

**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 BARD WAVE 1 and 2 CASES

PRETRIAL ORDER # 165

(Third Amended Docket Control Order for Selection and Discovery of 200 Cases)

IT IS ORDERED that PTO ##s 118, 158 and 163 related to the Wave 1 and 2 cases are amended.

The new and/or amended provisions are contained in the following paragraphs: 28 and 30. The remaining provisions remain in force and effect.

The following criteria, deadlines, and other requirements shall govern the selection and discovery of these Wave 1 and 2 cases:

A. SELECTION OF CASES

1. On **March 10, 2014**, each side unilaterally selected 50 cases (the “Wave 1 Cases”), and filed a list identifying each plaintiff and her counsel of record.

2. On or before **April 14, 2014**, each side will unilaterally select an additional 50 cases (the “Wave 2 Cases”). Each side must file a list identifying each plaintiff, the case number and her counsel of record.

3. To be eligible for selection, (a) a case must be on file by the date of this Order, and (b) the plaintiff must have served on Bard a substantially completed Plaintiff Profile Form (“PPF”) and Census Spreadsheet by the date of this Order. Cases that do not meet all of these criteria cannot be selected absent express agreement between the parties. In addition, the Court

has mandated that the parties shall not select plaintiffs whose cases are reasonably expected to be transferred or remanded to District Courts in the following states: Hawaii, Alaska, Washington, Oregon, California, Arizona, Nevada, Idaho, and Montana.¹

4. If a party selects a case that does not satisfy these criteria (*see* ¶ 3), the non-selecting party has the option to notify its adversary in writing and request that the non-compliant case be replaced. In that event, the selecting party must replace the non-compliant case with a compliant case within **7 business days**. If the parties disagree on whether a case complies, the non-selecting party shall request a telephonic conference with the Court, and the Court shall consider whether to strike the non-compliant case without permitting the selecting party to identify a replacement.

B. PLAINTIFF FACT SHEETS, AUTHORIZATIONS, AND PRESERVATION OF EVIDENCE PROTOCOL

5. On or before **March 28, 2014**, Plaintiffs shall provide Plaintiff Fact Sheets (“PFS”) and executed authorizations for all Wave 1 Cases. Authorizations shall be provided in accordance with the requirements of PTO # 69.

6. On or before **May 5, 2014**, Plaintiffs shall provide PFSs and executed authorizations for all Wave 2 Cases. Authorizations shall be provided in accordance with the requirements of PTO # 69.

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

¹ Bard respectfully objects to the Court’s preclusion of the selection of cases that are expected to be remanded to District Courts within the Ninth Circuit Court of Appeals, and Bard’s submission of this [Proposed] Docket Control Order should not be construed as a waiver of that objection.

8. 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 request the entry of an Order to Show Cause why the case should not be dismissed with prejudice.

9. To ensure the fair, orderly, and efficient collection and use of pathological evidence derived from explanted mesh, the parties shall enter into a preservation of evidence and pathology/explant handling protocol by no later than **April 4, 2014**. The parties should make every effort to agree to a mutually-acceptable protocol. If the parties cannot agree, they shall promptly request a telephone conference with the Court.

C. DEFENDANT FACT SHEETS

10. On or before **April 28, 2014**, Bard shall provide a Defendant Fact Sheet (“DFS”) for all Wave 1 Cases. On or before **May 19, 2014**, Bard shall provide a DFS for all Wave 2 Cases. If the deposition of an implanting physician is scheduled before April 28, 2014, Bard shall provide a DFS in each such case at least 14 days prior to the implanting physician’s deposition.

D. FACT DISCOVERY

11. In each case, the “Lead Party” will be the party who selected that case. The Lead Party has the option of coordinating the depositions of treating physicians and the option of questioning the treating physicians first.

12. Absent good cause shown, the depositions of all plaintiffs, implanting physicians, and explanting physicians (if applicable) shall be completed by no later than **October 3, 2014**. The parties agree that the depositions of the plaintiff and the physician who implanted the

plaintiff's device(s) shall occur before the depositions of other, non-corporate fact witnesses. All additional fact discovery shall be completed by no later than **January 5, 2015.**²

13. Corporate and non plaintiff-specific fact discovery shall commence on **March 28, 2014.** Absent agreement by counsel for Bard, no depositions of corporate or third-party witnesses shall occur prior to **April 7, 2014.**

14. 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.

E. EXPERT DISCOVERY

15. 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).

16. Absent good cause shown, Plaintiffs shall serve expert disclosures and reports in each case on or before **October 6, 2014.** If a treating physician has not been deposed by this deadline, Plaintiffs shall disclose that treating physician as a non-retained expert witness no more than **10 days** after the date of the physician's deposition.

17. At the time Plaintiffs serve their expert disclosures and reports, they shall provide—for each expert witness—at least two dates during the period between **October 13, 2014 and November 7, 2014** on which that expert witness can be deposed. In accordance with

² The parties expressly agree that 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.

Paragraph 16, *supra*, this requirement shall not apply to the depositions of treating physician non-retained expert witnesses.

18. Absent good cause shown, Bard shall serve expert disclosures and reports in each case on or before **November 10, 2014**. If a treating physician has not been deposed by this deadline, Bard shall disclose that treating physician as a non-retained expert witness no more than **10 days** after the date of the physician's deposition.

19. At the time Bard serves its expert disclosures and reports, it shall provide—for each expert witness—at least two dates during the period between **November 17, 2014 and December 12, 2014** on which that expert witness can be deposed. In accordance with Paragraph 16, *supra*, this requirement shall not apply to the depositions of treating physician non-retained expert witnesses.

20. The parties shall serve disclosures and reports for rebuttal expert witnesses, if any, by no later than **December 22, 2014**.

21. Absent good cause shown, expert discovery shall be completed by no later than **January 5, 2015**.

F. DISPOSITIVE MOTIONS

22. If some subset of fact discovery (e.g., the deposition of plaintiff and her implanting physician) reveals facts that could support a motion that would be dispositive of the *entirety* of a plaintiff's claims (e.g., the statute of limitations), either party may seek the Court's leave to file an early dispositive motion on that issue. If such leave is granted, the Court shall set a briefing schedule at that time.

23. *All Wave 1 and Wave 2 Cases*. In the absence of leave to file an early dispositive motion, dispositive motions shall be filed by no later than **January 12, 2015** in all Wave 1 and 2

cases, including *Wise*. Opposition briefs, if any, shall be filed in all Wave 1 and 2 cases, including *Wise*, by no later than **January 26, 2015**. Reply briefs, if any, shall be filed in all Wave 1 and 2 cases, including *Wise*, by no later than **February 2, 2015**.

24. *Wise v. C. R. Bard, Inc.* The parties may file *Daubert* motions before trial in *Wise*. *Daubert* motions in *Wise* are due no later than **January 12, 2015 (except as noted in paragraphs 27 and 29)**. Opposition briefs, if any, in *Wise* shall be filed by no later than **January 26, 2015 (except as noted in paragraphs 27 and 29)**. Reply briefs, if any, in *Wise* shall be filed by no later than **February 2, 2015 (except as noted in paragraphs 27 and 29)**.

25. *Wave 1 and 2 Cases (except Wise)*. To accomplish compliance with PTO # 161 in the remaining Wave 1 and 2 cases (except *Wise* where the parties have already substantially complied with the PTO), the parties are directed to indicate by separate filing in each Wave 1 and 2 case who, for that particular case, they may call as an expert. This document should be titled “Disclosure required by PTO ##s 161 and 163” and must be filed in each individual member case in Wave 1 and Wave 2 on or before **February 6, 2015**. If the parties do not file a timely “Disclosure required by PTO ##s 161 and 163,” I will deny as moot any *Daubert* motion pertaining to any expert who is not identified in that case.

26. *Wave 1 and Wave 2 Cases (except Wise)*. The parties may file *Daubert* motions before trial. *Daubert* motions in all Wave 1 and 2 cases are due no later than **January 12, 2015 (except as noted in paragraphs 28 and 30)**. Opposition briefs, if any, shall be filed in the remaining Wave 1 and 2 cases (except *Wise*) by no later than **February 18, 2015 (except as noted in paragraphs 28 and 30)**. Reply briefs, if any, in the remaining Wave 1 and 2 cases (except *Wise*) shall be filed by no later than **February 25, 2015 (except as noted in paragraphs 28 and 30)**.

27. *Wise v. C. R. Bard, Inc.* To the extent the parties wish to challenge specific expert opinions that were initially challenged generally in the four Omnibus *Daubert* motions which I denied in *Wise* (and will deny in the remaining Wave 1 and 2 cases), such motions applicable to *Wise* have been filed in that case. Opposition briefs, if any, shall be filed in *Wise* by no later than **February 2, 2015**. No reply briefs shall be filed.

28. *Wave 1 and Wave 2 Cases (except Wise)*. In the remaining Wave 1 and 2 cases, to the extent the parties wish to challenge specific expert opinions that were initially challenged generally in the four Omnibus *Daubert* motions that I denied in *Wise* (and will deny in the remaining Wave 1 and 2 cases), such *Daubert* motions are due no later than **February 20, 2015**. Opposition briefs, if any, shall be filed in the remaining Wave 1 and 2 cases (except *Wise*) by no later than **February 27, 2015**. Reply briefs, if any, in the remaining Wave 1 and 2 cases (except *Wise*) shall be filed by no later than **March 3, 2015**.

29. *Wise v. C. R. Bard, Inc.* In PTO # 158, I stated that “[p]ursuant to the agreement of the parties and with the court’s approval, *Daubert* motions are due within fourteen (14) days of the final deposition on the following experts: (1) pathologists; (2) Dr. Raybon; (3) Dr. Arendt; (4) Dr. Ferzandi; (5) Dr. Giudice; (6) Dr. Holzberg; (7) Dr. Molden; (8) Dr. Vardy; (9) Dr. Garely; and (10) Dr. Bercik.” In *Wise*, Bard filed a *Daubert* motion as to Dr. Raybon, and plaintiffs have responded. Any reply to the Raybon motion shall be filed by no later than **February 2, 2015**. Dr. Austin, a pathologist, also has been identified by Bard as an expert in *Wise*, and he was only recently deposed. Any *Daubert* motion related to Dr. Austin is due no later than **February 2, 2015**. An opposition brief, if any, shall be filed by no later than **February 6, 2015**. A reply brief, if any, shall be filed by no later than **February 9, 2015**.

30. *Wave 1 and Wave 2 Cases (except Wise)*. In the Wave 1 and 2 cases, *Daubert* motions related to the experts cited in paragraph 29 are due no later than **February 20, 2015**. Opposition briefs, if any, shall be filed in the remaining Wave 1 and 2 cases (except *Wise*) by no later than **February 27, 2015**. Reply briefs, if any, in the remaining Wave 1 and 2 cases (except *Wise*) shall be filed by no later than **March 3, 2015**.

31. *All Wave 1 and Wave 2 Cases*. Dates for summary judgment and *Daubert* hearings, if any, will be set at a future status conference.

32. *All Wave 1 and Wave 2 Cases*. The page limitations provided in Local Rule of Civil Procedure 7.1(a)(2) apply to memoranda in support of all dispositive motions, oppositions, and replies, and the Court will not be inclined to grant motions to exceed the page limit. 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.

33. *All Wave 1 and Wave 2 Cases*. In the past, the Court has permitted parties to file placeholder exhibits in support of dispositive motions 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, a party who wishes to file confidential documents must file a motion to seal well before the filing is due so that the opposing party can respond and the Court can rule on the motion. The court encourages the parties to resolve issues related to confidential documents on a wholesale basis well in advance of the dispositive motion deadline. Filings containing placeholder exhibits will be struck.

34. *Wise v. C. R. Bard, Inc.* Motions in limine have been filed in *Wise*. Response briefs shall be filed no later than **February 2, 2015**. No reply briefs shall be filed for motions in limine.

35. *Wave 1 and Wave 2 Cases (except Wise)*. Motions in limine and *Daubert* based dispositive motions shall be filed no later than fourteen days (14) after the court rules on non *Daubert* based dispositive motions and *Daubert* motions. Response briefs shall be filed within seven (7) days. Motions in limine are limited to 3 pages each; responses are limited to 2 pages each. No reply briefs shall be filed for motions in limine.

G. CASES READY FOR TRANSFER, REMAND OR TRIAL

36. By no later than **July 18, 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 **July 25, 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.

37. 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 to this Court by the JPML shall be remanded for further proceedings to the federal district court from which each such case was initially transferred.³


38. 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 the Court rules on the parties' pretrial motions. The trial date for cases transferred or remanded to other

³ As expressly contemplated by PTO #51, Bard does not waive its right to seek transfer—pursuant to 28 U.S.C. § 1406(a) or any other available ground—of any case to a court of proper venue, regardless of whether that case was transferred to or directly-filed in the Southern District of West Virginia.

federal district courts shall be set by the judge to whom the transferred or remanded case is assigned (including the undersigned through intercircuit assignment).

The court **DIRECTS** the Clerk to file a copy of this order in 2:10-md-02187 and **in the cases that have been designated by the parties as Wave 1 and 2 cases**. In cases subsequently filed in this district after civil action number 2:15-cv-01699, 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: February 12, 2015



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE