

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

IN RE: Bard Implanted Port Catheter
Products Liability Litigation,

MDL No. 3081

CASE MANAGEMENT ORDER NO. 23
(Seventh Case Management Conference)
(Applies to All Actions)

The Court held a seventh Case Management Conference with the parties on May 24, 2024. *See* Docs. 751, 768. This order reflects matters discussed and decided during the conference.

1. The Court will hold an eighth Case Management Conference on **July 9, 2024, at 10:00 a.m.** Arizona time. The conference will be held via Zoom. By **11:00 a.m.** on **July 8, 2024**, the parties shall file a joint memorandum providing an update on the topics addressed in the remainder of this order.

2. The parties have reached agreement on the search terms to be used in Defendants' TAR search for relevant ESI from the first 30 custodians. Doc. 751 at 2, 10. The deadline for substantial completion of production for these custodians is July 1, 2024. *See* CMO 18, Doc. 525 at 4.

3. The parties are conferring on the ESI searches to be completed with respect to the second 30 custodians, where the substantial completion deadline is August 15, 2024.

1 *Id.* Defendants stated that they intend to share TAR metrics with Plaintiffs for these
2 custodians as soon as reasonably possible. The parties should report on the status of their
3 discussions in the July 8 joint memorandum. If the parties reach an impasse on this issue
4 before **June 13, 2024**, they shall call the Court to schedule a telephone conference for the
5 following day. The same is true with respect to an impasse on any other time-sensitive
6 discovery issue being addressed by the parties.

7 4. Despite their efforts, the parties have not yet reached agreement on a
8 substantial completion deadline for documents from DocuShare. *See* Docs. 693 at 2, 751
9 at 14. Defendants shall provide an update at the next case management conference on the
10 status of this issue.

11 5. As reflected in CMO 22, Doc. 724 ¶ 3, the July 8 joint report should include
12 a discussion of the parties' efforts to reach a stipulation on successor liability.

13 6. The parties have reached agreements on three categories of documents. The
14 agreements are reflected in emails between the parties and are summarized as follows:

- 15 • Non-IPC Devices: Plaintiffs seek discovery of certain documents related to
16 non-IPC devices, including peripherally inserted central catheters (“PICCs”) and
17 central venous catheters (“CVCs”). Defendants generally object to the
18 expansion of discovery beyond the IPC devices that are the subject of this MDL,
19 but recognize that certain technologies used in PICCs and CVCs may be
20 relevant. After conferring about the relevancy of these other devices, the parties
21 agree on limiting discovery of documents reviewed as part of the Custodial TAR
22 workflow to those documents that may implicate Plaintiffs’ “Alleged Defect
23 Theory.” This includes, for example, documents related to antimicrobial or
24 antithrombotic coatings, the smoothness/roughness of catheters, degradation of
25 catheters, and the strength of the catheters insofar as those issues informed
26 alternative catheter designs contemplated for use in the United States.
- 27 • Ethanol Locks & 3CG Catheter Position Technology: Plaintiffs seek discovery
28 regarding (1) ethanol lock therapy, which is a potential mechanism to reduce

1 catheter-related bloodstream infections discussed in scientific literature; and
2 (2) 3CG catheter position technology, which allows for confirmation of the
3 catheter tip via ECG in lieu of fluoroscopy or x-ray. Defendants agree to
4 produce documents discussing ethanol locks with respect to IPCs, but not other
5 devices such as PICCs. Defendants further agree to produce documents related to
6 Plaintiffs' "Alleged Defect Theory" in catheters when used in conjunction with
7 Defendants' 3CG catheter position technology.

- 8 • Foreign Discovery: Defendants agree to produce documents from the Custodial
9 TAR workflow that relate to (a) regulatory communications with foreign
10 regulatory bodies regarding ports in accordance with and as limited by CMO 15;
11 (b) relevant adverse events for ports, such as internal discussion of fracture,
12 infection or thrombosis; (c) discussion of the US market or consideration of
13 technologies for use in the US market regarding ports; and (d) with respect to
14 Japan only, documents regarding Plaintiffs' "Alleged Defect Theory" (i) as it
15 relates to ports or (ii) as it relates to the certain alternative designs identified by
16 Plaintiffs.

17 7. With respect to Plaintiffs who allegedly have produced inconsistent
18 information (*see* CMO 22, Doc. 724 ¶ 7), issues remain with respect to two – Plaintiffs
19 Kessler and Gay (*see* Doc. 751 at 18-19). Within the next two days, Defense counsel shall
20 send an email to Plaintiffs' lead counsel identifying precisely the inconsistency that
21 remains. Within 14 days of this order, counsel for Plaintiffs Kessler and Gay shall provide
22 a clear, direct, and complete response to Defendants on the identified inconsistencies. If
23 Plaintiffs' counsel do not respond, defense counsel may seek attorneys' fees related to this
24 issue in the July 8 joint memorandum.

25 8. Defendants believe Plaintiffs in the six cases identified on page 22 of Doc.
26 751 have failed to produce all medical records required with their PPFs. Within the next
27 two days, Defense counsel shall send an email to Plaintiffs' lead counsel identifying
28 precisely the records that are missing. Within 14 days of this order, counsel for these six

1 Plaintiffs shall provide clear, direct, and complete responses to Defendants' assertion of
2 missing documents. If Plaintiffs' counsel do not respond, defense counsel may seek
3 attorneys' fees related to this issue in the July 8 joint memorandum.

4 9. Defendants contend that some Plaintiffs who produced PPFs before
5 March 15 have failed to amend their PPFs to state whether they are asserting port body
6 claims (as ordered by the Court – *see* CMO 22, Doc. 724 at 3-4), and some who produced
7 PPFs after March 15 have left the port body portion of their PPFs blank and have not
8 amended their PPFs as ordered by the Court (*see id.*). Within one week of this order,
9 Defendants shall send Plaintiffs' lead counsel a list of these cases. Because these Plaintiffs
10 have failed to respond to court orders, this case will proceed on the assumption that they
11 are not asserting port-body-related claims.

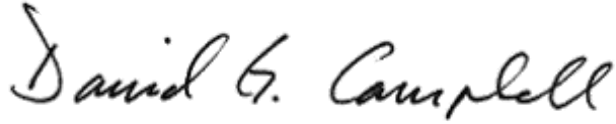
12 For reasons stated on the record, the Court will not at this time preclude these
13 Plaintiffs from asserting port body claims. The existence of such claims in some cases may
14 be revealed only through discovery. The Court also recognizes, however, that certainty
15 about the claims asserted by various Plaintiffs is an important component of bellwether
16 selection.

17 These Plaintiffs will be included in the Initial Plaintiff Pool (IPP) for purposes of
18 bellwether selection, but if the Court allows Plaintiffs to assert previously-undisclosed port
19 body claims at a later date, and Defendants believe the addition of those claims has an
20 adverse effect on a Plaintiff's inclusion in the bellwether selection process, Defendants
21 may raise that issue with the Court in a joint memorandum.

22 If any Plaintiff who has failed to assert a port body claim wishes to do so in the
23 future, Plaintiffs' lead counsel shall identify such Plaintiffs in joint case management
24 memoranda and shall include the basis for the Plaintiff's request to add the claim. The
25 Court will discuss the issue with the parties at the corresponding case management
26 conference and, if necessary, call for focused briefing under Rule 15. In ruling on whether
27 a Plaintiff should be allowed to amend his or her claims, the Court will consider the
28

1 traditional Rule 15 factors and also whether the Plaintiff failed to respond to court-ordered
2 disclosures.

3 Dated this 24th day of May, 2024.

4
5 

6
7

8 David G. Campbell
9 Senior United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28