

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

IN RE: C. R. BARD, INC., PELVIC
REPAIR SYSTEM PRODUCTS LIABILITY
LITIGATION

MDL NO. 2187

THIS DOCUMENT RELATES TO ALL WAVE 3 CASES

**PRETRIAL ORDER # 142
(First Amended Docket Control Order for Discovery of
Certain Avaulta, Bard Only Cases – Wave 3)**

On October 16, 2014, the parties appeared for a brief telephone conference regarding certain deadlines and provisions in PTO # 131. Plaintiffs' counsel, Mr. Henry Garrard, moved for modification of PTO # 131 as follows: (1) plaintiffs sought an extension of the expert disclosure deadlines by sixty (60) days in light of the fact that disclosures will be due before written deposition questions of treating physicians are completed; and/or (2) plaintiffs asked that the court permit the taking of oral rather than written depositions of specific causation experts, particularly treating physicians. Counsel for defendant C. R. Bard, Inc., Lori Cohen, opposed the oral motion.

Upon consideration of the arguments of counsel, it is **ORDERED** that plaintiffs' oral motion is **GRANTED in part and DENIED in part**. I will not change the provisions of the PTO related to the written deposition questions. However, I have made changes to PTO # 131 so that deposition questions are completed before the disclosure of experts by either side. I have modified the following paragraphs: B.2.e, C.1.b, C.1.c, C.1.d, C.2.b, C.2.c, D.1, D.2, D.3, and D.7.² The remaining provisions remain in force and effect.

² In addition, I deleted paragraph C.1.e from PTO # 131.

A. CONFIRMATION OF APPROPRIATENESS FOR INCLUSION IN WAVE 3

1. On or before **August 6, 2014**, both sides must jointly file a list identifying any cases on Exhibit A in which the most current Short Form or Amended Short Form Complaint identifies a defendant in addition to Bard OR a product other than the following Avaulta products ((1) Avaulta Plus Anterior Support System; (2) Avaulta Plus Posterior Support System; (3) Avaulta Solo Anterior Synthetic Support System; and (4) Avaulta Solo Posterior Synthetic Support System), such that it is not appropriately included for work up in Wave 3. This list should indicate the case name, number and defect³ and be filed in MDL 2187. On or before **August 8, 2014**, the court will determine whether any case on the contested list filed by the parties should be removed from Wave 3 and will file an order to that effect. Thereafter, the court will instruct the Clerk to mark the remaining individual cases as Wave 3 cases.

B. FACT DISCOVERY

1. Plaintiff Fact Sheets, Authorizations and Defendant Fact Sheets.

- a. **Plaintiff Fact Sheet.** On or before **August 29, 2014**, plaintiffs shall provide Plaintiff Fact Sheets (“PFS”) and executed authorizations for all Wave 3 Cases. Authorizations shall be provided in accordance with the requirements of PTO # 69.
- b. **Plaintiff’s Medical Records.** To increase efficiency, plaintiffs shall timely provide Bard with copies of all medical records that are in their attorneys’ possession as of the date of this Order. Such records must be received by

³ I will not remove a case from the list simply because Bard asserts that the case involves a non-Avaulta product or multiple manufacturers when the Short Form Complaint or Amended Short Form Complaint indicates otherwise or because the Short Form Complaint has not been timely served. The parties must either jointly agree to the removal of these cases from this wave or litigate these issues.

counsel for Bard no more than **10 business days** after the deadline for service of the Plaintiff Fact Sheet.

- c. If a plaintiff fails to provide a substantially completed PFS or executed authorizations by the deadline applicable to that action, Bard has the option to file a motion for the entry of an Order to Show Cause why the case should not be dismissed with prejudice.
- d. PTO # 121 (Stipulated Evidence Preservation Protocol for Potential Trial Selection Cases) shall apply pending further order of the court.
- e. **Defendant's Fact Sheet.** On or before **September 19, 2014**, Bard shall provide a Defendant Fact Sheet ("DFS") for all Wave 3 Cases.

2. Depositions.⁴

- a. **Plaintiff's Deposition.** The deposition(s) of the plaintiff and any spouse must be completed by no later than **October 17, 2014**. The deposition of the lead plaintiff in each case may not exceed two (2) hours for direct examination and one (1) hour for cross-examination. The deposition of any spouse making a consortium claim may not exceed one (1) hour for direct-examination and thirty (30) minutes for cross-examination. The parties are encouraged to coordinate the locations for and the taking of such depositions. I urge the parties to consider entering into agreements to take multiple plaintiffs' depositions at the same time and location where the deponents reside in the same geographic region.

⁴ The depositions of a plaintiff's friends and family members need not be completed by the deadline for the completion of fact discovery. Such depositions may be taken at any time prior to trial provided the deposition is requested before the deadline for completing fact discovery. These depositions are limited to one (1) hour for direct examination and thirty (30) minutes for cross-examination.

b. **Treating physicians (implanting, explanting physicians).** It is impractical for the parties to orally depose each and every treating physician in these cases. There are 298 cases in Wave 3, and if Bard deposed three (3) treating physicians for a total of seven (7) hours each, these depositions would last a total of 6,258 hours. While Rule 31(a)(2) does not fully apply to the situation at hand, the court finds that its provisions for depositions by written questions provide a means by which some efficiency may be achieved in collecting the necessary information from the treating physicians given the unique set of circumstances in this MDL, the distinct directive provided in Rule 1 and the flexibility suggested by Rule 26.

i. In each case, Bard may serve no more than thirty (30) written deposition questions per treating physician by no later than **October 31, 2014**; responses must be served no later than **November 14, 2014**.

ii. Plaintiffs' cross-questions (limited to twenty (20)) may be served no later than **November 17, 2014**; responses must be served no later than **December 1, 2014**.

iii. Bard's redirect questions (limited to ten (10)) may be served no later than **December 3, 2014**; responses must be served no later than **December 10, 2014**.

c. **Sales Representatives.**

i. In each case, plaintiffs may serve no more than ten (10) written deposition questions per sales representative by no later than **October 31, 2014**; responses must be served no later than **November 14, 2014**.

ii. Bard's cross-questions (limited to five (5)) may be served no later than **November 17, 2014**; responses must be served no later than **December 1, 2014**.

iii. Plaintiffs' redirect questions (limited to three (3)) may be served no later than **December 3, 2014**; responses must be served no later than **December 10, 2014**.

- d. **Corporate and non plaintiff-specific fact discovery.** Rule 30(b)(6) depositions may not exceed two (2) hours for direct examination and one (1) hour for cross-examination. Plaintiffs are limited to five (5) Rule 30(b)(6) witnesses. Plaintiffs must choose a lead questioner. If a corporate witness has been previously deposed in this MDL litigation, the parties shall attempt to agree on whether a second deposition should occur, and if so, the parameters of the deposition. Nothing in this Docket Control Order should be construed to abridge a party's right to seek a protective order as to any appropriate issue on any available ground. All other non plaintiff-specific fact discovery shall be completed by written deposition and be limited to five (5) questions per side; three (3) cross-questions per side and two (2) redirect.
- e. All fact discovery must be completed by **December 10, 2014**.
- f. The court will permit additional fact discovery where a party specifically describes the additional discovery and shows good cause for the taking of such discovery in accordance with the Federal Rules of Civil Procedure.

C. EXPERT DISCOVERY ON AVAULTA PRODUCTS

1. **Expert Discovery and Reports.** The parties may conduct general and specific expert discovery on the Avaulta products at issue in Wave 3. In light of the bellwether trial that already occurred on the Avaulta Plus Posterior Support System and the substantial discovery conducted to date on the other Avaulta products, the parties are cautioned not to engage in duplicative general expert discovery, but instead, to tailor their discovery to the remaining Avaulta products at issue (to the extent such discovery is necessary), supplementing any discovery already completed and conducting specific causation discovery for the Wave 3 plaintiffs. In light of the common products involved in this wave, the likelihood of overlap in expert opinion from one case to another (except as to specific causation) and the need to streamline discovery in these cases, each side is limited to no more than three (3) experts per case (exclusive of treating physicians). It is the court's expectation that these experts will overlap for plaintiffs who have the same product(s), to some extent, if not entirely.

- a. In each case, the parties shall serve (i) expert disclosures pursuant to Fed. R. Civ. P. 26(a)(2)(A) and Fed. R. Civ. P. 26(a)(2)(C), and (ii) expert reports pursuant to Fed. R. Civ. P. 26(a)(2)(B).
- b. Absent good cause shown, plaintiffs shall serve expert disclosures and reports in each case on or before **December 17, 2014**.
- c. Absent good cause shown, Bard shall serve expert disclosures and reports in each case on or before **January 16, 2015**.

- d. The parties shall serve disclosures and reports for rebuttal expert witnesses, if any, by no later than **February 26, 2015**.
- e. The court will permit additional expert discovery where a party specifically describes the additional discovery and shows good cause for the taking of such discovery in accordance with the Federal Rules of Civil Procedure.

2. Expert Depositions.

- a. **General Causation Expert Depositions.** The parties shall coordinate the depositions of general causation experts. Insofar as multiple plaintiffs have utilized the same general causation expert or experts, those experts shall be deposed only once on the issue of general causation. As to Bard's experts, plaintiffs are instructed to choose a lead questioner.
- b. **Specific Causation Expert Depositions.** The opinions of experts regarding their specific causation opinions for individual plaintiffs shall be obtained by written deposition as follows:
 - i. Bard may serve no more than thirty (30) written deposition questions per expert by no later than **January 5, 2015**; responses must be served no later than **January 20, 2015**.
 - ii. Plaintiffs' cross-questions (limited to twenty (20)) may be served no later than **January 23, 2015**; responses must be served no later than **February 10, 2015**.
 - iii. Bard's redirect questions (limited to ten (10)) may be served no later than **February 13, 2015**; responses must be served no later than **February 20, 2015**.

- c. Absent good cause shown, expert discovery shall be completed by no later than **March 5, 2015**.

D. Motion Practice.

1. ***Daubert* Motion Practice.** To the extent the parties are able to file identical *Daubert* motions in multiple cases or groups of cases, they are encouraged to do so. The parties must file such omnibus motion(s) in each Wave 3 case to which it applies. Insofar as there are case-specific and/or omnibus *Daubert* motions in the individual cases, such motions are due **March 12, 2015**. Responses are due **March 26, 2015**. Replies are due **April 2, 2015**.
2. **Non *Daubert* Based Dispositive (or partially dispositive) Motion Practice.** Non *Daubert* based dispositive (or partially dispositive) motions also can be streamlined by grouping motions by issue and/or State. The parties are encouraged to file omnibus motions where common issues are involved in multiple cases or groups of cases. If the parties file such motions, the parties are directed to file in each Wave 3 case in which the motion applies. Individual and/or omnibus motions are due **March 12, 2015**. Responses are due **March 26, 2015**. Replies are due **April 2, 2015**.
3. ***Daubert* Based Dispositive Motion Practice.** *Daubert* based dispositive motions are due **May 8, 2015**. Responses are due **May 16, 2015**. No reply briefs shall be filed for *Daubert*-based dispositive motions.
4. **Motions in Limine.** Motions in Limine may be filed only upon leave of court based on a showing of specific need for that particular issue to be determined prior to trial. In the event the court grants leave, motions are limited to 3 pages each, responses are limited to 2 pages each. No reply briefs shall be filed for motions in limine.

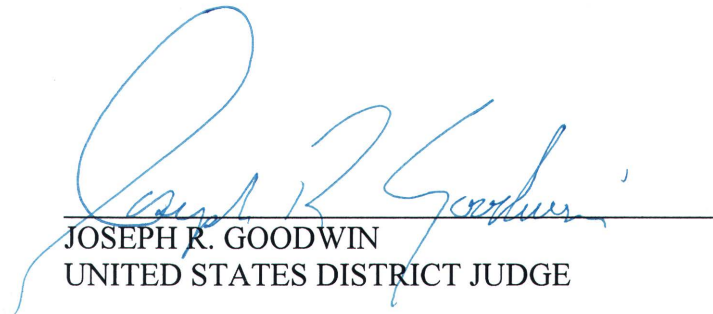
5. Dates for hearings on motions, if any, will be set at a future status conference.
6. **Page limitations.** If the parties file omnibus motions related to multiple cases or groups of cases, I will not impose additional page limits beyond those contained in the court's Local Rules of Civil Procedure 7.1(a)(2). The parties shall provide courtesy copies to the court in accordance with Local Civil Rule 7.1(a)(5), and requests that such courtesy copies include the header added upon filing. If a motion (other than a motion in limine) does not apply to more than one case, the court imposes the following deadlines: the memorandum in support of the motion is limited to five (5) double spaced pages; the response is limited to three (3) double spaced pages; and the reply is limited to two (2) double spaced pages.
7. **Placeholder Exhibits.** In the past, the court has permitted parties to file placeholder exhibits in support of *Daubert*, dispositive and other motions, responses and replies in the place of confidential documents that may be sealed and then, within five days, redact/dedesignate the documents or file a motion to seal. Moving forward, ***the court will no longer permit this practice. Parties may no longer file placeholder exhibits. The court expects leadership counsel for plaintiffs and Bard to resolve issues related to confidential designations well before the filing of the above motions.*** Filings containing placeholder exhibits will be struck. In the event there are issues related to sealing of confidential documents that the parties are unable to resolve, they must be brought to the court's attention in a consolidated manner as follows: Any consolidated motion to seal is due on or before **February 9, 2015**, any response is due **February 17, 2015**, and any reply is due **March 23, 2015**.

E. CASES READY FOR TRANSFER, REMAND OR TRIAL.

1. By no later than **September 15, 2014**, the parties shall meet and confer concerning the appropriate venue for each of the cases, and the parties shall submit venue recommendations to the court, either jointly or separately, by **September 22, 2014**. The parties' recommendation(s) shall identify the cases about which the recommended venue is and is not in dispute. In accordance with PTO # 51, the court may then request briefing concerning the venue for those cases about which the parties disagree. Each party reserves the right to object to the venue selected by its adversary or the court.
2. At the conclusion of pre-trial proceedings, the court, pursuant to PTO # 51 and 28 U.S.C. § 1404(a), will transfer each directly-filed case to a federal district court of proper venue as defined in 28 U.S.C. § 1391. In the alternative, pursuant to PTO # 51 and 28 U.S.C. § 1407, cases that were transferred by the JPML shall be remanded for further proceedings to the federal district court from which each such case was initially transferred.
3. If a case is to be tried in the United States District Court for the Southern District of West Virginia (either by agreement of the parties or where venue in the Southern District is determined to be proper by the court), the case shall be deemed trial-ready as soon as discovery is completed and the court rules on the parties' motions in limine and non dispositive *Daubert* motions. The trial date for cases transferred or remanded to other federal district courts shall be set by the judge to whom the transferred or remanded case is assigned (including the undersigned through intercourt assignment).

The court **DIRECTS** the Clerk to file a copy of this order in 2:10-md-02187 and **in all Wave 3 cases** and it shall apply to each member related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:14-cv-26651. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsd.uscourts.gov.

ENTER: October 29, 2014



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE