UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
Steven Johns, No. 2:18-cv-01509
Jesus Campos, No. 2:18-cv-00915
Thomas McCourt, No. 2:18-cv-01011
Antonio Milanesi, No. 2:18-cv-01320
Gregory Miller, No. 2:18-cv-01443
Aaron Stinson, No. 2:18-cv-01022

EVIDENTIARY MOTIONS ORDER NO. 3

Plaintiffs' Motion to Strike Undisclosed Opinions of Defense Expert Stephen Badylak, D.V.M., Ph.D., M.D.

This matter is before the Court on Plaintiffs'[1] Motion to Strike Undisclosed Opinions of Defense Expert Stephen Badylak, D.V.M., Ph.D., M.D. (*Johns* ECF No. 132.) The Motion was briefed on an expedited basis (ECF Nos. 146, 152) and is now ripe for decision. For the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion.

I.

Plaintiff Steven Johns' case is the first bellwether trial of the thousands of cases brought against Defendants Davol Inc. and C.R. Bard, Inc. (collectively "Bard") in this multidistrict litigation ("MDL") and is scheduled to commence on July 13, 2020. The Judicial Panel on Multidistrict Litigation described the cases in this MDL as follows:

[1] Although Plaintiffs' Co-Lead Counsel filed this Motion on behalf of the six Bellwether Trial Pool Plaintiffs, the challenged opinions are only relevant to the two cases involving the Ventralight ST devices, *Johns* and *McCourt*.

> All of the actions share common factual questions arising out of allegations that defects in defendants' polypropylene hernia mesh products can lead to complications when implanted in patients, including adhesions, damage to organs, inflammatory and allergic responses, foreign body rejection, migration of the mesh, and infections.

(Transfer Order, MDL 2846 ECF No. 1.)

A. Ventralight ST Product

Ventralight ST is a prescription medical device used for hernia repair and is one of Bard's products at issue in this MDL. The FDA cleared it for use through the 510k process on July 15, 2010, and later cleared it for use with the Echo positioning system on April 1, 2011. (*See* Bard's Mot. for Summary Judgment at 3, ECF No. 29.) It is a multicomponent device made of a mesh of polypropylene, polyglycolic acid (PGA) fibers, and a bioresorbable coating called Sepra Technology ("ST"). (*Id*.) The bioresorbable coated side of the mesh is placed against organs, such as the bowels, while the uncoated polypropylene side is placed to maximize tissue attachment to support the hernia repair. (*Id*. at 3-4.)

Plaintiffs contend that "[b]are polypropylene never should be the intraperitoneal (intra-abdominal) space because that would leave it adjacent to organ tissue, which then could result in significant adverse events." (Pls. Mot. to Strike at 2, ECF No. 132.) Instead, either a permanent non-polypropylene layer (such as "ePTFE") or a resorbable layer (such as Sepra Technology) is necessary to ensure that the peritoneum heals over and covers the mesh. (Pl.'s Opp. to Bard's Mot. for Summary Judgment at 5, ECF No. 69.)

According to Plaintiffs, "[o]ne of the core issues from the beginning of the Bard hernia mesh cases involving Sepra Technology ("ST") is the early resorption of the ST hydrogel coating…from the polypropylene hernia mesh, which results in bare polypropylene being exposed to visceral tissues such as the bowel, liver, spleen, and omentum." (Pls.' Mot. to Strike

at 1-2.) Specifically, Plaintiffs contend the ST coating resorbs in as little as 7 days—far quicker than the 30 days Bard's internal documents and studies had determined was necessary for reperitonealization. (*See id*. at 1-4.) According to Plaintiffs, Bard's own internal information "never showed histologic evidence that the ST hydrogel persisted for at least 28 days" as Bard had identified as a "key patient requirement" for its resorbable barrier products. (*See id*.) Bard disputes Plaintiffs' theory about the early resorption of its ST coating, and stands by the safety and labeling of its ST line of devices, which indicate that the coating has up to a 30-day resorption rate. (*See* Instructions for Use, ECF No. 29-4 at PAGEID#567 ("Shortly after hydration, the biopolymer coating becomes a hydrated gel that is resorbed from the site in less than 30 days."); *see also* July 17, 2015 "Dear Valued Customer" Letter, ECF No. 75-5 at PAGEID#5762 ("Davol's Sepra Technology coating becomes a hydrated gel that resorbs within 30 days.")).

B. Plaintiff Steven Johns

Plaintiff Johns brings his action to recover for injuries sustained as a result of the implantation of Bard's defective Ventralight ST. Plaintiff Johns was diagnosed with a symptomatic ventral hernia within a diastasis recti at the age of 58 in July 2015. (Pl.'s Opp. to Bard's Mot. for Summary Judgment at 9.) Plaintiff Johns underwent surgery to repair the hernia and diastasis in August 2015, and Plaintiff Johns' doctor implanted Plaintiff Johns with Ventralight ST. (*Id*.) Plaintiff Johns' symptoms returned several months later, and he underwent a second surgery in October 2016. (*Id*.) During that surgery, Plaintiff Johns' doctor observed omental adhesions to the original Ventralight ST and performed "lengthy arthroscopic [sic] lysis of the dense omental adhesions from the prior mesh implant[.]" (*Id*.) Plaintiff Johns' doctor then removed the original device and implanted another Ventralight ST. (*Id*.) Plaintiff Johns was

diagnosed with another hernia within the diastasis recti in April 2019 and underwent a third surgery that month to repair the hernia, but the second Ventralight ST device was not removed. (*Id*.)

Plaintiff Johns contends the omental adhesions discovered in his second surgery were a result of the failure of the ST coating on the Ventralight ST, and that the continued presence of the second Ventralight ST currently inside his body continues to threaten his health and well-being and cause pain. (*Id*. at 10-11.) He claims it is probable he will need additional surgery for either chronic pain or possible complications, such a bowel obstruction or fistulization. (*Id*.)

C. Stephen F. Badylak, D.V.M., Ph.D., M.D.

On January 10, 2020, Bard timely served an expert report for Stephen F. Badylak, D.V.M., Ph.D., M.D., in which he provides "an independent evaluation of the Plaintiffs' claims concerning the use of polypropylene as an implantable surgical mesh for the repair of abdominal wall defects; i.e., hernias, and the alleged product defect claims relating to this material specifically as to the Ventralight ST Mesh, Ventralex Hernia Patch, 3DMax Mesh, and PerFix Plug devices." (Badylak Report at 2, ECF No. 96-1.)

On January 22, 2020, Bard timely served a supplemental report for Dr. Badylak pursuant to Case Management Order ("CMO") 24. (MDL 2846 ECF No. 292.) That CMO memorializes the parties' agreed-upon procedure for each sides' experts to review histopathology materials, including 189 slides, for two Ventralight ST-related animal studies conducted by Bard, and to submit expert reports associated with their reviews. Dr. Badylak's supplemental report states the following:

> I was asked to review histopathology materials associated with the following animal studies: Ventralight ST/Sorbafix versus Physiomesh/Securestrap Porcine Study (Study Number: DB-364) and Ventralight ST Mesh Comprehensive GLP Porcine Study (DB-300). The histopathology materials consisted of 109 slides for

> DB-364 and 80 slides for DB-300. My opinions related to these histopathology materials are consistent with the study reports for DB-364 and DB-300. Nothing I observed changes my opinions in my Expert Report dated January 10, 2020.

(Badylak Supplemental Report at 1, ECF No. 96-2.) According to Plaintiffs, these animal studies did not explore the presence of the ST coating or its resorption rate, and the associated study reports do not discuss the ST coating. (Pls.' Mot. to Strike at 5-6.)

Plaintiffs contend that neither of Dr. Badylak's reports disclosed "*any* opinions about the ST hydrogel coating, much less the coating being present on the polypropylene at 28 days." (*Id.* at 6) (emphasis in original). Yet when Plaintiffs' counsel asked Dr. Badylak about the animal studies at his February 19, 2020 deposition, Dr. Badylak testified that he could see the presence of the ST coating at 28 days on the slides he reviewed, though he could not recall specifics of the studies:

> Q. And so when you reviewed the slides which was at 28 days, your testimony is that you saw the ST coating on the slides?
>
> A. I saw the presence of the material, yes.
>
> Q. What material?
>
> A. The coating, the ST coating.
>
> Q. And you don't remember as you sit here today which studies, the slides, other than the 28-day study that you reviewed?
>
> A. They tend to run together. But if you showed them to me, it could be very clear.

(Badylak Depo. at 70:13-71:2, ECF No. 146-3) (objection omitted).

Plaintiffs contend that Dr. Badylak's testimony regarding the presence of the ST coating on the animal studies slides is a new, undisclosed opinion in violation of Federal Rule of Civil Procedure 26, and moves to strike the opinion pursuant to Federal Rule of Civil Procedure 37. In the alternative, Plaintiffs request 1) Dr. Badylak be required to serve a written report detailing his

opinion regarding the ST coating and be re-deposed, and 2) Plaintiffs' pathology expert who also reviewed the slides, Dr. Tamas Nagy, be permitted to respond to Dr. Badylak's new opinions. (Pls.' Mot. to Strike at 10-11.)

Bard opposes this motion, arguing that Dr. Badylak's opinion is not new and was properly disclosed. (Bard's Opp. to Mot. to Strike at 5-7, ECF No. 146.) Bard further argues that Plaintiffs elicited this opinion from Dr. Badylak at his deposition and had an opportunity to further question him during the deposition, but that Plaintiffs' counsel never showed him the study reports or slides despite his statements that he could provide specifics if he viewed those materials. (*Id*. at 8-10.) Bard also contends that Plaintiffs' motion is a "last-ditch attempt to backdoor an expert report" from Dr. Nagy, who never submitted an expert report despite CMO specifically allowing for him to do so. (*Id*. at 1.) Bard opposes any effort by Plaintiffs to now offer an expert report for Dr. Nagy, well after the January 15, 2020 deadline set forth in CMO 24. (*Id*.)

II.

Federal Rule of Civil Procedure 26(a)(2) governs the disclosure of expert testimony, requiring parties to disclose the identity of any witness it may use a trial to present evidence under Federal Rule of Evidence 702, 703, or 705. *See* Fed. R. Civ. P. 26(a)(2)(A). That disclosure must be accompanied by a written report that contains, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B). The parties must make their expert disclosures "at the times and in the sequence that the court orders" and supplement "when required under Rule 26(e)." Fed. R. Civ. P. 26(a)(2)(D)-(E). If a party fails to provide information as required by Rule 26(a) or (e), they may not use that information at trial "unless the failure was substantially justified or is harmless." Fed. R. Civ. P.

37(c)(1). The court may also impose other sanctions. *Id*.

III.

The Sixth Circuit has held that district courts have broad discretion over whether to exclude untimely disclosed expert testimony. *See Pride v. BIC Corp.*, 218 F.3d 566, 578-79 (6th Cir. 2000); *see also Estes v. King's Daughters Medical Center*, 59 Fed. Appx. 749, 752 (6th Cir. 2003) ("Rule 16 grants district courts broad discretion to enforce their scheduling orders."). "The district court has discretion to impose whatever sanction it feels is appropriate, under the circumstances." *Estes*, 59 Fed. Appx. at 753 (citing Advisory Committee notes to Fed. R. Civ. P. 16(f) (1983); *see also United States v. Rayco, Inc.*, 616 F.2d 462, 464 (10th Cir.1980) (broad powers of enforcement inure to a pretrial order limiting issues to be tried and evidence to be introduced).

Plaintiffs move to strike Dr. Badylak's deposition testimony regarding the presence of the ST coating in the two animal studies he reviewed, arguing it is a new, undisclosed expert opinion in violation of Rule 26's requirement that an expert report contain "a complete statement of all opinions the witness will express and the basis and reasons for them[.]" Fed. R. Civ. P. 26(a)(2)(B)(i). "Rule 26(a) generally serves to 'allow[ ] both sides to prepare their cases adequately and efficiently and to prevent the tactic of surprise from affecting the outcome of the case.'" *Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 871 (6th Cir. 2007) (quoting *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000)).

Plaintiffs contend that "in his January 10 and January 22, 2020 reports, Dr. Badylak did *not* disclose *any* opinions about the ST hydrogel coating, much less the coating being present on the polypropylene at 28 days." (Pls.' Mot. to Strike at 6) (emphasis in original). But at his deposition, Dr. Badylak testified he saw the presence of the ST coating on the slides at 28 days:

Q. Did you review slides associated with the 28-day study?

A. I believe there was a 28-day time point in the slides, yes.

Q. And did you see the coating on the slides?

A. Part of the – the answer is yes.

Q. What about the 14-day study, did you review slides of the 14-day study?

A. I don't know that it was -- are you referring to this 14-day study?

Q. You just talked about a 14-day study, and I'm asking about that. So whatever study you recall that had a 14-day resorption.

A. Well, my answer was that there are also published reports or some combination of looking at slides, looking at final reports and whatever is in the literature. These are things that form my answer. But I do recall with certainty that there was barrier present in a 28-day study. If we want to look at each of these individuals, final reports or a published study, I'm happy to talk about it with you.

Q. And you saw the barrier in the slides?

A. Yes, ma'am.

***

Q. And so when you reviewed the slides which was at 28 days, your testimony is that you saw the ST coating on the slides?

A. I saw the presence of the material, yes.

Q. What material?

A. The coating, the ST coating.

Q. And you don't remember as you sit here today which studies, the slides, other than the 28-day study that you reviewed?

A. They tend to run together. But if you showed them to me, it could be very clear.

(Badylak Depo. at 69:9-70:8, 70:13-71:2) (objections omitted).

Plaintiffs state that they were "taken completely by surprise by Dr. Badylak's undisclosed

opinions" and that these "new and undisclosed opinions directly contradict the extensive liability discovery undertaken by the parties in this case." (Pls.' Mot. to Strike at 10.) The PSC claims it has been prejudiced by these undisclosed opinions and was unprepared to examine Dr. Badylak because he never disclosed "these ST hydrogel 28-day opinions," and because his five-sentence supplemental report only said his opinions were consistent with the study reports—"none of which discussed in any manner the presence of ST hydrogel[.]" (*Id*.) Plaintiffs add that the studies Dr. Badylak did review did not examine the presence of the hydrogel barrier, and that neither the studies' objectives nor the associated reports discuss the presence of the hydrogel coating or its duration. (*Id*.)

In response, Bard states that Dr. Badylak's challenged opinion is not new and was not a surprise to Plaintiffs. According to Bard, Plaintiffs knew Bard disputes Plaintiffs' theory about the resorption of the ST coating and defends the safety and labeling of its ST devices. (Bard's Opp. to Mot. to Strike at 2.) Bard also states Plaintiffs knew as of January 22, 2020 that Dr. Badylak had reviewed the animal studies, and had opinions related to those studies, based on his supplemental report:

> I was asked to review histopathology materials associated with the following animal studies: Ventralight ST/Sorbafix versus Physiomesh/Securestrap Porcine Study (Study Number: DB-364) and Ventralight ST Mesh Comprehensive GLP Porcine Study (DB-300). The histopathology materials consisted of 109 slides for DB-364 and 80 slides for DB-300. My opinions related to these histopathology materials are consistent with the study reports for DB-364 and DB-300. Nothing I observed changes my opinions in my Expert Report dated January 10, 2020.

(Badylak Supplemental Report at 1.) Bard does not claim—nor cannot it—that Dr. Badylak's supplemental report expressly contains the opinion that he observed the presence of the ST at 28 days in the materials he reviewed for the two animal studies. Bard instead relies on the statement that Dr. Badylak's "opinions related to these histopathology materials are consistent with the

study reports for DB-364 and DB-300" to argue Dr. Badylak's opinion is not new.

Bard's position requires examining the study reports themselves. According to Bard, "[n]othing in either study report indicates that the hydrogel coating was absent at 28 days" and that the "evidence from the reports and the histopathological materials identified in the reports is consistent with the presence of the hydrogel coating long enough to allow for reperitonealization." (Bard's Opp. to Mot. to Strike at 2.) More specifically, Bard contends that the studies support the following:

- The study report for DB-300 includes photomicrographs of histopathology slides, which are images of the same slides Dr. Badylak reviewed. *See* Study Report for DB-300 ("DB-300 Report"), Exh. 1, at p. 36. The comments related to those photomicrographs say nothing about the absence of the hydrogel coating. *Id*.

- Further, the pathology comments note the presence of "[n]umerous large macrophages with abundant, foamy cytoplasm were within the fibrous mesh." *Id*. Macrophages are a type of white blood cell that helps the body remove the absorbable components of the Ventralight ST, including the hydrogel coating. Thus, the presence of macrophages suggests that hydrogel was present.

- The report also notes that the photographs taken at four weeks post-implantation show mature reperitonealization at the perimeter of the device at 28 days, indicating the hydrogel was present long enough for the peritoneum to fully heal.

- Additionally, there was not a presence of numerous adhesions, which might have happened if the hydrogel resorb too quickly—as Plaintiffs claim.

- Finally, the overall conclusions from both DB-300 and DB-364 are that the Ventralight ST performed well, undermining Plaintiffs' claim that the hydrogel coating absorbs too quickly. *See* DB-300 Report, Exh. 1, at p. 38; Study Report for DB-364, Exh. 2, at p. 65.

(Bard's Opp. to Mot. to Strike at 5-6.) Put more simply, Bard's position appears to be that Dr. Badylak disclosed in his supplemental report that his opinions related to the animal studies were consistent with the study reports, and that the study reports are consistent with his testimony that he observed the presence of the ST coating at 28 days.

Bard contends "courts have distinguished between new opinions and further development of opinions contained in the expert report. Indeed, an expert is permitted to expand on proposed testimony relating to the same core opinions as in the report, so long as the underlying opinions remain the same." (*Id*. at 7) (citing cases). According to Bard, "Dr. Badylak's challenged opinion is consistent with what is in his Supplemental Report and what is shown in the DB-300 and DB-364 study reports" and that the challenged opinion "does not contradict any of Dr. Badylak's prior opinions, nor does it constitute a material change in opinion." (*Id*. at 8.)

Bard's arguments are well-taken. Though the Court agrees with Plaintiffs that the specific opinion regarding the presence of the ST coating was not included in either of Dr. Badylak's written reports, Rule 26 "contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report." *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006) ("Section 26(a)(2)(B) does not limit an expert's testimony simply to reading his report. No language in the rule would suggest such a limitation."). It was evident from Dr. Badylak's supplemental report that he reviewed the materials for the animal studies and that his opinions were consistent with the study reports. Plaintiffs' counsel knew Dr. Badylak had reviewed the animal studies, and it was Plaintiffs' counsel who initiated the line of questioning regarding Dr. Badylak's review of the animal studies at his deposition.

In fact, it was Plaintiffs' counsel who elicited Dr. Badylak's challenged opinion regarding the ST coating by specifically asking about the timing of if the resorption period observed in the animal studies. Plaintiffs' counsel asked if Dr. Badylak recalled reviewing the animal studies, and then asked:

> Q. And do you recall in any of these studies whether or not the resorption period was explored for the barrier -- strike that – the resorbable barrier?
>
> A. I have looked at studies where the absorption barrier was reported, yes.

> Q. And what was the minimum time of resorption in the studies you reviewed?
>
> THE WITNESS: I don't think any study talked about a minimum time. There are reports of looking at -- noting there was still barrier there at, I recall, 14 days and 28 days. So in that particular study, we're talking about, I guess, up to a month.

(Badylak Depo. at 66:15-67:5) (objection omitted). In response to further questioning from Plaintiffs' counsel about the animal studies, Dr. Badylak explained he reviewed the study reports and the slides, and saw the presence of the ST coating at 28 days. (*See id*. at 68-73.) Dr. Badylak's deposition testimony appropriately supplements, elaborates upon, and explains his opinions regarding the animal studies reports as disclosed in his supplemental report.

Despite eliciting this testimony from Dr. Badylak through their questioning, Plaintiffs claim to be surprised by this opinion. But as Plaintiffs themselves claim, "[o]ne of the core issues from the beginning of the Bard hernia mesh cases involving Sepra Technology ("ST") is the early resorption of the ST hydrogel coating…which results in bare polypropylene being exposed to visceral tissues such as the bowel, liver, spleen, and omentum." (Pls.' Mot. to Strike at 1-2.) Plaintiffs sought, and obtained through this Court's CMO 24, access to the animal studies at issue here and a schedule for each side's experts to submit reports regarding those studies. Plaintiffs are thus very familiar with the issues to which Dr. Badylak's challenged opinion relates: the alleged early resorption of ST coating and the animal studies.

As evidenced by Plaintiffs' counsel's questioning, they were prepared— at least to some extent—to examine Dr. Badylak regarding his review of the animal studies. When Dr. Badylak testified he could see the presence of the ST coating at 28 days in the studies he reviewed, Plaintiffs' counsel could have shown him the study reports or the photos of the slides to further question him regarding this opinion. But Plaintiffs' counsel did not do so, even though Dr. Badylak repeatedly stated that he could not recall specifics of the studies but would be better able

to answer questions if he was shown those materials. Had Plaintiffs' counsel showed Dr. Badylak the study reports or photos of the slides, he would have been able to further explain, as Bard has done here, how his testimony was consistent with the study reports as disclosed in his supplemental report.

The Court therefore declines to strike Dr. Badylak's opinion regarding the ST coating offered at his deposition. But the Court will allow for additional expert discovery by both parties to cure any perceived surprise to Plaintiffs posed by Dr. Badylak's opinion and given the importance of the resorption rate of the ST coating in this case. First, the Court notes that this issue could have been avoided had Dr. Badylak been more specific in his supplemental report regarding his opinions on the animal studies. The Court will therefore require Dr. Badylak to submit a written report, including any photomicrographs associated with his review, detailing his opinions regarding the presence of the ST coating in the animal studies materials he reviewed. The Court will also permit Plaintiffs to re-depose Dr. Badylak regarding this supplemental report.

Plaintiffs request that their pathology expert, Dr. Nagy, be permitted to submit an expert report responding to Dr. Badylak's supplemental report regarding the animal studies. Plaintiffs disclosed Dr. Nagy as an expert on December 5, 2019 and stated "his report and opinions are forthcoming pending review of the histology slides, pathology materials, and CD ROMs created from various animal studies that are currently in the custody and control of Defendants." (*See* PSC's Designation and Disclosure of Expert Witnesses at 5, ECF No. 26-1.) Pursuant to CMO 24, Dr. Nagy was permitted to review the slides for the two animal studies and to submit an expert report, but he declined to do so. When Bard moved to strike Dr. Nagy as an expert based on his failure to serve an expert report (*see* ECF No. 26), Plaintiffs claimed that "Dr. Nagy is

being utilized solely as a photo documentarian for the Bellwether Trial cases" and "Dr. Nagy will not be offering any affirmative expert opinions." (*See* ECF No. 60 at 1.)

But Plaintiffs now request that Dr. Nagy be permitted to respond to Dr. Badylak if the Court does not strike his opinion regarding the ST coating. Bard contends Plaintiffs are using this Motion as a "last-ditch attempt" to serve a report from Dr. Nagy. (Bard's Opp. to Pls.' Mot. to Strike at 1.) Plaintiffs explain Dr. Nagy's failure to serve an expert report:

> Dr. Nagy was initially tasked with reviewing histopathology slides and comparing them to the study reports, which, again, did not mention the presence of the ST hydrogel or its resorption time. Therefore, his initial review did not include an analysis of the presence of the ST hydrogel coating.

(Pls.' Mot. to Strike at n.27.) Plaintiffs add that "because the studies did not analyze the presence of the hydrogel coating, Dr. Nagy[] did not." (Pls.' Reply at 6, ECF No. 152.)

Plaintiffs' arguments are well-taken. The Court will permit Dr. Nagy to submit an expert report, but that report must be limited to responding to Dr. Badylak's supplemental report regarding the ST coating. Bard may also depose Dr. Nagy regarding his expert report. As a final note, it is clear Plaintiffs disagree with Dr. Badylak's interpretation of the animal study reports and the presence of the ST coating on the slides. (*See, e.g.*, Reply at 4) ("Defendants cannot now say that DB-364 and DB-400 study reports' silence on the topic of the hydrogel coating is consistent with an affirmative statement that the hydrogel coating is visible (has not absorbed) at 28 days."). It is also clear that Plaintiffs dispute the validity of Dr. Badylak's opinion, claiming Dr. Nagy has already "re-examined his microphotographs and confirmed that the hydrogel is not present on any of the slides and reviewed." (Pls.' Mot. to Strike at 7.) Plaintiffs' concerns can be addressed through Dr. Nagy's report and through examination of Dr. Badylak during his second deposition and at trial.

IV.

For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion to Strike (ECF No. 132.) Specifically, the Motion is **DENIED** with respect to Plaintiffs' request to strike Dr. Badylak's challenged opinion. The Motion is **GRANTED** with respect to Plaintiffs' request that Dr. Badylak submit a written report detailing his opinion relating to the ST coating in the animal studies he reviewed, and provide any photomicrographs from his review. The Motion is also **GRANTED** with respect to Plaintiffs' request to submit a report from Dr. Nagy responding to Dr. Badylak's supplemental report within 14 days after receipt of that report. Plaintiffs will be permitted to re-depose Dr. Badylak regarding his supplemental report, and Defendants will be permitted to depose Dr. Nagy regarding his report.

IT IS SO ORDERED.

4/16/2020
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

4/16/2020
DATE

s/Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE