, the 3DMax case Bard chose initially, as having insufficient injuries and damages to aid the bellwether process. CMO 25-A, ECF No. 514. Once the plaintiff in *Miller* terminated his relationship with his PSC counsel, Bard selected *Bryan*, the only other 3DMax case in the bellwether discovery pool, as a replacement. *See* Defs.' Br., ECF No. 739 at Page ID 8543. Later, when it was unclear if the plaintiff in *Bryan* was pursuing further surgery, Bard challenged whether *Bryan* would be representative; in response, the PSC vehemently argued that *Bryan* should be tried. *See* PSC's Br., ECF No. 740. Less than seven months ago, the Court rejected Bard's challenge and left *Bryan* in place as the fourth bellwether trial. 6/20/23 Order, ECF No. 763. That same order also left in place *Stinson* as the third bellwether trial, even though he had a testicle removed in a 2023 surgery, which greatly increased his injuries and damages compared to when the case was selected. Subsequent events have not altered the Court's prior reasoning in leaving these and other challenged cases in place as trial picks or that considerations of fundamental fairness in having an equal number of plaintiff-pick and defense-pick trial cases.

barriers. With the exception of a few devices with recoil rings, all the inguinal devices contain only polypropylene. As such, the division of the inguinal hernia repair market into open or laparoscopic devices is also the logical division for the cases involving inguinal hernia repair.

But this is much more than a matter of fairness. Bard's assessment of the pending cases and trends of filings over time supports that *Bryan* is not just another case like *Stinson* involving complaints of pain after an inguinal hernia repair with a polypropylene device. Compared to the three trial plaintiffs thus far, the plaintiff in *Bryan* is much younger. He also claims his injuries have prevented him from maintaining employment or having a normal sex life, claims not made by the other trial plaintiffs. In addition, unlike in the other trials, the facts of *Bryan* make it clear that all of plaintiff's medical care for his alleged injuries has been sought only after seeking to retain counsel and influenced by litigation considerations.

Each prior trial involved a complete explant of the device at issue, but the plaintiff in *Bryan* has approximately half of the device he is suing over still implanted, as it continues to provide a benefit. These are not distinctions without a difference. Chronic groin pain complaints among inguinal hernia patients are exceedingly common, but, in Bard's assessment, typical litigation complaints of chronic pain are far more like those in *Bryan* than those in *Stinson*, where the plaintiff complained of pain to multiple healthcare providers before seeking to retain counsel. Whether a jury will reject litigation-driven pain complaints or reward a young plaintiff with arguably significant damages because of alleged sexual damages and loss of employment is of key importance to Bard as it assesses the pending cases, not just for valuation but to determine how to proceed with inevitably similar claims down the road asserted by plaintiffs in cases in transferee courts.[2] Moreover, given the apparent focus of plaintiffs (particularly at trial in *Stinson* and in the expert reports in *Bryan*) on alleged microparticles of polypropylene perpetuating or increasing injuries, having approximately half of his 3DMax in place makes *Bryan* a better test case of the

[2] While the litigations are different in a number of respects, the experience of pelvic mesh litigation suggests that sexual relationship damages, where credited even in the face of a litigation overlay, have resulted in substantial verdicts. It is an open question whether the plaintiff in *Bryan*, who is in many ways a far more typical "chronic pain plaintiff" than the plaintiff in *Stinson*, evokes sympathy or skepticism from a jury.

impact of this (unsupported) theory than a plaintiff whose explanting surgeon testified to removing the entire implant, as was the case in *Johns*, *Milanesi*, and *Stinson*.

In addition, there are legal issues presented in *Bryan*, even though it will be under Florida law like *Milanesi*, that are different from the prior trials and bear resolution. For one, the implanting physician in each of the prior trials testified to relying to some degree on the content of the Instructions for Use ("IFU") and other information from Bard about the device at issue. That is not the case in *Bryan*, where Dr. Caban did not rely on the IFU or any information from Bard about the 3DMax. *See* Bard's Mot. for Summ. J., *Bryan* ECF No. 65 at PageID 959-63. While Bard believes this fact entitles it to summary judgment on the *Bryan* plaintiff's warnings and other informational claims, a jury's evaluation of this issue is key should the claim survive summary judgment. In *Stinson*, the jury found for plaintiff on his warning claims where Dr. Tan generally relied on the IFU—which did not specifically mention "chronic pain"—but did not testify that a warning about chronic pain would have changed her decision. *See* Bard's Mot. for Judgment as a Matter of Law, *Stinson* ECF No. 389 at PageID 14779-87. *Bryan* presents a different scenario, the resolution of which will be instructive for future cases.

In addition, the plaintiffs in *Johns*, *Milanesi*, and *Stinson* could each point to some issue or uncertainty about the device at issue in the case (even though Bard maintains that each device's performance has been exemplary). In *Johns*, the Ventralight ST was a relatively new product when the implant occurred and there were questions about the definitiveness of animal studies on how long the ST coating would last in relation to the timing for reperitonealization and the formation of adhesions. In *Milanesi*, the Ventralex device drew on the Composix Kugel, which was the subject of class I recalls more than a decade prior to the creation of this MDL, as a predicate and there was literature discussing "buckling," which plaintiff alleged caused his injury. In *Stinson*,

although the PerFix Plug had been widely used around the world for more than 20 years before the implant, there was literature criticizing the product and the "plug and patch technique," and there was a question whether it was still a state of the art device at the time of the implant in 2015. By contrast, in *Bryan*, the 3DMax has not only been the top laparoscopic hernia repair product in the United States for much of the last twenty-five years, but the medical literature is devoid of meaningful criticism of the device. As the allegations and evidence throughout the *Stinson* trial made clear, a "plug" device placed in an open technique (like the PerFix Plug) is quite different from an anatomically-shaped mesh device placed in a laparoscopic technique (like the 3DMax). Thus, *Bryan* presents a very different design defect question than in prior trials and one that may be instructive for future cases against other Bard devices without adverse medical literature or significant design issues.

While every defendant likes to win on summary judgment or at trial, this litigation also presents a clear relationship between how the trials have gone and the rate of case filings (understanding the complex relationship between advertising spend, case retention, and the timing of case filings in relation to statute of limitations deadlines). This is a very large MDL and there are a number of factors affecting case filings rates, including the COVID-19 pandemic and a large state court coordinated proceeding, but the simple fact remains that filings in this Court have slowed down since Bard started trying cases and getting good results. The monthly filing rate since the *Johns* verdict is almost 40% less than it was in the prior year—438 per month from September 2020 to August 2021 and 279 per month from September 2021 to December 2023. To put it simply, the number of cases and the rate at which they are filed affects discussions of resolution and any planning about post-bellwether options, including remand.

The history in this MDL is that more than half of pending cases were filed before the first trial, *Johns*, started in August 2021. After Bard won that trial, the PSC stated in various public fora that the verdict was not instructive because it was a defense choice, a weak plaintiff case, and had allegedly involved minimal effort from the plaintiff's counsel. Potential plaintiffs and their counsel were told to stand by for *Milanesi*, a strong plaintiff pick case. When the jury awarded only $255,000 to the plaintiffs in *Milanesi* and rejected the claim for punitive damages, potential plaintiffs and their counsel were told to stand by for *Stinson*, an even stronger plaintiff pick case with even higher actual damages (even before the plaintiff had sought a second explant procedure that ended up removing his testicle). When the plaintiff failed to "ring the bell" in *Stinson* with the "huge" actual damages and punitive damages he sought, the PSC was left with nothing to tout about the upcoming fourth trial to distract from the *Stinson* verdict. That, however, is not a reason to abandon the bellwether process.

From Bard's perspective, as long as significant numbers of new cases are being filed, summary judgment or a defense verdict in *Bryan* would help to send the message once and for all that this litigation is not pelvic mesh litigation, that the case for punitive damages is weak, and that Bard's still-marketed hernia devices are good products, advertising and hype notwithstanding. The PSC quickly latched onto the concern raised by the Court at the last CMC that getting a resolution on the merits in *Bryan* would not advance the plaintiff's "common benefit" interest. Defeatism notwithstanding, plaintiffs have not yet thrown up the white flag, either by voluntarily dismissing *Bryan*, dismissing a large volume of low damages or otherwise non-viable cases, or ceasing new case filings. For Bard, while it cannot take for granted what the Court or the jury will do, getting a decision on the merits in *Bryan* would advance the interest of the MDL both in terms of possible resolution and direction for future transferee courts.

II. The PSC's Motion Is Premature And Unfounded

Even before the January 10, 2024, CMC, it was apparent that the PSC's interest in pushing a CMO loaded with illogical provisions, which would benefit nobody and not advance resolution, was to distract attention from the *Bryan* case. Bard has set forth above why it believes that a decision on the merits in *Bryan* will benefit the purpose of the MDL. Those reasons also weigh against deciding now what the post-bellwether course of the MDL will be. Indeed, the only reason the PSC has articulated for entering such a CMO now is that the MDL is more than five years old. That is no reason at all. The Court and parties should stick to the plan, try *Bryan* (absent resolution or dismissal), and then decide on the course of the MDL in an intelligent and systematic fashion, not just offer wish lists of the most slanted and burdensome provisions that could be included in a CMO.

A. The Proper Time To Address Next Steps Is After The *Bryan* Trial

The Court's stated intent to have a mediator play a role after *Bryan*, allow a few months for that process to play out, and then set next steps including possible staggered remand still makes sense. 8/29/23 CMC Tr., ECF No. 779 at PageID 8865. The bellwether process has been designed to provide meaningful information about plaintiffs' claims and Bard's defenses thereto, the most common claimed injuries, and the most common devices at issue. Logic and fairness dictate that an equal number of plaintiff and defense pick cases be tried. Once that process is complete, then it will be appropriate to take stock of where things stand in terms of trial results, common legal issues, settlement history and discussions, and the nature of the inventory of pending cases. The trial results thus far are instructive, even though the PSC ignores them in its motion. As set forth above, *Bryan* should add to that body of knowledge in important ways. After *Bryan* is decided on

the merits, then a plan for next steps incorporating that decision and any other developments in the MDL can be set.

The PSC's arguments to the contrary are unavailing. First, there is nothing magical about the age of the MDL. It is now five months older than when the Court reiterated its position at the August 2023 CMC. All that has changed is that the PSC failed to get the result it wanted in *Stinson* and further discovery in *Bryan* has reinforced its weakness.[3] Given the scope of generic discovery and the impact of the COVID pandemic, this MDL will hardly be too old when its fourth bellwether trial occurs. *See* United States Judicial Panel on Multidistrict Litigation, MDL Statistics Report – Docket Summary Listing (Jan. 2, 2024), https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January-1-2023-January-2-2024.pdf (revealing that the duration of MDLs is highly variable, including some that lasted for over 14 years). JPML data indicates that many product liability MDLs have lasted longer before starting a remand process or shutting down. *See, e.g., In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, Case No. 10-md-02187 (S.D.W. Va.) (terminated in 2020 after pending before the court for over 10 years); *In re Zimmer M/L Taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Tech. and Versys Femoral Head Prods. Liab. Litig.*, Case No. 18-md-02859 (S.D.N.Y) (pending before the court for over 5 years and is currently in the bellwether trial process); *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, Case No. 18-md-02848 (E.D. Penn.) (pending before the court over 5 years and is currently in the bellwether trial process). It is true that this MDL is now older than the average for a product liability MDL. *See* Lawyers for Civil Justice, "Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee (Mar. 8, 2022) ("Products liability

[3] Plaintiff in *Bryan* has also filed a notice of serving the Florida equivalent of an offer of judgment. While the amount is confidential and Bard did not accept it, the amount and timing may be seen as consistent with an acknowledgment that *Bryan* is a low value case.

MDLs linger for an average of 4.7 years."). However, this MDL is certainly larger than average—the third largest of all MDLs currently—and involves a large number of products. The COVID-19 pandemic was the principal driver of delays in the bellwether trials, along with the additional surgery for the plaintiff in *Stinson*. For instance, CMO No. 20-A from November 27, 2019, set the first trial for May 11, 2020, the second for July 13, 2020, and the third for September 14, 2020. In reality, those trials began roughly 15 months, 20 months, and 37 months, respectively, later than originally set. In short, the MDL has been proceeding apace in light of its size, breadth, and circumstances.

Second, while Bard agrees that generic discovery is substantially complete, that does not mean there is nothing left to do in the MDL.[4] Because this litigation largely concerns marketed products, there will likely continue to be some supplemental document productions on a rolling basis. In addition, there are numerous common issues that could be addressed by this Court, which would advance the goals set out in 28 U.S.C. § 1407. For instance, there are many cases in the MDL that were filed several years after explant, making decisions on recurring statute of limitations issues helpful for resolution and/or remand courts.[5] In addition, cases involving devices that have not been the subject of surgical intervention or medical treatment may not have cognizable physical injuries under the laws of several states. Moreover, testing claims for damages for asymptomatic plaintiffs, plaintiffs who fear a future injury, and plaintiffs who claim to be an increased risk of future injuries can be tested.

[4] On December 21, 2023, a few hours before filing the instant motion, the PSC requested the generic depositions of three current or former Bard employees. While Bard maintains that this request is untimely and the depositions should be quashed [ECF No. 816], seeking further arguably generic discovery is inconsistent with the position in its motion on generic discovery. ECF No. 802 at PageID 9007. The PSC cannot have it both ways.

[5] Similarly, many states have statutes of repose that would bar claims from plaintiffs (like the plaintiffs in *Milanesi*) who did not sue for a decade or more after their implant procedures. *See, e.g.*, Tenn. Code Ann. § 29-28-103.

Plaintiff's suggestion that the Court must tee up huge waves of case-specific discovery so that it can begin remanding cases *en masse* is unfounded. The PSC's quote from *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), that § 1407 "obligates the Panel to remand any pending case to its originating court when, at the latest, those proceedings have run their course" lacks context. ECF No. 802 at PageID 9006. "[T]hose proceedings" refers to the "coordinated or consolidated pretrial proceedings" that an MDL has been established to conduct. The "obligation" addressed belongs to the JPML. By contrast. the MDL court itself determines when to suggest remand for an individual case or that the MDL has run its course and all cases should be remanded. Just as § 1407 does not expressly authorize bellwether trials, which MDL courts routinely conduct as part of their inherent authority to manage their dockets, there is no magic formula for how an MDL should be conducted, let alone when mass case-specific discovery and/or remands must begin. *See, e.g., In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 845 (6th Cir. 2020) ("There is much, of course, that an MDL court can do in its sound discretion in order to manage multidistrict litigation effectively." (quoting *In re Korean Air Lines Co.*, 642 F.3d 685, 700 (9th Cir. 2011)); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1232 (9th Cir. 2006) ("Pretrial plans will necessarily vary with the circumstances of the particular MDL."); *In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 246 (3d Cir. 2013) ("[I]n complex cases, district courts have wide discretion to manage 'complex issues and potential burdens on defendants and the court.'" (quoting *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340–41 (5th Cir. 2000)). There is certainly no authority for this MDL to "try every case" at any pace [ECF No. 802 at PageID 9007], and Bard has never suggested this should occur.

Third, it is implicit in the PSC's motion seeking a burdensome CMO that Bard and the Court need to be prodded into action. Setting aside the gumption of such a position from the PSC

given the results of the bellwether trials, it is not true. Having an "end game" for the MDL has been raised since the first CMCs in 2018 as something to be decided after the bellwether trial process concludes. Bard has not been dragging its feet. Bellwether cases have been tried, not settled before trial, and Bard has never sought to stay or delay the overall proceedings. When the time comes to participate in mediation, as the Court has indicated would be the likely next step, Bard will participate in good faith. When the time comes for a plan should mediation fail to resolve all the pending cases, Bard will participate in discussing that plan and carrying it out in good faith.

B. The MDL Will Not Benefit From The Relief The PSC Seeks

The CMO that the PSC has proposed has so many flaws that there is no point in engaging in what would effectively be a wholesale redlining process. Using the PSC's proposed CMO as a starting point will never result in a fair or productive CMO for what should happen after the end of the bellwether process. If the *Bryan* trial remains set for April 8, 2024, then starting any large-scale process on the timetable proposed by the PSC would make no sense. Prioritizing hundreds of "the most seriously injured" plaintiffs for discovery and remand is not a serious suggestion, especially where the PSC gets to determine which pending cases, including those represented by the PSC's members, are so prioritized. Similarly, while this MDL is located within Ohio, there is nothing about this litigation that supports separate and/or priority treatment for Ohio residents, let alone West Virginia residents. Doing so would not advance the goals of the litigation, whether they be timely resolution on the merits or resolution.

More generally, forcing Bard to work up thousands of PSC-selected cases at a time, especially on an expedited basis, would increase litigation costs greatly without a commensurate increase in the chance of resolution. Contrary to the PSC's claim that the Court would not be overloaded because its CMO proposes that expert discovery and summary judgment would be

addressed by transferee courts after remand, ECF No. 802 at PageID 9010, written discovery and fact depositions in thousands of cases at a time will invariably lead to a heavy volume of motions practice. Setting up multi-plaintiff trials involving a single product, whether that product has been the subject of a bellwether trial or not, would strongly and unfairly preference the plaintiffs, significantly prejudice Bard, and not streamline anything. Just having the same product does not mean the liability story or expert evidence will be the same, given differences in timeframes, models, and utilization. And that does not even take into account that each plaintiff will have a different medical history that a jury would have trouble keeping straight. If the bellwether trials thus far have shown anything, it is that the details of a plaintiff's medical history feature prominently in the evidence at trial and presumably the jury's consideration.

The approaches taken in other MDLs for steps after the conclusion of the bellwether process, like the bellwether processes themselves, have varied greatly. What may work in a toxic tort litigation where general causation has been conceded or in a litigation over a single product with decisions that will have clear implications to issues like statute of limitations, proof of use, or testing confirming the alleged injury will not work in another MDL. The Court recognized as much in surveying the use of docket control or *Lone Pine* orders in other MDLs and concluding in July 2022 that one was not yet appropriate in this MDL, despite Bard's request. *See* CMO No. 33, ECF No. 637. It is also clearly different to remand cases from an MDL with more than 20,000 pending cases than it is from one with less than 1000. What will work best in this MDL is not only something that should be decided after the conclusion of the bellwether process, but after the conclusion of the mediation process that the Court has indicated it will require. At that point, a CMO shaped to best meet the needs of the MDL as it stands then would make far more sense than adopting a one-sided wish list of burdensome provisions.

CONCLUSION

For the foregoing reasons, Bard asks that the Court keep the *Bryan* trial on calendar as scheduled, subject to ruling on Bard's motion for summary judgment, and deny the PSC's request for entry of its preferred CMO concerning discovery and remand.

DATED: January 23, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of this electronic filing to all counsel of record.

/s/Eric L. Alexander
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