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9
10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF ARIZONA

12 In Re Bard IVC Filters Products Liability
13 Litigation

No. 2:15-MD-02641-DGC

**PLAINTIFFS' BRIEF IN
OPPOSITION TO BARD'S
REQUEST TO DEPOSE PLC
COUNSEL**

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INTRODUCTION

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20 Bard's extraordinary request to depose Plaintiffs' counsel in this case is neither
21 supported by the law nor by the matters at issue in this litigation. Discovery into the
22 speculative and collateral issue of why the FDA chose to investigate Bard (which resulted
23 in undisputed acknowledgment of the violations by Bard) is not the type of information
24 deemed crucial to a core issue in the case that would justify the highly disfavored request
25 to depose opposing counsel. That is especially true here, where the attorneys have already
26 verified under oath that the one conversation they had with the FDA did not discuss the
27 warning letter issues. This brief is supported by the entire record before the Court in this
28 matter, and by the following Memorandum of Points and Authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. The Law.**

3 Courts recognize that requests to depose opposing counsel present unique concerns
4 and implications and are, therefore, highly disfavored. As the Eighth Circuit noted in
5 *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1330 (8th Cir.1986):

6 [C]ircumstances should be limited to where the party seeking to take the
7 deposition has shown that (1) no other means exist to obtain the information
8 than to depose opposing counsel; (2) the information sought is relevant and
9 nonprivileged; and (3) the information is crucial to the preparation of the
10 case.

11 ***

12 The harassing practice of deposing opposing counsel (unless that counsel's
13 testimony is critical and unique) appears to be an adversary trial tactic that
14 does nothing for the administration of justice but rather prolongs and
15 increases the cost of litigation, demeans the profession, and constitutes an
16 abuse of the discovery process.

17 The standard for deposing opposing counsel as outlined in *Shelton* is high. Although
18 the Ninth Circuit has not adopted *Shelton*, many courts in this district have applied it¹. An
19 alternative, or coexisting standard, is the more flexible rule that the totality of the
20 circumstances should be evaluated. *In re Subpoena issues to Dennis Friedman*, 350 F.3d
21 65, 71-72 (2d Cir. 2003). Yet, even under the more "flexible" totality of the circumstances
22 standard articulated in *In re Subpoena issues to Dennis Friedman*, the court identified the
23 important policy implications behind limiting such depositions and held the trial court must
24 evaluate the need and importance of such discovery in light of these policy concerns.

25 The central inquiry is whether the requested discovery relates to a core or crucial
26 issue in the litigation (and for which the information cannot be obtained from another source
27 or by less intrusive means such as interrogatories or the production of documents) and the
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¹ *In re Allergan, Inc.*, 2016 WL 5922717, at *3 (C.D. Cal. Sept. 23, 2016); *Flotsam of Cal., Inc. v. Huntington Beach Conference & Visitors Bureau*, No. C06-7028 MMC MEJ, 2007 WL 4171136, at *1 (N.D. Cal. Nov. 26, 2007)
In re Allergan, Inc., 14CV02004DOCKES, 2016 WL 5922717, at *3 (C.D. Cal. Sept. 23, 2016)

1 need for such discovery outweighs the risks attendant to allowing the deposition of opposing
2 counsel. *Id.* at 72.

3 As the following section will demonstrate, the role, if any, of contact between
4 Plaintiffs' attorneys and the FDA's issuance of the warning letter is not a central issue to the
5 case such that the deposition of opposing counsel should be allowed. In the first place,
6 courts draw a sharp distinction between information that is relevant and information that is
7 crucial under *Shelton*. In *Ditech Financial LLC v. SFR Investments Pool 1, LLC*, 2016
8 WL 4370034 at *2 (D. Nev. 2016), Ditech sought to depose SFR's attorney for information
9 regarding its defense that "SFR was not a bona fide purchaser of the foreclosed property"
10 at issue. *Id.* at *3. The court found:

11 This information may be relevant to Ditech's defense, but the company has
12 not shown it is crucial. Ditech has not cited to any authority that describes
13 when relevant information becomes crucial. And the terms 'relevant' and
14 'crucial' cannot be synonymous. To hold otherwise would render the third
15 *Shelton* factor redundant. Thus for information to be crucial, it must have
16 some greater importance to the action than merely being relevant.

17 *Id.* at *3 (emphasis supplied). In other contexts, courts have rejected the idea that
18 information sought for the sole purpose of undermining other documents is crucial. *See*
19 *Rojas v. Marko Zaninovich, Inc.*, 2011 WL 2636071 at *3 (E.D. Cali. 2011). In *Rojas*,
20 plaintiffs brought suit for a myriad of alleged labor-related violations, including failure to
21 provide meal periods, failure to pay reporting time wages, etc. *Id.* at *1. In support of their
22 motion for class certification, Plaintiffs included fifty-five declarations from various class
23 members. *Id.* Defendant sought to depose the attorneys who had gathered some of the
24 declarations. *Id.*

25 Defendant argued that the deposition would be "only for the purpose of
26 demonstrating to the court that the process for obtaining the declarations was so flawed as
27 to undermine completely the confidence in the declarations." *Id.* The court found that
28 defendant had failed to "show that the information is relevant to the preparation of its case,
let alone crucial to it." *Id.* The fact that defendant already had "sworn testimony" further
obviated the need to depose the attorney. *Id.*

1 Furthermore, courts have interpreted “crucial” as requiring a showing that the
2 information sought provides a missing link in the otherwise-established set of elements or
3 factors. *See Boughton v. Cotter Corp.*, 65 F.3d 823, 831 (10th Cir. 1995). In *Boughton*, the
4 Tenth Circuit applied the *Shelton* factors where plaintiffs sought to depose defense counsel.
5 *Id.* at 829. Although plaintiffs argued that the attorney’s deposition was essential for their
6 punitive damages claims, the court noted:

7 [I]n order to demonstrate that [the attorney’s] state of mind was crucial to
8 their case the plaintiffs would first have to establish as many other elements
9 of the fraud as possible, including the statements made, through alternative
10 sources. The failure of the plaintiffs to make a substantial effort to establish
11 as many elements of the alleged wrongs as was possible through alternative
12 sources before seeking the testimony of defendants’ counsel not only
undermines the argument that all the information sought from him was
exclusively within his possession, it also undermines the argument that the
particular information (if there was any) that was exclusively within his
possession would be proof of a crucial link or corroborative of a weak link
in a chain of proven elements to establish punitive damages.

13 *Id.* at 831 (emphasis supplied). In other words, before the court would allow plaintiffs to
14 argue that the information they sought was crucial, plaintiffs would first have to establish
15 other elements of their claim in order to lend credibility to their argument that the attorney
16 possessed the crucial element.

17 The facts in *Rojas* closely mirror those before this Court. Bard seeks to depose
18 Plaintiffs’ counsel on the grounds that such a deposition might reveal that Plaintiffs’
19 counsel’s actions undermine the validity of the FDA’s findings in the 2014 Warning Letter.
20 However, like the *Rojas* defendant, Bard must then show how undermining the findings is
21 relevant to its case—particularly in the face of the sworn testimony Bard already has from
22 Plaintiffs’ counsel, and the fact that Bard has admitted to the violations.

23 Furthermore, as *Ditech* indicates, Bard must then go further to meet its greater
24 burden of proving that the information is “crucial.” Bard cannot meet this burden. It has not
25 indicated what other evidence supports its argument that Plaintiffs’ counsel improperly
26 influenced the FDA’s investigation. It has not demonstrated that Plaintiffs’ counsel holds
27 the key element in proving influence. Finally, it has not shown how proving influence would
28 affect its affirmative defenses or the outcome of the case. Indeed, Bard cannot even argue

1 it did not commit the violations. In short, Bard is hard-pressed to demonstrate that the
2 information it seeks is *relevant*, let alone that it is *crucial* to Bard's case.

3 **II. Discovery into the Connection Between Contact by Plaintiffs' Attorneys and the**
4 **FDA Issuance of a Warning Letter to Bard is not a Central Issue of Crucial**
5 **Importance to this Case.**

6 Bard seeks discovery on an issue that involves matters of little, if any, relevance and
7 which may not result in any evidence that would ever be admitted in any trial.²

8 To link up Bard's theory, Bard must first show that it was Plaintiffs' counsel's
9 contact with the FDA that spurred the FDA to investigate Bard. First, even if this were true,
10 the question becomes "so what?" There is nothing wrong with allowing people uniquely
11 knowledgeable about injuries and deaths being caused by a product to notify the appropriate
12 governmental agency so that it can fulfill its role in protecting the public from defective
13 products.³ For example, after hearing evidence during trial about Bard's Recovery Filter, a
14 juror became so concerned that she questioned whether she and her fellow jurors were
15 required to report the safety issues and information they had seen:

16 Shouldn't we be notifying (now) FDA, Doctors, patients who are related to
17 these Filters implants to prevent a sudden, painfull (*sic*) death?

18 Are we, jurors, legally responsible for communicating these risks?

19 Don't you have enough witnesses (*sic*) statements to state that patients are in
20 (some) risk to have the filter migrating (fracturing) to their heart?
(*Phillips v. Bard*, CV0344-RCJ-WGC, Jury Notes, Dkt. 299 (Jan. 28, 2015),
attached as **Ex. A**)

21 ² Admissibility of FDA-related evidence is questionable in medical device cases cleared
22 via the 510(k) process. *See, Cisson v. Bard*, 86 F.Supp.3d 510, 515-17 (S.D.W. Va. 2015),
23 *aff'd sub nom. In re C.R. Bard, Inc., MDL No. 2187, Pelvic Repair System Products Liab.*
24 *Litig.*, 810 F.3d 913 (4th Cir. 2016) (holding that evidence of compliance with FDA
25 regulations and the process by which a device is cleared by FDA was inadmissible as
26 irrelevant or, alternatively, unduly prejudicial, and if admitted would result in a mini-trial
27 as to strengths and weaknesses of the process; an irrelevant matter).

28 ³ The decisions Bard cites regarding a party using a governmental entity to advance its own
interests have no bearing here. *See, e.g., Three Crown Ltd. P'ship v. Salomon Bros., Inc.*,
1993 WL 277182 (S.D.N.Y. 1993) (dealing with the production of documents, not
depositions, in the context of a grand jury proceeding); *Cante v. Baker*, 2008 WL 2047885
(E.D.N.Y. 2008) (analyzing whether conversations with a government entity amounted to
a waiver of the attorney-client privilege); *Reed v. Advocate Health Care*, 2007 WL 2225901
(N.D. Ill. 2007) (same).

1 Although Plaintiffs' counsel did not request that the FDA investigate Bard
2 concerning warning letter issues, it would not have been improper *had any* of them done
3 so.

4 The second question becomes: how does Bard prove the causal link it hopes to make?
5 Even if Plaintiffs' counsel had asked the FDA to investigate Bard (which they did not), how
6 can any juror determine whether it was such a request or other information (such as
7 discovery of violation during a routine audit) that spawned the investigation? This is an
8 issue of the FDA's state of mind, which cannot be answered by questions of Plaintiffs'
9 counsel.

10 Then, even if there is a possibility of somehow linking the initial investigation to
11 conversations with Plaintiffs' counsel, Bard would then need to connect the findings of
12 violation with such contact. In other words, the reason the investigation was triggered does
13 not have any relevance or logical link to the findings of violation by the FDA. There are
14 numerous findings of serious violations by Bard. They are well documented. Bard had
15 **admitted** to most of them. How does the reason the investigation was launched have any
16 relevance to the findings of violations? Does Bard hope to argue "our bad conduct and
17 breach of laws and regulations would have never been discovered if the attorneys hadn't
18 told on us?" Unless Bard can link the results of the independent investigation of the FDA
19 to Plaintiffs' counsel, the reason for the investigation is irrelevant. A convicted criminal is
20 a criminal, whatever the person reporting the crime's relationship to the criminal. It is the
21 findings of the FDA (again, most of which are admitted by Bard) that is relevant to this
22 litigation, not the road that lead the FDA to finding these violations. To allow Bard's
23 attorney to question PLC attorneys in this context is purely discovery for harassment, as
24 opposed to obtaining crucial information concerning an issue of central importance to this
25 case.

26 Finally, no further discovery is necessary because both Mr. Dalimonte and Mr.
27 Brenes have provided verified interrogatory answers on the issue, and both have verified
28 that the one phone call (over a year before the warning letter) did not discuss any of the

1 matters contained in the warning letter. The question has been answered. The Court, in an
2 appropriately narrowed fashion, has given Bard the opportunity to pursue this issue and
3 Plaintiffs' counsel has answered the question. This is sufficient and fair discovery into an
4 issue of sparse relevance to the MDL cases.⁴

5 **CONCLUSION**

6 The law rightfully imposes a higher burden of relevance and importance before
7 allowing an attorney to depose their opposing counsel. As demonstrated herein, the
8 discovery sought by Bard does not rise to the level of constituting an issue of crucial
9 importance to the case so as to warrant the deposition of opposing counsel. For the
10 foregoing reasons, Plaintiffs request that Bard's request to depose opposing counsel be
11 denied.

12 RESPECTFULLY SUBMITTED this 16th day of December, 2016.

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⁴ If any further discovery were to be allowed, it should be via interrogatory, not a deposition,
28 so as to minimize the risk of improper intrusion into Plaintiffs' work product or
attorney/client matters. *See Friedman*, 350 F.3d at 72.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2016, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/ Deborah Yanazzo

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