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**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
 THE MAY 10, 2024 CASE
 MANAGEMENT CONFERENCE**

(Applies to All Actions)

Pursuant to Case Management Order No. 18 (“CMO 18”), the Parties submit this Joint Memorandum in advance of the sixth Case Management Conference (“CMC”) scheduled for May 10, 2024. *See* Doc. 525, at 6.

I. Case Statistics & Overview

There are 223 cases pending in the MDL. 11 cases have been dismissed from the MDL. There are 38 cases pending in the Superior Court of New Jersey. Defendants have moved, or will move, to dismiss on *forum non conveniens* grounds

all cases in the Superior Court of New Jersey that were filed by non-resident plaintiffs where there is complete diversity (29 of 38 cases). The New Jersey state court liaison has advised Defendants that he intends to refile an application for multicounty litigation (“MCL”) designation. The parties are not aware of any cases pending in Arizona state court.

II. Common-Issue Discovery

A. The Parties’ Conferrals Pursuant to CMO 18

The Court ordered that the parties “meet and confer regarding successor liability custodians and non-custodial sources by April 26, 2024.” Doc. 525, at 4. The parties hereby set forth the outcome of those conferrals, and there are no disputes for the Court to resolve at this time.

1. Non-Custodial Sources

The parties conferred about Non-Custodial Sources and agreed to the following substantial completion deadlines:

- WorkDay: produced April 23, 2024
- Master Control & Master Control Archive: June 17, 2024
- EasyTrack & TrackWise: June 17, 2024
- SharePoint/Shared Drives: July 1, 2024
- VeevaVault Clinical: July 1, 2024
- Second Priority Sources:¹ August 30, 2024

Defendants have advised Plaintiffs that they will promptly schedule a conferral in the event that any unforeseen technical or logistical issues impact these deadlines. Defendants have also advised Plaintiffs that because of technical issues they cannot yet commit to a deadline by which they will produce documents from DocuShare, but will update Plaintiffs as soon as information becomes available. Defendants have further noted that, to the extent additional shared drives or

¹ Those sources include Veeva Vault Promomats, iCertis, Global Sales Data Warehouse, J.D. Edwards (JDE), and MFG Pro.

1 SharePoint sites are identified by Custodians, Defendants will strive to produce
2 those drives or sites after July 1st but in advance of the individual's deposition.

3 Plaintiffs have cautioned Defendants that, should materials relevant to a
4 deposition not be produced on schedule or in reasonable time to be reviewed and
5 used in that deposition, Plaintiffs intend to reopen the deposition.

6 **2. Successor Liability Custodians**

7 Plaintiffs requested the identification of four proposed custodians in advance
8 of the parties' conferral scheduled for April 17th, which Defendants provided.
9 Defendants requested that the parties discuss again whether an agreement can be
10 reached to avoid the need for discovery on successor liability issues. The parties
11 intend to continue their conferrals to determine whether the scope of successor
12 liability issues and discovery can be narrowed as general liability discovery
13 progresses. The parties anticipate that they will have ample time to conduct
14 successor liability discovery should the negotiations fail.

15 **B. Production of Documents**

16 **1. Plaintiffs' Position**

17 In March, following collaboration with the Plaintiffs, Defendants agreed to
18 employ a search methodology utilizing a technology assisted review ("TAR")
19 protocol. The Parties agreed to work together – and to share metrics and data about
20 the performance of the protocol – to collaboratively narrow the volume of
21 documents necessary to make Defendants' production of information responsive to
22 Plaintiffs' discovery requests. Although Defendants from the inception of the TAR
23 plan promised to share metrics and data, they were unable to do so until the day
24 before a draft of this memorandum was due, on April 30.

25 As Plaintiffs have just recently received the preliminary metrics and data
26 necessary to assist Defendants with narrowing production, (and the parties agree
27 that narrowing is warranted,) the issue is not yet ripe for the Court. Assuming that
28 Defendants will continue to share metrics, collaborate with a high degree of

transparency, timely respond to iterative metrics requests, and make time for conferrals, Plaintiffs agree with Defendants proposal of another case management conference around May 24, 2024.

2. Defendants' Position

a. Update on Defendants' Productions

Defendants continue to work diligently to identify, collect, and produce documents responsive to Plaintiffs' Requests for Production ("RFP"). This chart summarizes Defendants' productions to date:

PRODUCTION	DATE	DESCRIPTION	DOCS	PAGES
BARD_IPC_MDL_001	12/26/2023	Cruz Production	6,290	91,035
BARD_IPC_MDL_002a	1/5/2024	Prior Patent Litig. Production (I of IV)	211,955	993,418
BARD_IPC_MDL_003	1/5/2024	Prior Port Litig. Deposition Transcripts	48	1,794
BARD_IPC_MDL_002b	1/11/2024	Prior Patent Litig. Production (II of IV)	200,966	1,396,347
BARD_IPC_MDL_004	1/12/2024	CV of Information Infrastructure Rule 30(b)(6) Deponent & Related standard operating procedures ("SOPs")	18	241
BARD_IPC_MDL_005	1/17/2024	SOPs and corporate org document related to Information Infrastructure Deposition	4	50
BARD_IPC_MDL_006	1/19/2024	Information Infrastructure Document	1	9
BARD_IPC_MDL_002c	1/19/2024	Prior Patent Litig. Production (III of IV)	97,634	449,900

PRODUCTION	DATE	DESCRIPTION	DOCS	PAGES
BARD_IPC_MDL_002d	1/24/2024	Prior Patent Litig. Production (IV of IV)	137,420	814,251
BARD_IPC_MDL_007	1/26/2024	510(k) submissions related to the Product Codes	19	4,599
BARD_IPC_MDL_008	2/2/2024	510(k) submissions and related docs for the Product Codes	498	15,508
BARD_IPC_MDL_009	2/9/2024	Corrective and Preventative Actions (CAPAs), Remedial Action Plans (RAPs), Situational Analyses (SAs), Health Hazard Evaluations (HHEs) / Health Risk Assessments (HRAs), and Failure Investigation reporting documentation associated with the Product Codes	293	8,583
BARD_IPC_MDL_010	2/16/2024	Marketing team documents, SOPs, supplement of three 510(k)s	2,168	20,057
BARD_IPC_MDL_011	2/23/2024	Marketing team documents	4,316	24,239
BARD_IPC_MDL_012	2/29/2024	Design History Files, Instructions for Use, Patient Guides, and CAPAs	6,650	120,589
BARD_IPC_MDL_013	3/8/2024	Marketing shared drives, R&D shared drives, and Notes to File regarding various 510(k)'s	16,588	150,676

PRODUCTION	DATE	DESCRIPTION	DOCS	PAGES
BARD_IPC_MDL_014	3/15/2024	Documents from Design History Files and SOPs collected from Master Control	394	3,471
BARD_IPC_MDL_015	3/15/2024	Marketing shared drives and R&D shared drives	16,030	114,792
BARD_IPC_MDL_016	3/22/2024	Marketing shared drives and R&D shared drives	11,907	238,458
BARD_IPC_MDL_017	3/30/2024	R&D, Regulatory, Clinical Affairs, and Marketing departmental shared drives	14,220	111,010
BARD_IPC_MDL_018	4/5/2024	Marketing, R&D, Regulatory, & Medical Affairs departmental shared drives	12,613	69,351
BARD_IPC_MDL_019	4/12/2024	Marketing & R&D departmental shared drives	14,982	60,484
BARD_IPC_MDL_020	4/20/2024	Documents from Master Control Archive	19,918	105,149
BARD_IPC_MDL_021	4/23/2024	R&D, Marketing, Regulatory, & Clinical Affairs departmental shared areas, and an export from WorkDay	6,927	64,542
BARD_IPC_MDL_022	4/26/2024	Custodial Files & Volume 1 of Defendants' Privilege Log	42,300	168,088
BARD_IPC_MDL_023	5/3/2024	Regulatory departmental shared drive documents	3,328	25,384

PRODUCTION	DATE	DESCRIPTION	DOCS	PAGES
BARD_IPC_MDL_024	5/3/2024	Documents from Master Control Archive	26,254	125,322
Total			853,741	5,052,025

b. Defendants' Proportionality Concerns

Following the last CMC, a significant discovery issue has arisen through no fault of the parties. Specifically, it has become clear that proceeding with the processing and review of Custodial ESI data as the parties originally contemplated would be prohibitively expensive—exceeding \$16 million in review costs for 60 Custodians. The parties are conferring about alternative approaches, but Defendants request that the Court establish an expedited schedule for the parties to address this issue.

After the last conference, Defendants agreed to utilize Technology Assisted Review (“TAR”) to prioritize documents from Custodial Files and certain Non-Custodial Sources for review. “To focus the TAR population and mitigate expense of hosting irrelevant documents, Defendants [agreed to] run Plaintiffs’ proposed 728 search terms over Custodial File collections and collections of certain unstructured Non-Custodial Sources.” Joint Mem. at 3, Doc. 552. When Defendants agreed to that compromise,² neither party had data regarding the volume of documents that would be pulled into the TAR universe from the first set of Custodial Files. In other words, neither party knew whether Plaintiffs’ search terms would in fact achieve the goals of focusing the TAR universe and mitigating expense.

Defendants now have that data from the initial 30 Custodial File collections, which indicates that the search terms do not accomplish those intended goals given the substantial volume of documents populating the TAR universe. Defendants thus

² Defendants raised overbreadth concerns regarding Plaintiffs’ search terms with the Court previously. *See* Joint Mem., at 22-23, Feb. 27, 2024, Doc. 451.

1 raised their concerns with Plaintiffs, and the parties are actively conferring
2 regarding modifications to Plaintiffs' search terms. While Defendants have not yet
3 exhausted their conferrals with Plaintiffs on this issue, Defendants respectfully
4 request that the Court schedule a CMC on or before May 24, 2024 for the parties to
5 advise the Court if agreement has been reached, and if not, for resolution of this
6 matter to ensure that ESI discovery proceeds in an efficient and cost-effective
7 manner.

8 **i. The Parties' Conferrals to Date**

9 On April 15, 2024, during a scheduled conferral regarding ESI discovery,
10 Defendants raised their concerns about the overwhelming volume of non-responsive
11 documents identified in initial collections of 30 Custodial Files that hit on Plaintiffs'
12 search terms and the corresponding expense associated with review of such volume.
13 Defendants explained that this was just a fraction of the data for the first 30
14 Custodians, and that their discovery vendor, Epiq, was in the process of loading
15 more documents in addition to certain Custodial sources that were still in the process
16 of being collected. Plaintiffs acknowledged Defendants' concerns, and agreed to
17 confer once Defendants provided Plaintiffs with the appropriate data and proposed
18 alternatives. Defendants advised Plaintiffs that they would provide Plaintiffs with
19 the metrics and proposal as soon as they received the supporting data from Epiq.

20 In order to provide Plaintiffs with the most fulsome metrics and analysis of
21 the search terms, Defendants asked Epiq to include the additional Custodial
22 collections they were in the middle of processing. Given the volume of these
23 collections (totaling over 11 million documents), running the necessary analytics to
24 identify the actual universe of documents that would be subject to review required
25 machine time that could not be accelerated. In addition, unforeseen technical
26 issues—many of which were caused by the sheer volume of data—delayed Epiq's
27 ability to promptly provide Defendants with the necessary information
28 notwithstanding the urgency. Epiq therefore was not able to provide Defendants

(and hence, Plaintiffs) the data needed until April 30th. That afternoon, Defendants provided Plaintiffs with the data, an analysis of that data, and an alternative proposal on how to proceed. Defendants advised Plaintiffs that:

- 6,125,815 documents have been identified for TAR review *to date* for the first 30 Custodians;³
- A statistically significant 95/5 random sample of 400 documents in the TAR workflow revealed a 9.50% responsiveness rate. Stated otherwise, more than 90% of the collected documents would have no bearing on Plaintiffs' claims;
- Epiq estimates that review-related expense (first-level review, privilege review and logging, and redactions being performed by over 200 contract review attorneys) will exceed \$8 million for the first 30 Custodians—a figure that is expected to double for the second 30 Custodians;⁴
- Epiq's experts analyzed over 267,000 Custodial documents coded by reviewers in the TAR workflow and, based on this analysis, have proposed modifications to Plaintiffs' search terms that are focused on removing the significant volume of irrelevant documents currently being pulled in by Plaintiffs' terms; and
- Applying Defendants' initial proposal reduces the volume from 6.1 million documents to 1,375,848 documents, but only reduces the cost from \$8 million to approximately \$4 million for the first 30 Custodians.⁵

³ This is the volume after suppression of document level duplicates that are being suppressed for review purposes but will be included in production if responsive. This number will increase once remaining collections for the first 30 Custodians are processed and added.

⁴ The estimate does not include outside counsel fees associated with document review. Nor does this include the expense associated with review of Non-Custodial Sources, which is another significant cost component for Defendants.

⁵ The reduction in review related expense is not as significant as the reduction in document volume because a greater number of documents in the universe returned by Defendants' proposal will need to be reviewed in the TAR workflow since it contains more responsive documents.

- The reduced cost based on Epiq’s proposed search terms remains disproportionate to the needs of this litigation and, as a result, Defendants are continuing to explore alternative forms of relief to reduce volume and expense, including proposals to reduce the number of Custodians and apply more discrete temporal limitations.

ii. Defendants’ Request for Another CMC

Defendants recognize that the parties need adequate time to meaningfully meet and confer to develop appropriate proposals to address these proportionality issues. Defendants also recognize that the time passed between Defendants’ flagging of this development on April 15th and Epiq’s delivery of the data on April 30th prevented the parties from working through any proposals prior to the submission of this Joint Memorandum. Defendants nonetheless submit that resolution of these issues must be accomplished as expeditiously as possible in order to reduce the financial and substantive burden on Defendants, to enable Defendants to meet the current substantial completion deadlines, and to allow ESI discovery to proceed in an efficient and timely manner. Accordingly, Defendants respectfully request the Court schedule a CMC on or before May 24th, and further order the parties to provide their joint or competing proposals to the Court in advance thereof.

C. Disputes Regarding the Scope of Discovery

The parties are productively negotiating disputes about whether certain categories of documents fall within the scope of discovery and appear to be nearing resolution. These disputes concern 1) the relevance of subject matter contained in documents from Plaintiffs’ proposed training set in the TAR universe and 2) the discoverability of certain devices and projects from Plaintiffs’ Request for Production (“RFP”) regarding Design and Manufacture No. 11.

On March 18th, Plaintiffs provided 2,075 documents to Defendants to consider for inclusion in the TAR training set. On April 8th, Defendants identified 309 documents they believed were not responsive or otherwise inappropriate for

1 training the system. Following several conferrals, the parties resolved their
2 disagreements over the substantial majority of those documents.

3 On April 8th, Plaintiffs served their Second Set of RFPs regarding Design and
4 Manufacture on each Defendant. RFP No. 11 seeks the production of “all
5 Information, communications, testing, studies (internal and external), regulatory
6 and/or third-party communications relating to, referring to, or embodying” 44
7 different catheters, ports, or projects. The parties promptly met and conferred over
8 the scope of RFP No. 11 and resolved their disagreements over the majority of these
9 projects and devices, as well as the scope of the RFP itself. Defendants’ Responses
10 and Objections to Plaintiffs’ Second Set of RFPs are due May 8th.

11 The following non-exhaustive list identifies the general categories of documents
12 that are the subject of the parties’ ongoing conferrals: (1) peripherally inserted
13 central catheters (“PICCs”); (2) central venous catheters (“CVCs”); (3) ethanol
14 locks; (4) 3CG/ECG catheter positioning technology; (5) BAS’s acquisition of Spire
15 Corp.’s hemodialysis catheter technology; and (6) certain OUS materials. In
16 response to Defendants’ relevance and proportionality objections, Plaintiffs have
17 proposed limiting discovery into the non-IPC devices and technologies to
18 documents that implicate the alleged failure modes at issue in this MDL. Defendants
19 intend to confer with Plaintiffs over the proper definition of the alleged failure
20 modes as well as any other necessary limitations on this discovery, and reserve all
21 rights with respect to their objections. With respect to OUS materials, the parties are
22 similarly working on the contours of the limited scope of that discovery.⁶

23 **III. Plaintiff Profile Forms**

24 **A. Defendants’ Position**

25 CMO 10 set a deadline of May 1, 2024, for service of all cases in the Initial
26 Plaintiff pool. *See* Doc. 115, at 1. CMOs 15 and 18 set a deadline of May 1, 2024,

27
28 ⁶ The parties agree that they will brief any disputes over these categories of discovery in advance
of the next CMC, should any remain.

1 for the completion production of deficient PPFs identified at the fourth CMC. *See*
2 Doc. 454, at 6-7; Doc. 525, at 4-5.

3 The parties have collectively made substantial progress to resolve the
4 deficiencies in the PPFs. Defendants have provided Plaintiffs' Leadership with
5 weekly charts on the status of PPFs and the parties have met regularly to discuss the
6 PPFs and missing information. However, despite expending substantial time and
7 money and following up beyond what is required by CMO 8, Defendants still have
8 not received complete profile forms from all of the plaintiffs in the Initial Plaintiff
9 Pool (as defined by CMO 10 (Doc. 115)). Defendants simply seek the information
10 that all parties have agreed that Defendants need to evaluate the cases at this stage
11 of the litigation. Defendants have conferred with Plaintiffs' Leadership on all of
12 these issues. Defendants hereby address the profile forms by categories of missing
13 information:

14 **1. No Profile Form Served**

15 Despite the Court's orders in CMO 8, 10, 15 and 18, as of May 1, 2024,
16 Defendants have not received PPFs from 5 plaintiffs. In addition, none of those
17 plaintiffs created an account in MDL Centrality or made any contact with
18 Defendants regarding the need for an extension. Pursuant to CMO 8, Defendants
19 sent letters to each plaintiff's counsel (and copied Plaintiffs' Leadership) requesting
20 that they serve a PPF within 21 days. None of the 5 plaintiffs responded to the letter
21 or made any contact with Defendants. As a result, Defendants request that (even if
22 they ultimately serve a PPF) these plaintiffs be excluded from the Initial Plaintiff
23 Pool. Defendants respectfully submit that this is a fair sanction for failure to comply
24 with four orders of this Court.

Plaintiff and Member Case Number	Date of Delinquent PPF Notice
Wright, Diana 2:24-cv-00438	4/2/2024
Bennett, Patricia 2:24-cv-00660	4/26/2024
Garza, Amber 2:24-cv-00700	4/30/2024
Graham, Janice 2:24-cv-00696	4/30/2024
Palazzo, Susan (deceased) 2:24-cv-00701	4/30/2024

In addition, because more than 21 days have expired since a deficiency notice was sent to Plaintiff Diana Wright. On May 7, 2024, Counsel for Plaintiff Diana Wright sent an email stating that she is dismissing her complaint. The remaining four plaintiffs still have time within the 21 days to cure the deficiency prescribed by CMO 8, and Defendants will address those plaintiffs in the next joint submission if no PPF is served.⁷

2. Certain or all Medical Records Not Produced

All parties agree that the medical records required to be produced by CMO 8 are vital to the review and evaluation of the cases, as well as to the determination whether a particular case should be included in the PFS/DFS Group 1 that is to be selected by July 1st. *See* Doc. 115, at 2. However, Defendants recognize that there can be delays in obtaining records. In the cases in the chart below, plaintiffs did not produce all or some of the medical records required with the PPF and have not

⁷ Defendants note that as of the filing of this Joint Memorandum, 11 Plaintiffs have failed to provide complete product identification (product code and lot number) as required in CMO 8, and an additional eight Plaintiffs have not provided a Lot Number for the device or devices alleged to be at issue.

responded to Defendants' requests that they produce them. Defendants acknowledge that in some instances the plaintiffs have produced multiple medical records, and Defendants have reviewed those records to determine whether they include the records required by the PPF.

Plaintiff and Member Case Number	Date of Deficiency Notice
Hawkins, Vera 2:23-cv-02020-DGC	1/4/2024
Eckert, Rebecca 2:24-cv-00139-DGC	3/26/2024* *LTR asking for supplementation based on review of medical records
Shelby, Burgandy 2:24-cv-00359	4/1/2024
Whitby, Latwon 2:24-cv-00482-DGC	4/12/2024
Gay, Paisami 2:23-cv-1755-DGC	1/4/2024
Kessler, Paul 2:23-cv-1696-DGC	1/4/2024
Catanzaro, August 2:24-cv-00292-DGC	3/29/2024

For each of these plaintiffs, Defendants request that the Court enter an order compelling each plaintiff in this category do one of the following on or before May 24, 2024:

- a. Produce the missing records;

- b. Produce a certification from the medical provider where the treatment occurred stating that no records exist; or
- c. Produce a declaration from plaintiff's counsel of record stating that the records were requested before the PPF served and the date the request was made and stating that the records have not been received

Inconsistencies in Information, Unclear Claims or Incomplete Medical Records Produced

In reviewing the PPFs and medical records produced, Defendants have identified some inconsistencies between the information in the PPF and the medical records and, in other instances, incomplete information, all of which is important to Defendants' evaluation of the cases, and all of which is known to the plaintiff. For example, some plaintiffs have produced medical records identifying a second port that was implanted but did not respond in the PPF indicating whether they are making a claim for that second port. Defendants have raised these inconsistencies, and many plaintiffs have responded and resolved the issues. However, the plaintiffs in the chart below (or attached) have not responded to Defendants' inquiries.

Plaintiff and Member Case Number	Date of Deficiency Notice
Kessler, Paul 2:23-cv-1696-DGC	1/4/2024
Catanzaro, August 2:24-cv-00292-DGC	3/29/2024
Dragon, Melissa 2:24-cv-00480	4/9/2024
Gay, Paisami 2:23-cv-1755-DGC	1/4/2024

Plaintiff and Member Case Number	Date of Deficiency Notice
Amos, Larissa 2:24-cv-00290-DGC	3/22/2024
Nicosia, Danielle 2:23-cv-2122-DGC	1/23/2024
Prescott, Jennifer 2:23-cv-2729-DGC	2/21/2024

While Defendants acknowledge that the parties did not contemplate these inconsistencies occurring and CMO 8 does not specifically address this issue, so that Defendants have complete and accurate information to evaluate the cases, they request that the Court enter an order compelling that the plaintiffs in the chart respond to Defendants' inquiries on or before May 24, 2024.

PPFs in the 15 day Cure Period

Many cases were filed in the last few days before the April 1, 2024, deadline so as to be included in the Initial Plaintiff Pool. As a result, Defendants received many PPFs in the few days leading to and including the May 1st deadline established by CMO 10. So as not to delay the process, Defendants worked diligently to review the PPFs and correspond with the plaintiffs. Defendants served all of the deficiency notices by May 6, 2024. Unfortunately, there are currently 31 cases (17% of the Initial Plaintiff Pool) that have deficient PPFs (many with very little information provided) that are still in the 15-day cure period allowed by CMO 8.

Plaintiff and Member Case Number	Date of Deficiency Notice
Edgell, Joshua 2:24-cv-00531-DGC	4/23/2024
McLaurin, Erin 2:24-cv-00487-DGC	4/23/2024
DeStefano, Christine (deceased) 2:24-cv-00588-DGC	4/23/2024
Galvan, Marisella 2:24-cv-00578-DGC	4/23/2024
Holzman, Karen 2:24-cv-00590	4/24/2024
Jackson, Jeffrey 2:24-cv-00599	4/24/2024
Latham, Lindy 2:24-cv-00586	4/24/2024
Stack, Gary 2:24-cv-00619-DGC	4/26/2024
Toranzo, Giny 2:24-cv-00577-DGC	4/26/2024
Traylor, Donna 2:24-cv-00621-DGC	4/26/2024
Wilson, Piper 2:24-cv-00425	4/26/2024

Plaintiff and Member Case Number	Date of Deficiency Notice
Chapman, Tina 2:24-cv-00651	4/29/2024
Peterson, George 2:24-cv-00678	4/29/2024
Young, Gloria 2:24-cv-00679	4/29/2024
Mobley, Cynthia 2:24-cv-00677	4/29/2024
Farmer-Garmon 2:24-cv-00620	5/1/2024
Cunningham, Jeanette 2:24-cv-00664-DGC	5/1/2024
Taylor, Sabrina 2:24-cv-00704	5/1/2024
Woods, Marilyn 2:24-cv-00615	5/1/2024
Terry, Misty 2:24-cv-00686	5/1/2024
Morgan, Annalisa 2:24-cv-00627	N/A
Gallaher, Kathy 2:24-cv-00723	5/2/2024

Plaintiff and Member Case Number	Date of Deficiency Notice
Fogle, A (minor) 2:24-cv-00720	5/2/2024
Holdridge, Donna 2:24-cv-00719	5/2/2024
Myers, Rebecca 2:24-cv-00718	5/2/2024
Miller, Linda 2:24-cv-00724	5/2/2024
Verdugo, Shirley 2:24-cv-00721	5/2/2024
Johnson, Linda 2:24-cv-00687	5/2/2024
Holcomb, Angela (deceased) 2:24-cv-00707	5/3/2024
Perry, Anetria 2:24-cv-00722	5/3/2024
Hall, Vicky 2:24-cv-00716	5/3/2023
LaPlante, Angel 2:24-cv-00418	5/6/2023

Plaintiffs' Leadership is aware of each of the cases and has indicated that they are contacting the attorneys involved. Because the July 1st deadline to select the PFS/DFS Group 1 is fast approaching, Defendants request that the Court order

1 the plaintiffs who are still within the 15 day cure period to serve full and complete
2 PPFs and, if applicable, include any missing medical records (or certification of no
3 records or declaration that they have been requested and not receive) and resolve
4 any uncertainties or inconsistencies, on or before May 24, 2024.

5 **d. Port Body Claims**

6 Amended CMO 8 (Doc. 477) requires that plaintiffs who served their PPFs
7 after March 15th use the new PPF that included information about claims involving
8 the port body. It also required plaintiffs who had served their PPF before March 15
9 to amend it by May 1, 2024, if they are asserting a claim relating to the port body
10 (and many did). Defendants have noticed two issues that leave uncertainty as to
11 whether port body claims are being asserted: (1) some plaintiffs who used the post-
12 March 15 version of the PPF left the page blank regarding port bodies (although it
13 contains a box to check to say no claim is being asserted), and (2) in discussions,
14 Plaintiffs' Leadership has emphasized that each plaintiff has a duty to supplement
15 under Rule 26 – implying that a plaintiff could assert a port body claim after the
16 Plaintiff Initial Pool is selected. The purpose of the PPF process is for all parties to
17 know what claims are being asserted by each plaintiff. Defendants believe that if
18 plaintiffs have collected the information required by the PPF they should know if
19 they are asserting a port body claim, and Defendants should not be faced with
20 additional claims being added after the Initial Plaintiff Pool is selected. Defendants
21 request that the Court enter an order setting a deadline of May 24, 2024, for any
22 plaintiff who filed a SFC on or before April 1, 2024, to amend their PPF and assert
23 a port body claim and ruling that the port body claim will be excluded for any
24 plaintiff who fails to meet that deadline.

25 **B. Plaintiffs' Position**

26 Plaintiffs agree that the parties have made substantial progress resolving
27 Defendants' claims of deficiencies in the PPFs and records served by plaintiffs in
28 this MDL. Plaintiffs also agree that the parties have spent significant time and

resources over the intervening weeks to investigate and address a wide variety of issues which Defendants have raised and characterized as “deficiencies” within the purview of CMO No. 8. The Plaintiffs’ efforts in this respect have involved substantial interaction and cooperation between the PLC and individual plaintiffs’ counsel, including (1) numerous individual conferences with plaintiffs’ counsel, (2) review and analysis of PPF submissions and accompanying medical records submitted through the MDL Centrality platform, and (3) town hall-style meetings with plaintiffs’ counsel regarding use of the MDL Centrality platform; best practices for retrieval, review and compilation of supporting medical records; and guidelines for compliance with CMO No. 8, disclosure supplantation, etc. As a result of these efforts, coupled with the cooperation with counsel for the Defendants, a great many of the existing deficiencies have been cured, and PPF deficiencies that are identified have been addressed and, in many cases, cured more quickly and efficiently.

The parties’ efforts have also been helpful in identifying areas of agreement and dispute, respectively, regarding the PPF disclosures more generally. These categories of deficiencies and alleged deficiencies are addressed in turn below.

Cases in Which a PPF has not been Served

According to Defendants, there are five cases filed on or before April 1, 2024 in which a PPF has yet to be served. Discussions with counsel for the plaintiffs at issue in these cases indicate that at least some of these issues arise from difficulties contacting plaintiffs that have arisen relatively recently and that the efforts to re-establish communication and serve the completed PPFs are ongoing. In one or more of the subject cases, counsel intends to effect voluntarily dismissal pursuant to Fed. R. Civ. P. to avoid the time and expense of motion practice.

Although CMO No. 10 does not explicitly call for the exclusion from PFS/DFS Group 1 those cases where a PPF has not been served by May 1, 2024, Plaintiffs recognize the underlying purposes of CMO No. 8 as it relates to bellwether selection in this MDL. In light of the upcoming selection exchange date set forth in

CMO No. 10 (Dkt. No. 115 at p. 2), Plaintiffs will not oppose the exclusion of the five cases referenced herein from the selection process for PFS/DFS Group 1.

Cases in which Defendants Claim That no Records have been Produced

Although Defendants appear to claim that there is a large category of cases in which the medical records required by CMO No. 8 are “not produced,” the cases in this category are more typically marked by having produced medical records which raise one or more issues which Defendants seek to address through the deficiency process outlined in CMO No. 8. Each case in this category is unique with respect to the records produced and the issue(s) raised by Defendants, but the current status of the PPF disclosure process for the cases identified by Defendants is reflected below:

Plaintiff and Member Case Number	Date of Deficiency Notice	Curative Records Submissions
Hawkins, Vera 2:23-cv-02020-DGC	1/4/2024	1/9/2024 1/17/2024 2/19/2024 5/6/2024
Eckert, Rebecca 2:24-cv-00139-DGC	3/26/2024* *LTR asking for supplementation based on review of medical records	
Shelby, Burgandy 2:24-cv-00359	4/1/2024	4/12/2024 4/15/2024
Whitby, Latwon 2:24-cv-00482-DGC	4/12/2024	Records produced 4/5/2024

Plaintiff and Member Case Number	Date of Deficiency Notice	Curative Records Submissions
Gay, Paisami 2:23-cv-1755-DGC	1/4/2024	1/17/2024 2/9/2024 2/19/2024 3/25/2024
Kessler, Paul 2:23-cv-1696-DGC	1/4/2024	1/9/2024 1/18/2024 3/26/2024
Catanzaro, August 2:24-cv-00292-DGC	3/29/2024	Records produced 3/13/2024

In many cases, plaintiffs in the above-referenced actions have produced more records than those which are required by CMO 8 in order to address the issues raised by Defendants. Plaintiffs take no position as to whether the records produced in the curative submissions are required by CMO 8 or whether they are produced in response to a valid deficiency. Rather, the initial PPF disclosures are diverse in the issues they raise for Defendants, and the curative submissions are equally diverse.

As to the remedies that Defendants request, Plaintiffs believe that the language of CMO No. 8 and the PPF are clear, as are the remedies outlined therein. However, Plaintiffs acknowledge that the approaching deadline for selection of cases for PFS/DFS Group 1 underlines the importance of compliance with CMO No. 8 by all parties. To that end, Plaintiffs will not oppose an added process which would assure that the purposes of the bellwether selection process are being served by the parties' disclosures and help define the contours of CMO 8 compliance. It is Plaintiffs' position that any action required by the plaintiffs identified by Defendants on the proposed May 24 deadline should be limited to:

- a. Producing missing records required by CMO No. 8;

b. Stating that the plaintiff takes the position that their PPF disclosures are currently compliant with CMO No. 8; or

c. Providing an affirmative communication to Defense counsel stating that any required records have been requested but have not been received.

Cases Where Defendants Claim Inconsistencies in Information, Unclear Claims or Incomplete Medical Records Produced

As a threshold matter, Plaintiffs dispute the claim that CMO 8 generally requires Plaintiffs to provide information outside of that required by CMO 8. However, the limited number of cases referenced by Defendants on this issue and the importance of defining the universe of claims in the bellwether pool do counsel toward resolution of valid inquiries arising from ambiguities in plaintiffs' disclosures, where they exist. Plaintiffs will not oppose an added requirement of the identified plaintiffs to provide a response to Defendants' inquiries.

Port Body Claims

Contrary to Defendants' suggestions, a "port body claim" is not a monolithic case theory that is readily discernible to every plaintiff, possibly with the exception of port erosion through the tissue of the implantation site. Rather, as is set forth in the Amended Master Complaint, the alleged defects in the port body may manifest in very different clinical complications which may or may not be recorded in a medical record. For example, it is not within the normal course of diagnosis and treatment for a treating physician to make a determination whether an infectious biofilm initially formed in a port reservoir or a catheter. Further, corporate discovery is still in its early stages. The role(s) of the particular defects of the port bodies in precipitating the injuries set forth in the Master Complaint cannot be determined without additional discovery, and plaintiffs would be prejudiced if

multiple theories for defect and causation are foreclosed prior to the close of discovery.

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Respectfully submitted,

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