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. 6** (Second Case Management Conference)

The Court held a second case management conference on November 16, 2023. *See* Doc. 108. This order will reflect decisions made during the conference and decisions on matters taken under advisement.

I. Proposed Orders.

The Court reviewed the parties' Proposed Protective Order (Doc. 94) and Proposed ESI Order (Doc. 95). The Court finds both orders acceptable and will enter them in the docket. The parties shall provide the Court with a Proposed Preservation Order by **December 22, 2023**.

II. Joint Memorandum.

As instructed in the Court's Case Management Order ("CMO") No. 2 (Doc. 42), the parties addressed several issues in their joint memorandum (Doc. 102). These were discussed during the conference and will be addressed further in this CMO.

A. Proposed Master Complaint.

The Court reviewed Plaintiffs' Proposed Master Complaint (Doc. 93-1) and discussed portions of it with counsel at the conference. The Court concluded that the

successor liability claim in Count XVII should remain in the Master Complaint. *See id.* ¶¶ 565-88.

The Court took under advisement Defendants' argument that the Master Complaint should not include claims based on port reservoir defects or claims based on the Peritoneal Titanium Port. *See* Docs. 99, 102 at 3-12. After considering this issue further and reviewing relevant cases, the Court agrees with Defendants regarding port reservoir defects, but not with respect to the Peritoneal Titanium Port.

1. Port Reservoir Defects.

Plaintiffs do not dispute that alleged port reservoir defects were not raised before the Judicial Panel on Multidistrict Litigation (the "Panel"). *See* Doc. 102 at 5-6. Nor do Plaintiffs dispute that the Panel established this MDL to address claims alleging defects in the catheter component of Defendants' port devices due to high concentrations of barium sulfate. *See id.* at 14. The Panel's transfer order makes this clear:

> All actions can be expected to share factual questions arising from allegations that defendants manufacture the catheter component of their port devices with a concentration barium sulfate that is too high, which reduces the material integrity of the catheter, and can lead to injuries, including infection, fracture of the catheter, migration of the catheter, and thrombosis. All actions share common issues of fact regarding whether the design of Bard's port catheters involves a concentration of barium sulfate that reduces the material integrity of the catheters and can cause injury[.]

Doc. 1 at 1.

Plaintiffs' proposed Master Complaint includes allegations about different defects in a separate component of the port devices. The Master Complaint alleges that Defendants manufacture the port reservoir component using polyoxymethylene ("POM"), that POM is known to undergo oxidative degradation, and that this process reduces the mechanical properties of the POM which can lead to surface defects in the port reservoirs. *See* Doc. 93 ¶¶ 267-86. The Master Complaint further alleges that Defendants defectively designed the port reservoir with three palpation bumps that can cause ulceration, infection, and tissue

necrosis. *See id.* at 287-93. These claims were not part of the MDL when the Panel issued its transfer order in August 2023. *See* Doc. 1.

Plaintiffs contend that the Court may expand the MDL's scope. Doc. 102 at 12-16. But the cases Plaintiffs cite generally involve the transferee court's power to *narrow* the scope of an MDL after it is established by the Panel. *See In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 787 F. Supp. 2d 1358, 1360 (J.P.M.L. 2011) ("Several plaintiffs request that the centralized proceedings be limited to solely the metal-on-metal configuration of the DePuy Pinnacle Acetabular Cup System and that the litigation be renamed accordingly. . . . At this early stage of the litigation, we will not limit the scope of this MDL docket. . . . Should the transferee judge deem remand of any claims or actions appropriate (or, relatedly, the subsequent exclusion of similar types of claims or actions from the centralized proceedings), then he may accomplish this by filing a suggestion of remand to the Panel.") (citing Panel Rule 10.1); *In re AndroGel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378, 1380 (J.P.M.L 2014) ("As with any other litigation, the transferee judge retains wide discretion as to how the MDL should be defined, and if, after close scrutiny, the transferee judge determines that remand of any claims or actions involving any particular product is appropriate, procedures are available whereby this may be accomplished with a minimum of delay."); *In re Proton-Pump Inhibitor Prods. Liab. Litig. (No. II)*, 261 F. Supp. 3d 1351, 1354-55 (J.P.M.L. 2017) ("As with any MDL, the transferee judge has substantial discretion to refine the litigation's parameters. If, after close examination, she determines that Section 1407 remand of any claims or actions involving a particular defendant or [proton-pump inhibitor] is appropriate, procedures are available to accomplish this with minimal delay.") (citations omitted); *In re Medtronic, Inc. Implantable Defibrillators*, No. MDL05-1726(JMR/AJB), 2007 WL 968436, at *1 (D. Minn. Mar. 7, 2007) ("This Court has express authority from the JPML to exercise its discretion to control the scope of MDL-1726 and suggest remand of dissimilar cases that do not belong in MDL-1726."); *see also In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, No. 08-1967-MD-W-ODS, 2010 WL 2134275, at *1-2 (W.D. Mo. May

26, 2010) ("[T]he MDL Panel has twice declined to expand the scope of this case. . . . Plaintiffs suggest they may expand the products at issue in this suit and the discovery is justified to determine the BPA content of other products (such as plastic eating utensils, plastic plates, and other food-contact items). . . . Consistent with the Court's observation that this case was not intended to – and will not – become an all-encompassing 'BPA case,' the Court discerns no need or justification for starting the discovery process over at the beginning as Plaintiffs identify more plastic products.").

Plaintiffs argue that "MDLs can naturally expand to encompass other claims involving the products at issue and presenting similar factual questions." Doc. 102 at 12 (quoting *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, No. MDL 2873, 2021 WL 755083, at *1 (J.P.M.L. Feb. 4, 2021)). This may be true, but it is the Panel that should decide in the first instance whether the MDL should be expanded to include new claims involving different defects in a separate product component. *See In re Aqueous*, 2021 WL 755083, at *4 (Panel decision to expand the MDL to include direct exposure claims by firefighters because they involve the same common issues as the groundwater claims in the MDL); *In re Philips Recalled CPAP, Bi-Level PAP, & Ventilator Prods. Litig.*, No. 2:21-MC-1230, 2023 WL 7019287, at *55 (W.D. Pa. Sept. 28, 2023) ("Plaintiffs further argue that this court has the authority to determine the scope of the MDL and include devices not originally included. . . . [But] Plaintiffs may not unilaterally add to an MDL. . . . Rather, transfers are made by the Judicial Panel on Multidistrict Litigation.") (citations omitted). What is more, this MDL has not "naturally expanded" to include port reservoir claims – Plaintiffs confirmed at the conference that no case currently pending in this MDL has alleged port defects based on the presence of POM. *See In re Aqueous*, 2021 WL 755083, at *2 (noting that the MDL "already includes more than 350 direct exposure actions by firefighters that were filed directly in the transferee court").

The Court concludes that the Master Complaint should not include allegations and claims based on port reservoir defects. *See, e.g.*, Doc. 93-1 ¶¶ 173, 267-93, 305-06, 326(c), 327(d), 328(c), 329(c), 330(f) and (h), 331(d), 355, 388. Plaintiffs' Master Complaint

should be filed without the port defect allegations. Those allegations can be added later if the Panel expands this MDL to include them. Pursuant to Case Management Order No. 7, Plaintiffs shall file a revised Master Complaint by **December 1, 2023**, and Defendants shall file a Master Answer by **December 15, 2023**.

2. Peritoneal Titanium Port.

The proposed Master Complaint includes the Peritoneal Titanium Port as a subject device. *See* Doc. 93-1 ¶¶ 2(g), 207; at 94 (Ex. A). Defendants argue that references to the device should be stricken from the Master Complaint because it is not a *vascular* access device. Docs. 99 at 2, 102 at 3-4. Plaintiffs counter that the Peritoneal Titanium Port is an implantable port catheter made of barium sulfate – the alleged defect highlighted in the Panel's transfer order. Doc. 102 at 15.

The Court concludes that the Peritoneal Titanium Port is a potential subject device and that allegations regarding the device in the Master Complaint are proper. These allegations may be included in the Master Complaint filed on December 1, 2023.

Defendants' motion to strike (Doc. 99) is **denied as moot**.

B. Motions to Dismiss.

Defendants indicate that they will file no motion to dismiss the Master Complaint. Doc. 102 at 2.

C. Proposed Short-Form Complaint.

The Court has reviewed the Proposed Short-Form Complaint (Doc. 93-2). Exhibit A, including the reference to the Peritoneal Titanium Port, shall be included (*id.* at 8-10). The parties shall add the words "in this MDL" at the end of Paragraph 10. The Court further accepts Plaintiffs' proposal for Paragraphs 12, 13, and 14 of the Short-Form Complaint and rejects Defendants' proposals for additional topics. *See id.* at 4-6. The Court concludes that Plaintiffs' disclosures are sufficient to put Defendants on notice of the issues raised by each Plaintiff – the purpose of the Short-Form Complaint. Profile forms filed by Plaintiffs shortly after the Short-Form Complaint will provide additional information that, in almost every event, will require supplemental disclosures by

Defendants to the FDA. Little efficiency would be gained by requiring Plaintiffs to disclose additional information in the Short-Form Complaint that would not normally be required under Rule 8 of the Federal Rules of Civil Procedure.

D. Successor Liability.

Plaintiffs allege successor liability in detail in the proposed Master Complaint (Doc. 93-1 ¶¶ 39-127), and Defendants have stated that they deny successor liability (Doc. 102 at 20-21). As a result, successor liability is an issue that will be addressed during general fact and expert discovery. During the conference, the Court rejected Defendants' suggestion that successor liability be placed on a later discovery track or that the discovery be closely regulated by the Court. *See* Doc. 102 at 21. The Court also rejected Plaintiffs' suggestion that Defendants be forced to take a position on successor liability in the near future. *See id.* at 19; Doc. 102-4 at 3 (proposed DPF, § V). If either side believes that questions of successor liability can be narrowed or resolved through motions for summary judgment, they may address the issue in such motions.

E. Profile Forms.

The Court reviewed with the parties some proposed changes to the parties' Proposed Case Management Order on Profile Forms (Doc 102-2). The Court will make these modifications before entering the Case Management Order. For reasons stated above, the Court will also delete the section on port reservoir-related claims.

F. Schedule for Common Fact and Expert Discovery.

The Court reviewed the parties' proposed litigation schedule for common fact and expert discovery (Doc. 102-5). The Court finds the schedule reasonable and will enter the parties' Proposed Case Management Order. The Court will modify Paragraph II.C slightly as discussed with the parties.

G. Bellwether Procedures.

The Court addressed the parties' proposals for bellwether procedures (Doc. 102-1). The Court advised the parties that it will hold six bellwether trials in this MDL. It does not believe a larger number is necessary, nor that claims of different Plaintiffs should be

consolidated in single trials. The Court will enter the parties' Proposed Case Management Order on bellwether procedures with these modifications. If the parties conclude during the course of discovery that more or different bellwether trials should be held, they may raise the issue with the Court at that time.

The Court reminded the parties that no attempts should be made to manipulate the cases selected for bellwether trials through dismissal of cases by Plaintiffs or refusals to grant *Lexecon* waivers by either side. If the Court believes that either side is attempting to manipulate the selection of bellwether cases by such methods, it will consider foregoing the bellwether trial process altogether and simply remanding the cases for trials in their home jurisdictions.

III. Plaintiffs' Leadership.

Upon a request made during the conference, the Court agreed that Attorney Mark O'Connor will be added to Plaintiffs' Steering Committee.

IV. Next Case Management Conference.

The Court will hold the next Case Management Conference on **January 8, 2024, at 2:00 p.m.** At least three working days in advance, the parties shall jointly file a memorandum addressing issues to be discussed during the conference.

Dated this 22nd day of November, 2023.

David G. Campbell
Senior United States District Judge