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

IN RE: Bard Implanted Port Catheter  
Products Liability Litigation

MDL No. 3081

**JOINT MEMORANDUM RE  
ISSUES FROM THE TENTH CASE  
MANAGEMENT CONFERENCE**

(Applies to All Actions)

Pursuant to Case Management Order No. 26 (“CMO 26”), the Parties submit this Joint Memorandum setting forth (1) their views on whether depositions can be completed by the end of January, and (2) the results of their conferrals on privilege- and redaction-related issues. *See* Doc. 1348, at 1-2.

**I. Depositions**

**A. Plaintiffs’ Position**

For the reasons that follow, good cause exists for this Court to extend the common-issue discovery schedule by approximately two months, into March, and the briefing and trial schedule by approximately one month.

First, because of the intervening holidays, the parties expect to lose nearly three weeks of potential deposition time during November and December. Pursuant to CMO 26, Defendants stated that their “counsel can be available for depositions on any business days before the end January, 2025 other than November 26 through 29, and December 23 through January 1.” In theory, Plaintiffs’ counsel can be similarly available while simultaneously preparing for other depositions, some of which require Plaintiffs’ counsel to absorb over 100,000 documents; thus, knowing, agreeing to, and sticking to dates for individual depositions is important.

1 Second, eight unexpectedly late depositions from Group 1 and 2 custodians  
2 are already set in December and cannot likely be moved earlier based on either  
3 witness or attorney availability. At least three more depositions are in the process  
4 of being rescheduled and may need to be set in December, again, based on witness  
5 and attorney availability. Additionally, the parties currently plan for five Group 3  
6 custodians to be deposed in December and January. Plaintiffs have likewise  
7 identified a few of Defendants' employees who are not custodians whom they intend  
8 to depose; the parties have not yet had an opportunity to meet and confer on those  
9 witnesses.

10 Third, Plaintiffs anticipate that more fact-witness depositions than currently  
11 anticipated will need to be moved into December. For example, many witnesses  
12 that have been moved back into December have been moved because the witness or  
13 attorney become unavailable after initial scheduling. Extenuating circumstances  
14 will almost certainly occur: sickness, weather, emergencies, etc.

15 Fourth, the parties also intend for corporate depositions to take place in  
16 December and January. Counsel must both be available and have adequate time to  
17 prepare. Months ago, the Parties agreed that a draft 30(b)(6) notice could be helpful  
18 to create scheduling efficiencies (should any fact witnesses also be corporate  
19 representative witnesses). Thus, on July 2, Plaintiffs provided Defendants with the  
20 draft notice. Defendants have never used that information to coordinate deposition  
21 scheduling. However, with that draft, Defendants ought to be able at least to say  
22 about how many witnesses they believe will be required to cover the topics.  
23 Plaintiffs raised this during the Parties' meet and confer regarding scheduling issues  
24 for this joint memo.

25 Fifth, Plaintiffs likewise expect a number of third-party depositions to take  
26 place during December and January. As the Court well knows, third-party  
27 information regarding the materials out of which Defendants' catheters are made  
28 has become extremely important. Plaintiffs have served 15 subpoenas seeking

1 production of information and are in the process of meeting and conferring  
 2 regarding responsive production. Plaintiffs are also considering new subpoenas to  
 3 a few additional entities. Plaintiffs will schedule depositions of those entities and/or  
 4 seek to reopen depositions of Defendants' witnesses as production necessitates.

5 Sixth, Plaintiffs expert reports are due just two weeks after the close of  
 6 discovery. Plaintiffs will need time to integrate deposition information into expert  
 7 reports, and a number of key deposition team members are also key expert report  
 8 team members. Because so many depositions have been moved back, Plaintiffs will  
 9 require more time to both cover the depositions and to complete the reports.

10 Finally, this amount of discovery during the already-full months of  
 11 December and January was not contemplated when the discovery schedule was set,  
 12 and the issues that have arisen are not of Plaintiffs' own making. Much of the  
 13 problem has been caused by depositions moving in the face of late production and  
 14 by Defendants rescheduling on the basis of witness availability. As Plaintiffs  
 15 impressed in the last case management conference, depositions in MDLs are of  
 16 elevated importance as compared to single-incident cases, because the parties intend  
 17 for depositions to be used at trial with juries, making the depositions especially  
 18 important as both exploratory and trial cross. Plaintiffs anticipate prejudice on the  
 19 current schedule and seek reasonable accommodation that they have calculated to  
 20 delay the Court's original schedule as little as possible.

21 As such, Plaintiffs respectfully request that the Court enter an order  
 22 amending scheduling as follows:

<b>Event</b>	<b>Current Deadline</b>	<b>Plaintiffs' Proposal</b>
Common-Issue Fact Discovery	January 31, 2025	March 28, 2025

<b>Event</b>	<b>Current Deadline</b>	<b>Plaintiffs' Proposal</b>
Plaintiffs' Expert Disclosures	February 14, 2025	March 31, 2025
Defendants' Expert Disclosures	March 31, 2025 (45 days)	May 12, 2025 (42 days)
Plaintiffs' Rebuttal Expert Disclosures	April 30, 2025 (30 days)	June 18, 2025 (37 days)
Expert Depositions	June 30, 2025 (61 days)	August 1, 2025 (44 days)
Motions to Exclude Common-Issue Experts and for Summary Judgment	July 21, 2025 (21 days)	August 25, 2025 (24 days)
Oppositions to Motions	August 25, 2025 (35 days)	Sept. 29, 2025 (35 days)
Replies in support of Motions	September 8, 2025 (14 days)	October 13, 2025 (14 days)

## **B. Defendants' Position**

Plaintiffs' concerns about their inability to complete depositions are speculative, novel, the result of their own delay, or all of the above. Defendants respectfully submit that all timely noticed and necessary depositions can be completed by the end of January.

As of the date of this submission, the parties have completed or confirmed dates for twenty-two of the twenty-three agreed-upon depositions for the first set of

1 Custodians.<sup>1</sup> The parties have confirmed dates for eighteen of the twenty-one  
2 agreed-upon depositions for the second set of Custodians.<sup>2</sup> Defendants have offered  
3 dates for three of the five agreed-upon depositions for the third set of Custodians,  
4 whose custodial files were subject to a substantial completion deadline of October  
5 15, 2024.<sup>3</sup> Defendants await confirmation of those dates from Plaintiffs. Contrary  
6 to Plaintiffs' suggestions, the winter holidays should have no impact on the  
7 confirmed deposition dates (many of which are in October and November). If  
8 depositions do need to be rescheduled due to unforeseen circumstances, the parties  
9 can always conduct virtual depositions or double-track depositions on the same day  
10 given the slate of examining and defending attorneys on each side.

11 Plaintiffs' belated request for additional depositions of unidentified  
12 individuals is not a basis to extend the fact discovery deadline. As Plaintiffs

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13 <sup>1</sup> With respect to the one remaining deponent from Group 1, Defendants initially  
14 offered a September date for this deposition. Plaintiffs requested a later date and  
15 Defendants offered November 12<sup>th</sup>. Plaintiffs did not accept that date and no notice  
16 of deposition was issued. The deponent has now advised Defendants that he and his  
17 family are living in Germany and he is no longer available on November 12<sup>th</sup>. At  
18 this time, it is uncertain when he will be returning to the U.S. Defendants have  
19 requested that he provide alternative dates in November and December.

20 <sup>2</sup> On October 7<sup>th</sup>, Plaintiffs requested that the deposition of one Group 2 deponent  
21 be rescheduled due to ESI issues. Later that day, Defendants offered available dates  
22 for that witness and are awaiting Plaintiffs' response. A second Group 2 deponent  
23 recently left the company and started a new job with a different employer.  
24 Defendants have now offered a date for his deposition and are awaiting Plaintiffs'  
25 response. The final unscheduled deposition from Group 2 is former employee and  
26 apex witness Mr. Beasley. Per CMO 26, the parties will address the issue of his  
27 deposition in the Joint Memorandum for the next case management conference,  
28 including "whether other depositions will provide the information Plaintiffs need  
from [this] witness." Doc. 1348, at 2. Defendants will confirm the date of his  
deposition, if necessary, following resolution of Defendants' objection.

<sup>3</sup> Defendants have not been able to make contact with two of the Custodians from  
Group 3, both of whom are former employees. Defendants believe that one of these  
custodians may reside in Japan. Defendants will provide last known contact  
information if Plaintiffs insist on their depositions.

1 concede, *supra* at 2, Plaintiffs have never raised the prospect of additional  
2 depositions of non-Custodians prior to this date. Nor do Plaintiffs identify the  
3 individuals that they seek to depose.

4 This Court should deny any belated request for additional depositions of  
5 Defendants' current or former employees. The parties extensively negotiated  
6 Custodians and putative deponents in the early stages of discovery. Indeed, on  
7 February 20, 2024, Defendants provided Plaintiffs with a list of over **200** employees  
8 with representative job titles that Defendants believed to have had roles with IPCs.  
9 Plaintiffs have had in their possession millions of documents since the summer in  
10 light of substantial completion deadlines for the Custodial Files from the first sixty  
11 Custodians. *See* Doc. 1095-1 (stating that Defendants had produced 2,079,503  
12 documents as of August 14, 2024); Doc. 949-1 (stating that Defendants had  
13 produced 1,721,928 documents as of July 8, 2024). If Plaintiffs contemplated  
14 additional depositions of non-Custodians, they should have raised this possibility  
15 during the fifth Case Management Conference on March 29, 2024 prior to the entry  
16 of the CMO establishing the planned deadlines to complete depositions of  
17 Custodians. *See* Doc. 512, at 4; Doc. 525, at 4.

18 Plaintiffs' failure to request a meet-and-confer regarding new fact witness  
19 depositions or to identify those witnesses does not comply with the Court's directive  
20 that the parties should "discuss all fact depositions that remain in this case." Doc.  
21 1348, at 1; *see also* Tr. at 50:18-19 ("What I want you to do is to confer about  
22 deposition availability dates between now and the end of January. I want you to pick  
23 those dates, get them on everybody's calendar."). Nor have Plaintiffs delineated the  
24 specific depositions that remain. Plaintiffs do not, for example, state how many  
25 third-party depositions they are contemplating or have scheduled (if any).

26 Defendants have not yet received a formal request for a Rule 30(b)(6)  
27 deposition in accordance with CMO 21. On July 2, 2024, Plaintiffs provided  
28 Defendants with "a model 30b6 that [the parties] can use to assist with fact witness

1 deposition scheduling.” Email from R. Phillips, July 2, 2024, at 2:08 p.m. EST.  
2 Plaintiffs noted that “th[e] model is NOT Plaintiffs’ official 30b6 notice,” but rather  
3 a “tool to help with scheduling” the depositions of individuals “who may offer both  
4 fact and corporate testimony.” *Id.* (capitalization in original). Plaintiffs further stated  
5 that, “[s]ince [the model was] intended for that purpose and [the parties were] still  
6 early in the discovery process, it [was] as comprehensive as [Plaintiffs could] make  
7 it at [that] point.” *Id.*

8       Accordingly, the parties have not conferred over the substance, wording, or  
9 appropriateness of the 94 topics plus 59 subparts set forth in the draft model notice  
10 intended for planning purposes only. That said, the draft model notice is facially  
11 overbroad. *See Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846, 2012 WL  
12 1511901, at \*2 (N.D. Cal. Jan. 27, 2012) (granting protective order finding that  
13 Samsung’s 229-topic notice to be “facially excessive” and to impose an  
14 “impracticable demand” upon Apple); *Acton v. Target Corp.*, No. 08-cv-1149, 2009  
15 WL 5214419, at \*4 (W.D. Wash. Dec. 22, 2009) (“No reasonable person could  
16 believe that [defendant] could prepare one or more deponents to testify on the [96  
17 noticed] topics [plaintiff] has proposed without incurring undue burden and  
18 expense.”). Now that Plaintiffs have taken numerous fact witness depositions and  
19 reviewed the document productions, Defendants remain hopeful that the formal  
20 Rule 30(b)(6) notice will contain targeted relevant and proportional topics that are  
21 stated with reasonable particularity, as required by Rules 26 and 30.

22       Defendants will have fourteen days to object and provide available times for  
23 a meet and confer upon receipt of the formal notice. *See* Doc. 617, ¶ 5(b). CMO 21  
24 states that “the Receiving Party shall provide the soonest available dates on which  
25 the deposition may occur within three (3) business days of resolution consistent with  
26 paragraph 6.” *See id.*, ¶ 5(c). Paragraph 6 prescribes that, in the event that a Rule  
27 30(b)(6) Notice contains a request to produce documents, the deposition notice  
28 “should be served at least forty (40) calendar days before the deposition.” *Id.* ¶ 6.

1 Once Defendants receive the formal notice, they will be able to negotiate the topics  
2 and their language; confirm their designees once the final topics are identified with  
3 “reasonable particularity,” Fed. R. Civ. P. 30(b)(6); and negotiate a total cap of the  
4 number of hours for Rule 30(b)(6) testimony (if needed). Based on the foregoing  
5 timing and assuming Plaintiffs promptly serve their formal request for Rule 30(b)(6)  
6 depositions, the parties remain on track to complete depositions of Defendants’  
7 corporate designees by the fact discovery deadline.

8 For the reasons set forth *supra* and in the prior Joint Memorandum, Plaintiffs  
9 have failed to demonstrate that good cause exists for modification of the Court’s  
10 schedule. *See McBroom v. Ethicon, Inc.*, 341 F.R.D. 40, 44 (D. Ariz. 2022) (stating  
11 that good cause turns on the diligence of the party seeking the extension). In the  
12 event that the Court is inclined to grant the extension, Defendants respectfully  
13 request that the Court adopt Defendants’ proposed amended schedule set forth in  
14 the prior Joint Memorandum.

## 15 **II. Privilege & Redaction Issues**

### 16 **A. Plaintiffs’ Position**

17 For the reasons that follow, good cause exists for this Court to conduct an *in*  
18 *camera* review of a sample of at least 50 documents over which Defendants assert  
19 a claim of privilege. Plaintiffs bring to the Court *prima facie* evidence that  
20 Defendants’ review methodologies have resulted in indiscriminate and  
21 overinclusive privilege claims, including redactions for privilege.

22 First, Defendants unredacted 70% of the documents that this Court ordered  
23 the parties to confer about pursuant to CMO 26. On Tuesday, October 8, 2024,  
24 Plaintiffs sent Defendants 20 exemplary, redacted documents and requested  
25 Defendants to review them for the appropriateness of the privilege redactions. On  
26 Monday, October 14, Defendants alerted Plaintiffs that 14 of those documents  
27 would be unredacted either in whole (11 of the 20) or in part (3 of the 20) and  
28



1 reproduced to the Plaintiffs. Those un-redactions are *in addition to* the unredactions  
2 Defendants made after Plaintiffs last joint memo submission to the Court.

3         Second, at least 136 other documents that Defendants had entirely withheld  
4 for a claim of privilege have also been released for production after being challenged  
5 by Plaintiffs. Plaintiffs' privilege challenges have been successful despite the fact  
6 that Defendants' privilege log is full of conclusory descriptions that impede the  
7 conferral process. While Defendants are permitted to use some document metadata  
8 to populate their privilege log, "[n]othing . . . will relieve a party of reviewing the  
9 logged document(s) for privilege, and parties are not permitted to solely utilize  
10 metadata for privilege review." CMO 19, Dkt. 528 at 4. The parties agreed privilege  
11 log protocol, CMO 19, mandates that a party must still analyze logged documents  
12 to confirm that the content actually satisfies the elements of attorney client privilege:  
13 *a communication, made between privileged persons, in confidence, for the purpose*  
14 *of seeking, obtaining, or providing legal assistance to the client.* This is in keeping  
15 with Federal Rule 26, which mandates that the withholding party must "describe the  
16 nature" of the withheld document "in a manner that, without revealing information  
17 itself privileged or protected, will enable other parties to assess the claim." Fed. R.  
18 Civ. P. 26(b)(5)(A)(ii).

19         Defendants have failed their privilege-log obligations in a systematic way.  
20 To meet their burden to "describe the nature" of the withheld document "in a manner  
21 that, without revealing information itself privileged or protected, will enable other  
22 parties to assess the claim," Defendants created a drop-down list of bullet points that  
23 repeat the language found in a 2016 Order authored by this Court. The Order  
24 addressed IVC Filter litigation privilege challenges.<sup>4</sup> Some of Defendants' drop-  
25 down items are simply conclusory, which would not, for example, support a

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27 <sup>4</sup> See Order [DE 2813], *In re: Bard IVC Filters Products Liability Litigation*, 2:15-  
28 md-02641-DGC, July 25, 2016.

1 contention that an entire document was justified in being withheld as opposed to a  
2 portion being redacted. Defendants' inadequate descriptions have resulted in  
3 numerous meet and confers between the parties during the prior months with  
4 Plaintiffs seeking additional privilege descriptions or the second level review of the  
5 withheld document.

6 Even with Defendants' deficient privilege log, meet and confers between the  
7 parties to date have resulted in more than 136 documents being released from a  
8 claim of privilege. The number of documents released and unredacted should be  
9 non-reassuring to the Court, as they are to Plaintiffs. The percentages – which are  
10 only spot-checks – establish a *prima facie* case that the corpus of documents  
11 currently being withheld under the claim of privilege is substantially over-  
12 designated.

13 Third, Defendants seemingly own that their quality control review has been  
14 strained by the current amount of production, including late production, and tight  
15 substantial completion deadlines. Defendants have acknowledged that “two  
16 hundred seventy contract attorneys” have been used to identify documents for  
17 redactions or withholding for privilege and that this process is only spot-checked  
18 because of production volumes and deadlines:

19 Defendants' pre-production QCs include assessing documents  
20 redacted or withheld for privilege and making document-level  
21 corrections, which in turn also become part of the feedback loop for  
22 the ongoing review, redaction, and production of documents and  
23 privilege logs. In order to timely meet production deadlines, and as in  
24 any large scale review, these QCs do not involve a document-by-  
25 document review of every redacted document. It is therefore the case  
26 that documents are not always consistently redacted.

27 Dkt. 1331, Joint Memo October 3, 2024 CMC at 28. While this type of workflow  
28 may meet the standards of care for a large-scale document production, its conduct  
under a compressed deadline-driven time frame may well explain the large  
preponderance of indiscriminate and unjustified assertions of privilege that

1 Plaintiffs have encountered. The tendency for contract review attorneys to over-  
2 designate material for privilege is well understood.

3 If, as Defendants suggest, some of their over-designation is attributable to  
4 large production volumes and short deadlines, an *in-camera* review will likely find  
5 that ordering a more deliberate, post-production review by Defendants of withheld  
6 content is justified.

7 Plaintiffs have already met and conferred *extensively* with Defendants over  
8 the issues presented in Plaintiffs' First Challenges to Defendants' Privilege Log. It  
9 is worth a reminder that Defendants' privilege logs are produced on a rolling basis,  
10 following production. Below is a timeline, with corresponding communications  
11 evidencing the extent of Plaintiffs' good-faith collaborations with the Defendants:

- 12 • **July 4, 2024:** Plaintiffs sent First Challenges to Defendants' Privilege  
13 Log Vol. 1 (attaching Exhibits 1-5). Ex. A.
- 14 • **July 18, 2024:** The parties met and conferred regarding Plaintiffs' First  
15 Challenges to Privilege Log Vol. 1; Defendants offered a redaction log  
16 for certain redacted documents. *See ex. B.*
- 17 • **July 23 & 24, 2024:** Plaintiffs sent First Challenges to Privilege Logs  
18 Vols. 2-4 (attaching Exs 6-10). Exs. C - E.
- 19 • **July 27, 2024:** Defendants write again regarding Plaintiffs First  
20 Challenges to Vols. 2-4. Ex. F
- 21 • **August 5, 2024:** The parties met and conferred regarding Plaintiffs First  
22 Challenges.
- 23 • **August 6, 2026:** Defendants email to resolve portion of disputed issues.  
24 Ex. G.
- 25 • **August 26, 2024:** Defendants corresponded releasing privileged  
26 documents. Ex. H.
- 27 • **August 30, 2024:** Plaintiffs' send Second Challenges to Defendants'  
28 Privilege Log Vols. 2-4 (attaching Ex. 11). Ex. I.

- 1 • **September 10, 2024:** Defendants correspond releasing some privileged  
2 documents related to Plaintiffs’ First Challenges. Ex. J.
- 3 • **September 13, 2024:** Defendants partially unredacted *one*  
4 *document* that Plaintiffs first challenged on July 4 and asked that the  
5 unredacted document be “considered” a redaction log; that is *not* a  
6 redaction log. Ex. K & L.
- 7 • **October 10, 2024:** After Court hearing, Defendants re-commit to  
8 provide an actual redaction log. Ex. M.
- 9 • **October 14, 2024:** The parties met and conferred, and Defendants  
10 confirmed that 1) the parties had met and conferred regarding Plaintiffs’  
11 First Challenges (Exs. 1-10), and 2) Defendants had no plan to further  
12 release documents or provide information in response to Plaintiffs’ First  
13 Challenges to Defendants (Exs. 1-10). The parties agreed to continue  
14 meeting and conferring regarding Plaintiffs Second Challenges to  
15 Defendants (Ex. 11). Ex. N.

16 It is already evident, however, without the additional collaborations that will  
17 continue, that Defendants should do now what they may not have previously had  
18 the time to complete: a deliberate and accurate re-review of all of the documents for  
19 which a claim of privilege has been made. There is abundant evidence that  
20 Defendants’ designations have been systematically over-inclusive, and a very large  
21 percentage of documents being withheld in their entirety are, at the most, likely in  
22 need of only modest redactions.

23 As of the date of this submission, Plaintiffs continue to challenge allegedly-  
24 privileged items from Defendants’ rolling privilege log, and the Parties continue to  
25 meet and confer regarding Plaintiffs’ Second Set of Challenges (reflected in Exhibit  
26 11 to Defendants). For instance, there are 1,977 privilege-log entries where  
27 Defendants withheld the *metadata* (subject lines of emails or document file names)

28

1 from the privilege log under a claim of privilege. Defendants have committed to  
2 review these and other challenges raised by Plaintiffs.

3 Defendants confirmed during the most recent meet and confer on October 14  
4 that the parties had met and conferred regarding Plaintiffs' First Challenges (Exs.  
5 1-10) and that Defendants had no plan to release more documents or provide more  
6 information. With respect to Plaintiffs' Second Challenges, they largely contain  
7 systematic issues already addressed in the Plaintiffs' First Challenges. In support  
8 of Plaintiffs' request for re-review, this process would benefit by a commitment  
9 from the Court that when the parties' deliberations have run their course, the Court  
10 would conduct an *in-camera* review of at least 50 documents selected by Plaintiffs  
11 for which Defendants currently assert a claim of privilege.

## 12 **B. Defendants' Position**

### 13 **1. Plaintiffs' New Request for *In Camera* Review**

14 Despite the Court's clear direction in CMO 26 for "the parties to meet and  
15 confer about . . . other privilege-and redaction-related issues during the next two  
16 weeks," and despite multiple requests from Defendants for Plaintiffs to identify their  
17 issues before and during the meet and confer, Plaintiffs never disclosed their  
18 position that the Court should now "conduct an in camera review of a sample of at  
19 least 50 documents [chosen by Plaintiffs] over which Defendants assert a claim of  
20 privilege" and order a re-review of the entire privilege log. Rather, the first that  
21 Defendants learned of Plaintiffs' position was when they received Plaintiffs' draft  
22 of the instant Joint Memorandum. Without the parties having met and conferred to  
23 discuss and narrow the issues, however, the Court should not entertain Plaintiffs'  
24 requests. Indeed, the parties negotiated, and the Court entered, CMO 19 precisely  
25 to avoid this type of overbroad challenge. As such, Plaintiffs' request should be  
26 denied, and the parties should continue following CMO 19's protocol governing  
27 privilege disputes.

28

1 CMO 19 is working as the parties and Court intended. For several months,  
2 the parties have met and conferred regularly and in good faith to discuss Plaintiffs’  
3 individualized privilege challenges. As part of this process, Defendants have  
4 withdrawn some assertions when warranted, and maintained the remainder of their  
5 privilege assertions, which Plaintiffs have not further challenged. Notwithstanding  
6 the success of the meet-and-confer process to date, Plaintiffs now raise never-  
7 before-asserted claims that Defendants have asserted “indiscriminate and overinclusive  
8 privilege claims,” “failed their privilege-log obligations in a systematic way,”  
9 “substantially over-designated,” and described the nature of privilege  
10 communications in a “simply conclusory” fashion.

11 Plaintiffs’ overbroad claims are simply without merit and do not reflect the  
12 reality of the parties’ meet-and-confer discussions to date. First, Defendants have  
13 asserted attorney-client privilege or attorney work product for a *de minimis* number  
14 of documents in this litigation—fewer than 1% of Defendants’ document  
15 production.<sup>5</sup> Second, Defendants have worked to adhere to the Court’s detailed  
16 attorney-client privilege and work-product guidance contained in *In re: Bard IVC*  
17 *Filters Products Liability Litigation*, MDL No. 15-2641 PHX DGC, 2016 WL  
18 3970338 (D. Ariz. July 26, 2016)—as Plaintiffs note, Defendants have tied their  
19 privilege analysis closely to the issues and topics that the Court addressed in its  
20 order. Third, Defendants have gone above and beyond the requirements of Rule 26  
21 to provide Plaintiffs with information about each logged document, not only  
22 describing the privilege asserted, but also providing numerous metadata fields to  
23 further describe the subject matter of the protected communications. Moreover,  
24 Defendants have taken the additional step of manually populating an additional  
25 “Legal Nexus” field to identify who is conveying the protected communication if  
26 the information is not apparent from the available metadata. For particular

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27  
28 <sup>5</sup> Defendants’ log contains 9,884 privileged documents, and 6,796 documents were  
produced with privilege redactions.

1 documents, where the legal nexus still is not clear to Plaintiffs, Plaintiffs have asked  
2 for additional information, and Defendants have met and conferred, consistent with  
3 their obligations. Fourth, Plaintiffs’ pointing to the fact that Defendants have  
4 withdrawn some privilege assertions demonstrates that the meet and confer process  
5 ordered in CMO 19 is working as intended to resolve the parties’ privilege disputes.<sup>6</sup>

6 Defendants anticipate—as long as Plaintiffs raise issues on a case-by-case  
7 and good-faith basis—that CMO 19’s process will continue to be successful in  
8 resolving privilege disputes. In all events, however, the parties should follow CMO  
9 19 in meeting and conferring about Plaintiffs’ claimed current disputes to narrowly  
10 tailor the issues for the Court’s consideration in the format described in the Order.  
11 The Court should not, however, entertain Plaintiffs’ new demand for an *in camera*  
12 review of 50 documents of the Plaintiffs’ choosing or the demand that Defendants  
13 reconduct the entire privilege review before the parties move through CMO 19’s  
14 process.

## 15 **2. Issues Addressed by the Parties**

16 Pursuant to CMO 26, Bard met with Plaintiffs in good faith to attempt to  
17 resolve “other privilege-and redaction-related issues during the next two weeks.”  
18 Following the October 3<sup>rd</sup> CMC, Plaintiffs provided the twenty redacted documents  
19 and raised two additional privilege-related issues: (1) Plaintiffs’ request that  
20 Defendants unredact 1,977 entries in Defendants’ Privilege Log through Volume 9  
21 where the entry in the Filename/Subject column is described as “Redacted –  
22 Privilege”; and (2) Plaintiffs’ challenge to 1,352 documents on Defendants’  
23 Privilege Log volumes 2 – 4 in broad sweeping categories.

24

25

26 <sup>6</sup> Plaintiffs’ contention that the 136 documents Defendants have released from the  
27 privilege log to date are a result of Plaintiffs’ challenges is simply untrue. The  
28 majority of documents Defendants have released from their privilege log are a result  
of Defendants’ independent in continued good faith analysis of documents  
designated as privilege.

1 **i. The Twenty Redacted Documents**

2 On October 8, 2024, Plaintiffs provided Defendants with the bates-numbers  
3 of the twenty redacted documents. *See* Doc. 1348, at 2. On October 9<sup>th</sup>, Defendants  
4 advised Plaintiffs that they were available to meet and confer on October 14<sup>th</sup> to  
5 address those documents. Defendants simultaneously commenced analysis of the  
6 privilege redactions on the twenty documents. On October 11<sup>th</sup>, Defendants re-  
7 produced eleven of the twenty documents with the privilege redactions removed,  
8 and re-produced three of the twenty documents with revised privilege redactions.<sup>7</sup>  
9 During the October 14<sup>th</sup> meet-and-confer, Defendants asked Plaintiffs to review the  
10 documents that contain redactions and advise if any remain in dispute so the parties  
11 can further confer in advance of the October 18<sup>th</sup> submission. Defendants reiterated  
12 that should Plaintiffs identify specific documents in Defendants' production for  
13 which they question privilege redactions, Defendants are willing to assess and will  
14 promptly reproduce as appropriate consistent with our handling of redaction  
15 challenges to date. Defendants have not received any further communication about  
16 the twenty documents, and thus, consider this issue to be resolved.

17 **ii. Additional New Issues Raised After the October 4<sup>th</sup> CMC**

18 On October 9<sup>th</sup>, Defendants further advised Plaintiffs that, “[i]f there are  
19 other privilege or redaction issues [Plaintiffs] want to discuss or intend to raise with  
20 the Court on October 18, please let us know what those are by COB tomorrow  
21 (Thursday Oct. 10) so that [the parties’] time at the meet and confer will be  
22 productive.” Email from K. Helm, Oct. 9, 2024, at 3:53 p.m. EST. Late in the  
23 afternoon on October 10<sup>th</sup>, Plaintiffs sent, for the first time, a request asking  
24 Defendants to review the 1,977 entries included on Defendants’ Privilege Log up  
25 through Volume 9 where the entry in the “Filename/Subject” column is described  
26

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27 <sup>7</sup> Defendants also undertook efforts to identify and review substantively similar  
28 documents and reproduced those documents consistent with the updates made to the  
redactions on the 14 documents.



1 as “Redacted – Privilege.” During the parties’ meet-and-confer on October 14<sup>th</sup>,  
2 Defendants agreed to review the redacted Filename/Subject information.  
3 Defendants stated, however, that given the volume of documents and the fact that  
4 Plaintiffs raised the issue for the first time on October 10<sup>th</sup>, it would be unlikely that  
5 Defendants’ analysis will be complete by the submission of this Joint Memorandum.  
6 Plaintiffs indicated that they understood. Defendants intend to provide an updated  
7 log with any unredacted Filename/Subject information by October 24<sup>th</sup>.  
8 Accordingly, Defendants respectfully submit that this issue is not ripe for  
9 consideration by the Court.

10 In addition to requesting that Defendants provide unredacted  
11 Filename/Subject information, Plaintiffs’ Oct 10<sup>th</sup> correspondence further stated,  
12 “These times [*sic*] do not reflect the entirety of all the outstanding issues related to  
13 redactions and privileges, including those related to Exhibit 11. However, Plaintiffs  
14 will propose a meet and confer dedicated to those remaining disputes.” Email from  
15 D. Rogers, Oct. 10, 2024, at 4:24 p.m. Defendants promptly responded asking  
16 Plaintiffs to clarify their position as Defendants’ understanding per CMO 26 was  
17 “that Judge Campbell ‘directed the parties to meet and confer about these documents  
18 and other privilege- and redaction- issues during the next two weeks.’” Email from  
19 K. Helm, Oct. 10, 2024, at 4:59 p.m. Defendants reiterated their request that  
20 Plaintiffs advise them before close of business what other privilege issues they  
21 believe are outstanding so that Defendants could adequately prepare for Monday’s  
22 meet-and-confer and have time to address those issues by the Court’s deadline. *Id.*  
23 A day later, on October 11, Plaintiffs served a letter with nine enclosures—Exhibits  
24 “11A” to “11I” reflecting their challenges to Defendants privilege log through  
25 volume 4 (served July 2, 2024). Defendants saw a version of Exhibit 11 previously,  
26 when Plaintiffs initially served it on August 30, 2024. However, during a meet and  
27 confer on September 3, Plaintiffs agreed to review Exhibit 11 to determine if any  
28 documents could be removed and to provide additional explanation for the

1 challenges. The following day Plaintiffs confirmed, “Plaintiffs agreed to review  
2 exhibit 11 and provide Defendants with more explanation on the challenges asserted  
3 to the documents withheld.” Email from D. Rogers, Sept. 4, 2024, at 9:19 a.m.  
4 Defendants followed up on September 9th stating that they were awaiting Plaintiffs’  
5 revised list of Exhibit 11 documents. Despite their promises, Plaintiffs did not  
6 provide Defendants with an updated Exhibit 11 for almost six weeks—and just one  
7 week before the submission of this Joint Memorandum.

8 In Exhibit 11 Plaintiffs challenge 1,352 documents from privilege log  
9 volumes 2 – 4 —nearly *half* of the 3,014 entries on those logs. Further, Plaintiffs’  
10 challenges in Exhibit 11 do not contain “more explanation” but are instead broad  
11 sweeping categorical challenges to multiple entries. For example, Plaintiffs  
12 challenge 347 entries on the privilege log that relate to marketing communications  
13 as “Advice regarding marketing or marketing communications is business advice  
14 and not legal advice.” But this Court (and others) have held to the contrary. *In re:*  
15 *Bard IVC Filters Prods. Liab. Litig.*, 2016 WL 3970338 at \*17 (D. Ariz. July 26,  
16 2016) (“In the heavily regulated industry context, ‘services that initially appear to  
17 be non-traditional in nature, like commenting upon and editing television ads and  
18 other promotional materials, could, in fact, be legal advice.” (quoting *In re Vioxx*  
19 *Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 800 (E.D. La. 2007))). Given the volume  
20 of documents included in Exhibit 11A to 11I, Plaintiffs’ six-week delay in providing  
21 Defendants with their updated list, and the broad categorical challenges, Defendants  
22 cannot reasonably comply with CMO 19. *See* Doc. 528, § C.3 (stating that  
23 Producing Party shall provide written response “[w]ithin ten (10) days following the  
24 meet and confer”). The parties had a preliminary conferral over these challenges on  
25 October 14<sup>th</sup>. Recognizing the burden on Defendants to address the volume of  
26 challenges, as well as Defendants’ concerns regarding whether Plaintiffs’ broad  
27 categorical challenges are appropriate, Plaintiffs suggested Defendants review a  
28 sample of documents from the Exhibit 11 categories, but did not offer how the

1 sampling should be used. Nonetheless, Defendants agreed to the concept of a  
2 sampling and the parties agreed to continue to meet and confer. Defendants  
3 respectfully request relief from the requirements of CMO 19 including the ten-day  
4 review period so the parties can further meet and confer on the Exhibit 11 challenges  
5 received on October 11th. The parties will update the Court at the November 7<sup>th</sup>  
6 CMC.

7

8 Dated: October 18, 2024

Respectfully submitted,

9

10 /s/ Adam M. Evans  
Adam M. Evans (MO #60895)  
11 (Admitted Pro Hac Vice)  
Dickerson Oxton, LLC  
12 1100 Main St., Ste. 2550  
Kansas City, MO 64105  
13 Phone: (816) 268-1960  
14 Fax: (816) 268-1965  
Email: aevans@dickersonoxton.com

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

15 /s/ Rebecca L. Phillips  
16 Rebecca L. Phillips (TX #24079136)  
(Admitted Pro Hac Vice)  
Lanier Law Firm  
17 10940 W. Sam Houston Pkwy. N., Ste. 100  
Houston, TX 77064  
18 Phone: (713) 659-5200  
19 Fax: (713) 659-2204  
20 Email: rebecca.phillips@lanierlawfirm.com

/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

21 /s/ Michael A. Sacchet  
22 Michael A. Sacchet (MN #0016949)  
(Admitted Pro Hac Vice)  
Ciresi Conlin LLP  
23 225 S. 6th St., Ste. 4600  
Minneapolis, MN 55402  
24 Phone: (612) 361-8220  
25 Fax: (612) 314-4760  
26 Email: mas@ciresiconlin.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

27 ***Co-Lead Counsel for Plaintiffs***

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25  
26  
27  
28

Fax: (602) 382-6070  
E-mail: [jcondo@swlaw.com](mailto:jcondo@swlaw.com)

*Attorneys for Defendants*