

Edward J. Fanning (*Admitted Pro Hac Vice*)
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Phone: (973) 639-8486
Fax: (973) 797-3868
Email: efanning@mccarter.com

Richard B. North, Jr. (*Admitted Pro Hac Vice*)
NELSON MULLINS RILEY &
SCARBOROUGH, LLP
Atlantic Station
201 17th Street, NW, Ste. 1700
Atlanta, GA 30363
Phone: (404) 322-6000
Fax: (404) 322-6050
Email: 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

**DEFENDANTS' MEMORANDUM
RE: BELLWETHER SELECTION**

(Applies to All Actions)

Pursuant to Amended Case Management Order No. 10 (Doc. 2218) and Case Management Order No. 32 (Doc. 2897), Defendants submit this Memorandum regarding the final selection of bellwether cases.

I. THE BELLWETHER NOMINATIONS

As required by Case Management Order No. 32, the parties exchanged their respective nominations for the bellwether pool on April 17, 2025. Both sides proposed the Wanda Miller case. Otherwise, there was no overlap between the lists.

Plaintiffs nominated the following list of cases:

PLAINTIFFS' NOMINATIONS		
Plaintiff	Catheter Material	Alleged Complication
Divelbliss	Groshong	Fracture
James	Groshong	Fracture
Latanzio	Silicone	Infection
Sanders	Silk	Infection
Sours	Groshong	Infection
Miller	Polyurethane	Thrombus

In turn, Defendants proposed the following cases for the bellwether pool:

DEFENDANTS' NOMINATIONS		
Plaintiff	Catheter Material	Alleged Complication
Kelley	Polyurethane	Fracture
Cook	Polyurethane	Infection
Davilman	Polyurethane	Infection
Sorenson	Polyurethane	Infection
Hicks	Polyurethane	Thrombus
Miller	Polyurethane	Thrombus

During the week of April 21, the parties convened two meetings via zoom and exchanged several proposals for a compromise slate. Despite those efforts, the parties were unable to reach an agreement beyond the one case (Miller) they had jointly designated originally.

II. THE MDL INVENTORY

Plaintiffs' nominations are not representative of the MDL inventory as a whole. They heavily focus on catheter materials that make up a very small number of the cases pending in the MDL.¹ Their selections disproportionately include an alleged complication (fracture) that similarly makes up a very small percentage of the cases. And half of their nominations include significant surgeries, when only a very small number of the pending cases involve plaintiffs who underwent surgery allegedly related to a port complication.

A review of the available census data regarding the MDL inventory as a whole is instructive and readily demonstrates why Plaintiffs' choices are not representative. The Defendants maintain a database with information concerning every case. Upon receipt of a completed plaintiff's profile form, Defendants' counsel enters key information about each case, including the type of port catheter at issue and the complication alleged. At present, there are approximately 1,512 ports at issue in the MDL. This number exceeds the number of plaintiffs, because some plaintiffs are raising issues about multiple ports.

The breakdown of those 1,512 port claims² by complication is as follows:

Complication	Polyurethane	Groshong	Silk	Silicone	Unknown	Total	%
Infection	659	42	7	68	50	826	55%
Thrombosis / Occlusion	371	26	1	49	14	461	30%
Fracture	109	77	0	45	11	242	16%

¹ Each implantable port consists of a port body and a catheter. The catheters are made out of either silicone or polyurethane. All of the claims in the potential bellwether pool are related to the catheter rather than the port body itself.

²A relatively small number of plaintiffs allege a combination of complications. A complication included in a combination claim is included in the appropriate category. For example, if a port is alleged to have caused a fracture, thromboses, and infection, it would be included in each category.

Of those 1,512 ports, **55%** of the catheters are alleged to have caused an infection. Plaintiffs claim thrombus as a complication with **30%** of the catheters at issue, and fracture with **16%** of the cases. Despite this ratio of alleged complications, Plaintiffs have designated 2 fracture cases as bellwether cases, and only 1 thrombus case.

The cases selected by Plaintiffs are even less representative from the overall inventory when it comes to the material of which the catheter is made. The breakdown of the MDL inventory by type of catheter material is as follows:

Total # Plaintiffs	1295	
Total # Ports	1512	
Silicone	142	9%
Groshong	149	10%
Silk	7	0%
Poly/chronoflex	1133	75%
Unknown	81	5%

1512

As that chart demonstrates, the vast majority (**75 %**) of the catheters at issue in this MDL are made of polyurethane. Plaintiffs, however, identified only a single polyurethane catheter case (**Miller**) for the final bellwether pool. Three of the cases they selected (**Divelbliss, James and Sours**) involve Groshong catheters, a unique type of catheter made of silicone and equipped with a three-position valve that allows liquids to flow in and out yet remain close when not in use. Discovery has demonstrated that Groshong catheters have a very different risk-benefit profile than polyurethane catheters. And only **10%** of the catheters at issue in the MDL are Groshong catheters.

1 Plaintiffs' other two recommendations (**Latanzio** and **Sanders**) also deviate
2 from the breakdown of the MDL as a whole, when it comes to the material at issue.
3 **Latanzio** involves a non-Groshong silicone catheter, while only **9%** of the catheters
4 in the MDL fall into that category. **Sanders** involves a unique catheter called Silk,
5 made of a polyurethane material that goes through a different extrusion process than
6 other polyurethane catheters. Ports with Silk catheters were on the market for a
7 relatively short period of time, which likely explains why only 7 plaintiffs in the
8 entire MDL have identified a Silk Catheter, far less than **1%** of the inventory.
9 Despite those circumstances, Plaintiffs designated a Silk case as 1 of 6 of their
10 proposed bellwethers.

11 Given the relative percentage breakdown of alleged complications in the
12 MDL, Defendants believe the final pool should include 3 infection cases. That
13 would be consistent with the data showing that the plaintiffs are claiming infection
14 with **53%** of the catheters at issue. Defendants submit that 2 of the remaining cases
15 should involve a thrombus allegation and 1 should involve a fracture claim. That
16 would be consistent with the data demonstrating that the MDL makeup as a whole
17 includes twice as many claims of thrombus than there are of fracture.

18 With regard to the severity of the injuries alleged, the available data is not as
19 robust. The profile forms do not disclose whether a plaintiff had a surgical
20 procedure related to an alleged complication with the port. However, Defendants
21 do have comprehensive information concerning the 48 cases that were part of the
22 Fact Sheet group from which the 15 Discovery Group cases were selected.
23 Logically, one would expect those cases to be skewed with more serious injury cases
24 than the general bellwether pool, since Plaintiffs got to choose 24 of the 48 cases.
25 And it has been Defendants' experience in mass tort litigation that Plaintiffs
26 typically file cases alleging more serious injuries earlier in the litigation. Despite
27 that fact, only 4 of the 48 cases (**8%**) involve an open surgical procedure beyond
28 the routine minimally invasive procedure utilized to remove a port. Plaintiffs chose

1 3 of those 4 cases in their bellwether nominations, and fully half of Plaintiffs'
2 proposed bellwether picks (**Sours, Sanders, and Divelbliss**) involved serious
3 surgeries.

4 In sum, five of Plaintiffs' six bellwether recommendations involve catheter
5 materials that are not representative of the MDL inventory. Plaintiffs designated
6 twice as many fracture cases than thrombus cases, when the inventory has twice as
7 many thrombus cases as fracture cases. And the slate proposed by Plaintiffs
8 cherry-picked severe injury cases that are quite atypical of the MDL as a whole.

9 **III. THE PLAINTIFFS' SPECIFIC RECOMMENDATIONS**

10 **A. Divelbliss**

11 Divelbliss is an outlier in multiple respects. It involves a Groshong
12 catheter, which makes up only 10% of the inventory. It involves a fracture as the
13 alleged complication mode, when fracture makes up only 16% of the inventory. It
14 involves highly unusual injury claims, as the plaintiff and her cardiologist allege
15 that her cardiac problems, which have necessitated 4 ablation procedures and the
16 implant of a pacemaker, were caused by the fracture of the catheter. The Defendants
17 have not seen such allegations related to a port device in a single other case.

18 Moreover, substantial discovery regarding Ms. Divelbliss's cardiac
19 condition remains to be accomplished, through no fault of Defendants. Just this
20 month, after discovery for Discovery Group 1 had closed, Defendants received
21 medical records that provided the first indication that her cardiac difficulties existed
22 prior to the time the fracture of her port catheter occurred. In addition, Defendants
23 have recently identified a long list of medical providers that Plaintiff did not
24 previously disclose in her Fact Sheet, and records need to be obtained from those
25 providers to properly assess Plaintiff's cardiac condition, and the causal relation (if
26 any) to the fracture of her catheter. Similarly, despite repeated requests, her treating
27 cardiologist has yet to produce all of his medical records relating to this treatment
28 of Ms. Divelbliss. Because of those issues, it will be extremely challenging to put

1 this case in a posture where case-specific experts can analyze the case and prepare
2 reports within the present schedule.

3 Lastly, this Plaintiff is a case that presents a unique fact that
4 undermines the predictive value of any verdict in this case. Ms. Divelbliss had at
5 least 7 ports implanted over the years, including at least 5 Bard ports. A number of
6 these ports have had to be removed because of other issues related to those ports.
7 However, this Plaintiff has made it very clear that she is only raising a claim with
8 regard to the single port catheter that fractured. Nonetheless, the multiple ports the
9 Plaintiff has had over time, and the multiple times she has had to have a port
10 removed, may readily confuse the jury, and invite a decision based on evidence
11 unrelated to the single port that is the basis of her claim. In short, the case could
12 easily produce a verdict that tells the parties nothing about the value of more typical
13 cases.

14
15 **B. James**

16 Like Divelbliss, James is an outlier, in that it involves a Groshong
17 catheter and it involves an alleged fracture. Although Mr. James' injury is more
18 typical (a percutaneous removal of the fractured catheter), the fact that it involves a
19 Groshong catheter undercuts its representativeness. Since only 16% of the catheters
20 at issue in the MDL are alleged to have fractured, that small percentage justifies
21 including no more than 1 fracture case in the bellwether pool. In turn, since 75% of
22 the catheters at issue are polyurethane (compared to 10% being Groshong), it seems
23 logical that the single fracture case included in the bellwether pool involve a
24 polyurethane catheter.

25 **C. Latanzio**

26 Latanzio does involve a claim of infection, a more common allegation
27 (55%) in this MDL. However, it involves a silicone catheter, and only 9% of the
28 catheters at issue in the MDL are silicone.

1 **D. Miller**

2 Both Plaintiffs and Defendants nominated Miller to be a bellwether
3 case. It involves a polyurethane catheter alleged to have caused a thrombus.
4 Because all parties consider the case to be representative of the MDL as a whole,
5 Defendants respectfully submit that Miller would be an appropriate case to select as
6 the initial bellwether to be tried.

7 **E. Sanders**

8 Sanders does involve an alleged infection, a commonly claimed
9 complication in this MDL, but that is the only way it is representative of the claims
10 made in this MDL. It involves a Silk Catheter, and as previously noted, claims have
11 been made about Silk Catheters in only 7 cases – less than 1% -- pending in this
12 MDL. For that reason alone, any verdict in this case would have virtually no
13 predictive value for the other cases pending in the MDL. In addition, the case
14 involves an extremely serious surgical procedure (valve replacement), which
15 Defendants have not seen replicated in other cases. Given those facts, Sanders is an
16 extreme outlier.

17 **F. Sours**

18 Sours is still another Groshong case. It also involves a highly unusual
19 injury claim, as Plaintiff alleges, he had to have multiple surgeries (including spinal
20 fusion surgery) as a result of the alleged infection of his catheter. Further, the port
21 was utilized for a relatively rare indication, the administration of long-term infusion
22 therapy for a rare medical condition. The port was not used for chemotherapy, as is
23 typically the case. A verdict in this case would give the parties little or no
24 informative data about the value of other cases.

25 **IV. THE DEFENDANTS' SPECIFIC RECOMMENDATIONS**

26 As previously noted, the data from the MDL as a whole reveals that 55% of
27 the catheter claims allege infection, 30% allege thrombus, and only 16% allege
28 fracture. Based on that breakdown, Defendants believe that the final bellwether

1 pool should include 3 infections cases, 2 thrombus cases, and 1 fracture case. And
2 given the overwhelming predominance of polyurethane catheters at issue,
3 Defendants believe that all of the bellwether cases need to be catheters made of that
4 material.

5 Defendants' proposed picks are the following:

- 6 • **Cook** – Infection
- 7 • **Davilman** – Infection
- 8 • **Sorenson** – Infection
- 9 • **Kelley** – Fracture
- 10 • **Hicks** – Thrombus
- 11 • **Miller** – Thrombus

12 Of interest, Cook was a case that both Plaintiffs and Defendants designated
13 to be in the Discovery Group of 15 cases. As a result, in view of both sides'
14 favorable view of that case, Defendants submit that Cook is a particularly
15 appropriate case to include in the final bellwether pool.

16 All of the Defendants' nominations – both in terms of complication and
17 catheter material, and given the typical nature of the injuries alleged – are highly
18 representative of the MDL inventory as a whole. Defendants' submit that their slate
19 will provide predictive data that will assist in guiding the parties toward a resolution
20 of this litigation.

21
22
23 Respectfully submitted this 28th day of April 2025,

24 /s/ Edward J. Fanning, Jr.
25 Edward J. Fanning, Jr.
26 (Admitted Pro Hac Vice)
27 McCarter & English, LLP
28 Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
Phone: (973) 639-7927
Fax: (973) 297-3868
Email: efanning@mccarter.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

/s/ James R. Condo
James R. Condo (#005867)
Snell & Wilmer L.L.P.
One East Washington Street,
Suite 2700
Phoenix, AZ 85004
Phone: (602) 382-6000
Fax: (602) 382-6070
E-mail: jcondo@swlaw.com

Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28