

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division**

In re:)	Master File No. CV 92-P-10000-S
)	
SILICONE GEL BREAST IMPLANTS)	This Document Relates To:
PRODUCTS LIABILITY LITIGATION)	All Cases
(MDL-926))	

ORDER NO. 7
(Modification/Clarification of Order No. 5)

This order is entered as a result of discussions at a conference under Rule 16 held in Dallas, Texas, on September 30, 1992. It clarifies, supplements, and, to the extent inconsistent, modifies Order No. 5 (Revised Case Management Order) and applies to all cases that have been or are subsequently filed in, removed to, or transferred to this court as part of the Silicone Gel Breast Implant Litigation, including any cases involving other implant product liability claims considered suitable for inclusion in this litigation. Except to the extent herein provided, the motions for clarification of Order No. 5 filed by Baxter Healthcare, Foamex, '21' International Holdings, General Electric, and Union Carbide are denied.

1. **Bulletin Board.** National Liaison Counsel for Plaintiffs have established an electronic bulletin board at 205-252-6710, which can be accessed by computer modems to obtain information concerning orders, cases, etc. During the coming weeks they will be expanding the topics and storing additional information on subjects such as schedules of depositions, materials filed with the document depository, etc. While they may establish some features that would be accessible only by counsel for other plaintiffs, most of the information is not work-product and is available to other persons, such as defendants and other courts.

Most communications software should work with the bulletin board. Set your program for 2400 or 9600 baud, 8 data bits, no parity, 1 stop bit, ANSI emulation, and

XModem/CRC file transfers. For the initial contact, you will be asked to assign yourself a password and to provide some identifying information. After this initial contact, you can access the bulletin board by giving your name and password. If you have difficulties, call either of Liaison Co-counsel for plaintiffs.

2. **Pleadings.**

(a) **Master/Sample Complaints.** A principal purpose for using the master and sample complaints when bringing new actions is to simplify the pleading process. The procedure is not intended as a license for plaintiffs to sue defendants against whom they have no colorable claim. Plaintiffs are expected to use reasonable efforts to identify (and describe in the complaint) the product(s) on which their complaint is based and to limit accordingly the defendants who are sued--in short, to have a factual basis for making a claim against a defendant.

(b) **Answers to Newly-filed Complaints in Other Courts.** Paragraph 4(a) of Order No. 5 establishes a means for facilitating service of summons and complaints on the "National Defendants," under which those defendants have agreed to service of process by certified mail, return receipt requested, on the persons or at the addresses shown in Exhibit B. For cases initially filed in the Northern District of Alabama, it will not be necessary for those defendants to file an answer (or Rule 12 motion) since under paragraph 6(b) of Order No. 5 their master answers will be deemed automatically filed in all constituent cases. However, in cases filed in state court or in another federal district court, a defendant should file in that court an appropriate motion or answer, thereby reflecting that service has been made and avoiding possible default judgment. In federal courts, it should be acceptable to file a very brief answer in which the defendant adopts by reference its master answer.

(c) **Cross-claims.** The defendants are relieved of the obligation to include in their master answers the cross-claims they may have against other defendants. While they may include such cross-claims if they elect to do so, they may--to the extent permitted by applicable substantive law governing such claims--reserve or defer the presentation of such claims.

(d) **Amendments to Pleadings.** Paragraph 6 of Order No. 5 is not intended to preclude a party from amending its pleadings based upon discovery or other pretrial proceedings. It is intended, however, to relieve parties from the obligation to do so and thereby reduce unproductive and potentially distracting disputes over pleadings prior to the time a refinement of issues is needed.

3. **Dispositive Motions.** The restriction on Rule 56 motions contained in paragraph 6(e) of Order No. 5 is not intended to defer indefinitely all potentially dispositive motions, but rather to assure that an appropriate period for discovery is afforded before such motions are filed. The parties are expected to confer and attempt to agree on a schedule in which Rule 56 motions directed to particular issues or parties can fairly and efficiently be presented. In the absence of agreement, a party may seek leave from the court to file such a motion, indicating the proposed schedule for discovery and briefing.

4. **Depositions.**

(a) **Attendance.** To foster the objective of reducing unnecessary attendance at depositions--

(1) The party noticing a deposition shall briefly describe who the deponent is and, if not obvious from that description, the likely subject matters which the deposition will cover. Other parties expecting to examine the deponent on distinct subject matters shall give notice of such intent. This procedure is adopted for the purpose of alerting parties whether they should attend a deposition; it should not be used as a basis for objecting to lines of inquiry as being outside the expected scope of testimony.

(2) At the conclusion of a deposition, arrangements shall be made for the possible resumption of the deposition, typically at a date 45 to 60 days thereafter, to deal with supplemental or clarifying questions by non-attending parties. Parties not attending the initial deposition shall have 30 days after the deposition is filed in the depository in which to indicate a need for resuming the deposition and the subject matter(s) on which such additional examination is needed. The court expects this

option for a resumption of a deposition to be exercised sparingly--when a non-attending party is surprised and prejudiced by the deponent's testimony--and not as a device to harass a witness, to rephrase questions the substance of which was covered, or to cause unnecessary additional expenses to other litigants.

(b) **Questioning.** Paragraph 7(f)(4) of Order No. 5 establishes the principle that ordinarily the primary examination of a deponent should be conducted by one or two lawyers from "each side." The objective is to reduce redundant examination and avoid a "circus-like" atmosphere. The court recognizes that in some depositions there may be sufficient divergence of positions among various parties (e.g., between "manufacturer" defendants and "supplier" defendants) that additional examiners may be appropriate, provided redundant examination is avoided.

(c) **Use at Trial.** Some question has arisen concerning the efficacy of the injunction contained in paragraph 7(f)(6) of Order No. 5 in the light of the subsequent provisions allowing hearsay objections to admissibility of particular items of testimony contained in a deposition. The meaning is this: the parties to this litigation are (subject to the conditions stated in the order) enjoined from objecting in any federal or state court to the use of a deposition on the ground that the deposition in its entirety would be hearsay or otherwise inadmissible because it was not "taken" or "noticed" in that case or because they did not have personal notice or participate in that deposition; they are not, however, precluded from objecting at trial to items of testimony within the deposition which, if the deponent were testifying in person at the trial, would be inadmissible hearsay.

5. **Application to Cases Not Pending in the Northern District of Alabama.** The "caution" box on page 1 of Order No. 5 was inserted as a reminder to counsel that orders of this court do not apply to cases filed in other courts unless and until those cases are transferred to this court. Some aspects of Order No. 5, however, have potential significance in cases filed in other courts. For example, the willingness of the national defendants to accept service of process when effected as described in paragraph 4(a) and Exhibit B applies to all federal and state cases. Also, the indefinite extension of time for putative class members to exclude themselves from the Dante class applies, since Dante is now pending in this court (CV 92-P-10060-S), to all such persons, including those who have instituted individual actions that may be pending in other federal or state

courts.

This the 6th day of October, 1992.

/s/ Sam C. Pointer, Jr.

United States District Judge