UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION (MDL-926)	)	CASE NO. CV 92-P-10000-S (This document applies to all cases)

ORDER No. 30
(Pretrial and Revised Case Management Order)

In view of the recent remand or transfer of a substantial number of breast implant cases, and in anticipation of further remands and transfers, this Court, in accordance with § 31.133 of the *Manual for Complex Litigation, Third*, and after consulting with and receiving suggestions from the parties,[1] is entering this Order to chronicle the proceedings, summarize significant rulings, outline issues remaining for discovery and trial, and indicate the nature and expected duration of further pretrial proceedings that are likely to be needed after remand or transfer or in preparing for additional remands and transfers.

This order supplements—and, in the event of inconsistency, supersedes—prior orders entered in CV92-P-10000-S (the master file for MDL 926), and applies to all breast implant cases that are now pending in or may later be filed in, removed to, or transferred to this Court. Upon remand of cases to other federal or state courts (or upon transfer to other federal courts under 28 U.S.C. § 1404 or § 1406), the terms of this order will continue to apply in such cases except to the extent modified, for good cause shown, by such courts.[2] This order should also be treated as a supplemental order in those cases that have been recently remanded or transferred.

1. **Summary of Proceedings**. On June 26, 1992, the Judicial Panel for Multidistrict Litigation ("JPMDL") transferred 78 federal breast implant cases to the Northern District of Alabama (the "transferee court") under 28 U.S.C. § 1407. *In re: Silicone Gel Breast Implants Products Liability*

1 . Although this order has been developed through a process of consultation and suggestions, it should not be viewed as an "agreed" order. The Court has entered this order under the authority of Fed. R. Civ. P. 16, and plaintiffs or defendants may disagree with some portions of the order, particularly with respect to the description of certain earlier orders. These abbreviated descriptions should not be understood as modifying the basis on which such orders were entered.

2 . Although transferor courts have the power after remand, subject to comity and "law of the case" considerations, to modify or vacate rulings by the MDL transferee judge, this power should, as indicated in *MCL 3rd* § 31.133, be sparingly exercised.

Litigation (MDL 926), 793 F. Supp. 1098 (J.P.M.D.L. 1992). Since that original order, the JPMDL has entered more than eighty Conditional Transfer Orders or other transfer orders, resulting in transfer of approximately 20,000 cases to this court. Some cases transferred by the JPMDL had been initially filed in a federal district court (the "transferor court"); others had been removed to a transferor court from a state court.[3] A relatively small number of cases—less than 1,000—have already, on the suggestion of this court, been remanded by the JPMDL back to transferor courts or have been remanded by this court to state courts or have been transferred by this court to other federal courts under 28 U.S.C. § 1404 or § 1406. Of the approximately 20,000 cases that remain pending in this court, many are ready, or nearing readiness, for remand to a transferor court or to a state court, or for a transfer to another federal court. For convenience, the term "Remand Court" will be used in this order to refer not only to a federal or state court to which a case may be remanded, but also to a federal court to which a case may be transferred under § 1404 or § 1406.

On September 1, 1994, a class settlement was approved under Fed. R. Civ. P. 23(b)(3), with opt-out rights, in the *Lindsey* case. However, because of the amount of claims that would potentially be approved under the criteria of that settlement and because of Dow Corning's bankruptcy proceedings, the Court on December 22, 1995, approved the dissemination of notification of new opt-out rights and of the terms of a revised settlement program affecting claims against certain of the defendants. Class members have been advised of their "opt-out" rights relating to this revised settlement program; but, unless and until they exercise such rights, they are precluded from instituting or pursuing claims against the companies and persons named as settling defendants or released parties under the global settlement agreement (or the revised settlement program). The terms of this order do not affect the terms of this revised settlement program.

As indicated in ¶ 6 below, further proceedings in many cases, as well as the institution of new litigation by others, have been barred in whole or in part either because of claims against the Mentor defendants, the Bioplasty defendants, or Dow Corning, or because the plaintiffs were participants in a class settlement. However, with the availability of new opt-out rights that commenced December 1, 1995, more pending cases will soon become ready for remand or transfer. Also, the Court expects that, after exercise of these new opt-out rights, there could be a substantial number of new cases filed in state and federal courts, many of which may be transferred to this court.

2. **Conferences**. This Court held its first conference in this litigation in July 1992. General status and pretrial conferences have been conducted approximately every two months, with numerous additiional conferences held to consider special problems and motions. Major rulings resulting from these conferences have been incorporated into written orders. However, from time to time, there have been clarifications and directions from the Court during these conferences that are not embodied in written orders.[4]

3. **Case Management Orders**. The primary orders that have governed the pretrial management of MDL 926 are Order No. 1 (Initial Case Management Order), entered June 26, 1992; Order No. 5 (Revised Case Management Order), entered September 15, 1992; and Order No. 7, entered October 6, 1992. Some provisions of these orders—particularly those relating to the time for conducting and completing discovery—have been modified from time to time, and the Court has entered some additional case management orders relating to particular subjects, *e.g.*, Order No. 11 relating to scheduling and conducting depositions.

(a) **Representative Counsel**. The Court has appointed and assigned certain responsibilities

3 . Some additional cases initially were either filed in the Northern District of Alabama, removed to this court from Alabama state courts, or transferred directly to this court under 28 U.S.C. § 1404 from other federal courts without going through the JPMDL.

4 . All major conferences have been recorded by a court reporter, and these transcripts can be obtained through Liaison Counsel.

to Liaison Counsel for Plaintiffs, to Liaison Counsel for Defendants, and to a 17-member Plaintiffs' Steering Committee ("PSC").

(b) **Master File**. All orders, pleadings, motions, and other documents (except when not of general application) have been docketed and filed in a Master File, CV92-P-10000-S under the style, "In re Silicone Gel Breast Implants Products Liability Litigation (MDL-926)." Orders and other documents so filed have been deemed as filed in each individual case to the extent applicable, but have not been separately docketed or physically filed in such individual case files except where there was a particular reason to do so.

(c) **Preservation of Evidence**. The parties have been directed by Orders No. 1 and 5 to preserve all documents and other research or exhibits potentially relevant to the subject matter of this litigation. From time to time, this court has entered clarifications and addressed particular problems relating to preservation of evidence.

(d) **Service of Process**. At the Court's urging, the national defendants agreed to accept service of process in breast implant cases if a copy of the summons and complaint was sent by certified mail, return receipt requested, to the person or address shown in Exhibit B of Order No. 5. Such defendants' agreement to accept service of process applies to any case involving breast implant product liability claims filed in any federal district court or in any state court of general jurisdiction.

(e) **Master/Sample Complaints**.

(1) At the Court's direction, the PSC filed in CV92-P-10000-S a Master Complaint (the operative version is styled "Amended Master Complaint") containing allegations that would be suitable for incorporation by reference in individual cases, together with a sample complaint illustrating how allegations from the master complaint could be incorporated into an individual case. In many cases, there will be only a simplified complaint, adopting by reference allegations from the master complaint.

(2) Allegations of the Amended Master Complaint are not deemed automatically included in any particular case. However, to avoid possible problems with statutes of limitation or doctrines of repose, the Court ordered that a motion would be deemed to be made and be pending in each case (effective upon the case being filed in, removed to, or transferred to this court) to amend the complaint to add any potentially applicable claims and theories from the master complaint not contained in the complaint actually filed in that case. If a plaintiff desires to add any such claims and theories, she should do so through a specific motion in her case filed within 60 days after any remand or transfer; otherwise this "deemed" motion should be treated as withdrawn.

(3) In some cases, amendments to complaints will have been made before remand or transfer, which refine and limit the theories on which the plaintiff will proceed at trial. In other cases, such amendments will be needed in the Remand Court before the case proceeds to trial.

(f) **Master Answers**. At the Court's direction, each of the national defendants has filed in CV92-P-10000-S a Master Answer, incorporating its defenses in law or in fact to claims made against it in the various actions. The answers do not attempt to provide a cross reference to particular paragraphs or counts of the various complaints. The answers do, in a "generic" manner, admit or deny the allegations typically included in claims, as well as make additional allegations as are appropriate to the various claims and defenses.

(1) These Master Answers have been deemed by court order as automatically made by those defendants in each such case unless and until another answer is filed by that defendant, in which event the individually-filed answer (and not the Master Answer) should be treated as that defendant's response to the complaint.

(2) In some cases, amendments to answers will have been made before remand or transfer that conform to the requirements of Fed. R. Civ. P. 8. In other cases, such amendments may be needed in the Remand Court after the plaintiff's complaint has been refined and before proceeding to trial.

(g) **Additional Defendants**. The Court has typically granted plaintiffs leave to amend complaints to add defendants, without addressing whether or not these amendments would "relate back" or would be subject to a defense based on statutes of limitation or repose.

(1) In ruling on whether any such amendments are barred by statutes of limitation or repose, Remand Courts will need to determine when particular plaintiffs "opted out" of certain federal class actions, most particularly the *Dante* and *Lindsey* class actions. It should be noted that whether statutes of limitation and repose resume running 30 days or 6 months after a person opts out of the *Lindsey* class settlement will depend on when that opt-out right is exercised.

(2) In granting a plaintiff's motion to remand a case to state court (or to suggest to the JPMDL remand to a federal transferor court), this Court has generally required that the plaintiff indicate there are no further defendants to be added. While a Remand Court would have the power to allow addition of a defendant after remand or transfer, this power should be exercised sparingly and only for good cause shown.

(h) **Multiple Plaintiffs**. To consolidate filings and avoid unnecessary duplication and expense, plaintiffs were granted leave, without need for motion or order, to add other plaintiffs to any pending (or subsequently filed, removed, or transferred) case in this court if all plaintiffs in the case (1) were represented by the same counsel; (2) were suing the same defendants; and (3) were implanted in the same state. The result has been that in some cases there may be a large number of plaintiffs. Remand Courts will, after remand or transfer, need to consider in such cases the extent to which severance under Fed. R. Civ. P. 42 for further pretrial proceedings or for trial will be appropriate.

4. **Discovery**. The basic principles that have governed the conduct of discovery were set forth in ¶ 7(a) of Order No. 5, but are repeated here as an aid in understanding some of the details that follow: (1) discovery should be conducted on the assumption that there may be a separate trial of each case (federal or state); (2) additional "true discovery" will not be needed with respect to many potential witnesses who have previously testified in depositions or in trials; (3) video-taped depositions (which are also stenographically recorded) should be taken for potential use as trial testimony of all persons whose testimony will likely be needed in a number of trials, thereby enabling trials to be conducted in different courts at the same time without complications arising from unavailability of witnesses; (4) through use of a joint plaintiff-defendant federal-state library, all parties in any federal or state court should have quick and inexpensive access to, and the ability to retrieve, (A) all existing and future depositions, interrogatories, requests for admission, and trial transcripts in text-readable and searchable computer files and (B) all potentially relevant documents from the defendants and other sources that are likely to be used during depositions or at trial in more than a single case; (5) claims of confidentiality and use of "protective" orders restricting use of materials should be kept to an absolute minimum; (6) some discovery will be "national" in scope (*i.e.*, potentially needed in various cases throughout the country),

while other discovery will be "regional" (*e.g.*, depositions from plastic surgeons performing numerous implants) and still other discovery will be "case-specific" (*e.g.*, depositions of plaintiffs and their treating or examining physicians); (7) the plan should be designed to accommodate coordinated, cost-efficient discovery in both federal and state courts; and (8), in order to minimize unnecessary burdens and expense of redundant discovery, parties should not submit document requests, interrogatories, requests for admission, and notices of depositions without first determining that the materials are not available in the library or are inadequate.

(a) **Documents**.

(1) **Joint Document Depository**. A national document depository, maintained at the joint expense of the PSC and the national defendants, is located in the federal courthouse in Cincinnati, Ohio. The depository houses documents, transcripts, videotapes, and other materials produced by the defendants and third-parties in the litigation. It is accessible to both federal and state court litigants, including counsel involved in related insurance coverage litigation, as well as to nonlitigants. Directed to produce "all potentially relevant documents," the national defendants have to date produced over nine million pages of documents. This document discovery, begun in mid-1992, is now, for all practical purposes, substantially complete, though there is continuing production of some currently-created documents and there are a few remaining disputes regarding production of particular documents, primarily relating to claims of privilege or work-product protection and certain on-going studies. With few exceptions, the documents in the depository can be viewed and copied by any interested person; relatively few documents are subject to any protective order restricting copying, use, or disclosure.

(A) **Racine Warehouse**. Bristol-Myers maintains a large warehouse of documents from the Medical Engineering defendants in Racine, Wisconsin. The warehouse contains documents from a number of related companies and entities, including Natural Y Surgical Specialties, Aesthetech, Markham Medical, Surgitek, Medical Engineering, and related successor companies. The PSC reviewed the warehoused documents and selected a large number of documents to be sent to the Cincinnati document depository; these documents have been Bates-numbered, copied, and inventoried. There are thousands of additional documents in the Racine warehouse that are not in the Cincinnati depository; but it is unlikely that any litigant will need to review these documents.

(B) **Documents Obtained by Subpoena**. Also available in the depository are documents obtained by the PSC through subpoenas to third-parties, *e.g.*, the Food and Drug Administration, the American Society of Plastic & Reconstructive Surgeons, and the Health Industry Manufacturers Association. Given the documents produced to the depository by the FDA, there should be little reason for FOIA requests to the FDA.

(C) **Documents Produced at Depositions of Former Employees**. Certain former employees of defendants produced documents from their prior employment, pursuant to a subpoena duces tecum at their depositions. These documents have been maintained in the depository and typically are identified by a letter prefix related to the witness's last name.

(D) **Other Written Discovery Materials**. In addition to the MDL document production, the PSC has obtained and submitted to the depository materials from other breast implant litigation, including state coordinated proceedings, such as the

interrogatories and document production requests prepared by the California Plaintiffs' Steering Committee and the defendants' responses to such requests.

(E) **Trial Transcripts and Depositions**. Also available at the depository are copies of trial transcripts of breast implant trials in state and federal courts, as well as depositions taken in such cases that might be of general interest, *e.g.*, depositions of experts. Keeping these transcripts and depositions current is a joint responsibility of the PSC, individual plaintiffs, and the national defendants.

(2) **CD-ROM Disks**. Most documents produced to the depository by the defendants have been "imaged" and are available on CD-ROM disks, each of which contains approximately 15,000 pages of documents (approximately 7 to 8 banker's boxes). In a sense, these disks—approximately 200 at the present time—constitute a traveling document depository since hard copies can be printed from the disks and the parties have stipulated that accurate printouts from these disks are to be treated as duplicates of the documents on file in the depository. It should be noted that not every document produced to the depository has been so imaged. In particular, some records that are likely to be very case-specific, such as Dow Corning lot-history records and pleadings, may not be on CD-ROM disks and may be available only at the Cincinnati depository.

(3) **Objective Indices and Catalogues**. At the Court's direction, the PSC has, at its expense, reviewed and coded documents produced to the Depository and prepared a computerized database that identifies by number and describes (in neutral words suitable for use by a court preparing a list of exhibits) the various documents produced to the Depository. (National defendants were provided an opportunity to indicate any disagreement as to the PSC's coding of this data.) This database captures such information as document Bates numbers; the apparent dates, authors, recipients, and carbon copies; a brief description of the document; and identifying information regarding its image on CD-ROM disks. It should be noted that, as with certain documents not imaged on CD-ROM disks, some case-specific data has not been subjected to this review, coding, and computer data-entry by the PSC.

The PSC has also prepared a catalog of CD-ROMs, documents, and databases. This catalog details documents produced, including a description, the CD-ROM disks, and a list of the work product databases. The PSC has also created an "MDL-926 Box Inventory: Master List of Boxes." This list may be the most definitive source as to what documents have been produced in this litigation and includes a list of boxes produced by the defendants, a list of boxes from the Racine production, a list of boxes produced by third-parties, and a list of documents produced at depositions of former employees.

(4) **Privilege and "Work Product" Logs**. In directing the defendants to produce all potentially relevant documents, the Court recognized that some documents would be privileged or protected by the "work product doctrine." In Orders No. 5 and 12, the defendants were directed to prepare and maintain a "privilege log," listing documents withheld, with sufficient identifying information to permit the parties to determine whether the claim of privilege or protection was appropriate. Although most disputes regarding claims of privilege or work product protection have been resolved by this court or by state courts, there remain some disputes that will be ruled on by the Court over the coming months. (The documents still in controversy are not believed to be sufficiently significant as to justify delay in completing case-specific discovery or in setting cases for trial.)

(A) In ruling on claims of privilege or work-product, this Court has looked to the

state laws that would be most restrictive on such claims. The rationale for this approach is that, if a document would not be protected from disclosure under the laws of any state in which a party had been sued, then it would be ordered disclosed in cases from such jurisdiction, which in turn would moot arguments that the document might have been subject to protection under the laws of other states.

(B) From the outset of this litigation, it has been clear that cooperation among counsel and parties was essential for the orderly and expeditious completion of pretrial proceedings. Therefore, the Court has operated under the following general guidelines and urges the continuation of this practice upon remand or transfer: the communication, transmission, or dissemination of information among the Plaintiffs' counsel or among Defendants' counsel in the course of this litigation should not ordinarily be deemed a waiver of the attorney-client privilege, the protection afforded by the work product doctrine, the protections afforded to material prepared for litigation, or any other privilege to which a party may be entitled. Any cooperative efforts, as described above, should not be used against any of the parties, be cited as purported evidence of conspiracy, wrongful action or wrongful conduct, or be communicated to the jury. However, the mere exchange of information or documents between counsel shall not in itself render such information or documents privileged. Nothing in this paragraph shall in any way affect the applicability of any privileges or protections against disclosure otherwise available under law.

(C) One of the major disputes related to a claim of attorney-client and work-product protection involving certain reports prepared for Dow Corning by Griffin Bell, Esq. This Court ruled that, for the most part, such documents were protected from disclosure under the laws of all states. Given Dow Corning's bankruptcy proceedings, any efforts to revisit this ruling would have to be addressed to the Bankruptcy Court in the Eastern District of Michigan.

(5) **Objections to Admissibility of Documents**. To be separately transmitted to each Remand Court is a stipulation, with voluminous appendices, that should substantially reduce the time spent during trial in providing foundation evidence affecting the admissibility of documents produced to the depository. In general, this stipulation serves both as an agreement to waive various possible objections to documents (such as "best evidence", authentication, and business-records requirements) as indicated in the appendices and as deposition answers under Fed. R. Civ. P. 31 by defendants to questions affecting admissibility of the documents. Courts and litigants should review carefully the terms of the stipulation to determine its scope, effect, and limitations; the description of the stipulation in this order is not intended to modify or alter the terms of the stipulation, which were carefully worked out over a period of many months.

(A) It should be noted that the stipulation does not address, or attempt to preclude, objections under Federal Rules of Evidence 402 and 403, nor does it address when, during a trial, an otherwise admissible document should be received in evidence.

(B) It should also be noted that the stipulation does not preclude a Remand Court from imposing additional requirements, such as through further pretrial order or under local rules, relating to listing of documents and preserved objections in advance of trial.

(C) The stipulation, with appendices, will be provided to each Remand Court both in "hard copy" and on a computer-disk. Additionally, for convenient reference, a short-list will be prepared and provided that covers the documents most frequently

offered at trial.

(b) **The MDL Depositions**. The basic principles governing the taking of depositions were set forth in ¶ 7(f) of Order No. 5 and in Order No. 11 (Deposition Guidelines), entered June 30, 1993.

(1) Hundreds of depositions have been conducted in accordance with these directives, and are available through the depository in hard copy, minuscript, ASCII disks, and videotape. There will be some additional depositions to be taken either by the PSC or the defendants, and, when taken, these will likewise be made available to all litigants.

(2) Under terms of these orders, particularly ¶ 7(f)(6) of Order No. 5 and ¶ 16 of Order No. 11, these depositions should be usable in all Remand Courts, federal and state.

(3) Substantial portions of these depositions have been used by plaintiffs or defendants in various trials in federal and state court that have taken place in the last two years. It can be expected that a major part of the evidence to be presented in future trials will consist of selected portions of these depositions in either videotape or written transcript form. To facilitate presentation of this evidence, Remand Courts should consider requiring the parties in particular cases nearing trial to designate and counter-designate portions of these depositions appropriate to such cases and, if video tape is to be used, to prepare an edited version for use at trial. It is likely that, as additional trials are held, some consensus will develop as to the portions the parties will want to offer and thereby eliminate the need to repeat this designation and editing process in future trials.

(4) The parties were encouraged by the Court to take "trial-type" videotaped depositions of all persons whose generic testimony would likely be needed in many cases—both to reduce the burden on such persons and to reduce the potential that unavailability of such persons might prevent trial settings or cause continuances of trial. This Court recommends to Remand Courts that only in exceptional circumstances should trials not be scheduled or be continued based on the claimed unavailability of a "key" witness if a videotaped "trial type" deposition of that person, covering the subjects that would be presented at trial, has been taken or if the party should have anticipated the need to take such a deposition.

(c) **Remaining Discovery**. A relatively small amount of "national" discovery remains to be conducted or completed by the PSC or by the national defendants. This remaining national discovery—which is not sufficiently substantial to justify delay in remand or transfer of cases for further case-specific preparation and trial—will continue to be controlled by this Court and, when conducted, will be made available, as appropriate, to Remand Courts and litigants in such courts. The bulk of remaining discovery will be "plaintiff-specific" and may be conducted either while a case is pending in this Court or after it is remanded or transferred to a Remand Court. The following provisions are intended to govern further discovery in this Court and—subject to a Remand Court's power to alter these provisions by order or rule—discovery in a Remand Court after such remand or transfer.

(1) **Additional Discovery from Defendants and their Employees**.

(A) Further depositions of the national defendants and their current and former employees by the PSC, by individual plaintiffs, or by other defendants will be permitted only with the consent of that defendant or with the approval of this Court (or, after remand or transfer, by a Remand Court). It is anticipated that such depositions will be

limited to situations in which discovery of a particular issue is non-duplicative of prior discovery—typically being matters specific to an individual plaintiff—and that, absent a stipulation of the parties or court order for good cause shown, direct examination should be completed in 3 hours.

(B) A national defendant may, with the approval of this Court, preserve the testimony of any of its current or former employees whose health jeopardizes his or her ability to testify in multiple trials, or for other good cause. A national defendant may also, with the approval of this Court or a Remand Court, preserve the testimony of any of its current or former employee for use in a specific trial.

(C) Further document production requests of a national defendant by the PSC, by individual plaintiffs, or by other defendants will be permitted only with the consent of that defendant, with the approval of this Court, or—with respect to plaintiff-specific documents—by a Remand Court after remand or transfer. Any such request must be accompanied by a showing that the requested documents are not available in the Cincinnati depository.

(D) Interrogatories to a national defendant under Fed. R. Civ. P. 33 or a state counterpart will, unless approved by this Court (or, after remand or transfer, by a Remand Court), be limited to questions relating to identification of experts, expected areas of expert testimony, theories of defense, or identification of trial witnesses or exhibits, where such inquiries have not previously been addressed by the defendant. Questions will not be permitted if the answers would require examination of documents that are available in the Cincinnati depository.

(2) **Discovery from Plaintiffs**.

(A) Implant-recipient plaintiffs and their spouses are required to complete and serve on Defendants' Liaison Counsel (within 60 days after their case is filed in, removed to, or transferred to this Court) the approved MDL Questionnaire, which is treated as the plaintiff's answer to interrogatories and requests for production. This requirement is waived if such persons have provided substantially the same (or more extensive) information based on discovery requests in the court from which the case was transferred to or removed to this Court. Ordinarily, a case will not be remanded or transferred by this Court unless and until such information has been provided to the defendants.

(B) Defendants may, while a case is pending in this Court or after remand or transfer, conduct a deposition of a plaintiff (and, where applicable, the spouse), limited (unless extended by stipulation or court order) to a maximum of 6 hours of direct examination per person. Supplemental depositions may be permitted as a specific case nears trial if a significant length of time has elapsed since the last deposition of the plaintiff, but must be limited to matters not previously covered or which have changed since the prior deposition.

(C) Defendants may, while a case is pending in this Court or after remand or transfer, depose a plaintiff's treating physicians, limited (unless extended by stipulation or court order) to a maximum of 3 hours per physician (or 6 hours if the physician provides any substantial testimony respecting issues of general or specific "causation"). Supplemental depositions may be permitted as a specific case nears trial if a significant length of time has elapsed since the last deposition of the physician, but must be limited

to matters not previously covered or which have changed since the prior deposition.

(D) A plaintiff may, while a case is pending in this Court or after remand or transfer, preserve her trial testimony pursuant to the provisions of the Order Governing Expedited Discovery and The Taking of A Videotaped Deposition for Preservation of Testimony for Trial, entered April 26, 1993.

(E) A plaintiff may also, while a case is pending in this Court or after remand or transfer, schedule a "trial-type" deposition of her treating physicians.

(3) **Discovery of Non-Parties**. Depositions of non-party witnesses who have not previously been deposed and who are not providing "expert" testimony will be permitted in this Court and in Remand Courts as authorized by the Fed. R. Civ. P. or state counterparts. Supplemental depositions of such persons who have previously been deposed will not be permitted, without approval of this Court (or, after remand or transfer, of the Remand Court), on subjects covered in such earlier depositions.

(4) **"Expert" Testimony**. By a separate order (but, when approved, to be attached as Appendix B to this Order), the Court is establishing provisions relating to further discovery from, perpetuation of testimony from, and pretrial designation of witnesses specially retained or employed by plaintiffs or defendants to provide "expert" testimony under FRE 702 or 703.

(d) **New Developments**. By motion in this Court or in a Remand Court, a party may, notwithstanding the above limitations on further discovery, request permission to seek additional discovery from any party or non-party concerning new or newly-discovered developments and information, including but not limited to new epidemiological, manufacturing, and medical developments, or new legal issues. The motion should set forth (i) the specific discovery being sought and (ii) the reasons why prior discovery could not have adequately developed or addressed the specific area. Any party opposing the discovery request shall move to quash or for a protective order within fourteen (14) days after being served with the discovering party's motion.

5. **Summary Judgment and Other Potentially Dispositive Issues**.

(a) **Standard of Review.** In ruling on summary judgment motions, this Court has followed the principles clarified in the trilogy of cases decided by the Supreme Court in 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment is proper if but only if, based on the admissible evidence that would be available and the applicable burdens of production and persuasion, a party would be entitled at trial to judgment as a matter of law because of material facts that either are not in substantial controversy or lack sufficient evidentiary support. Facts in genuine dispute have been assumed to be favorable to the party against whom summary judgment would be entered.

(b) **Choice of Law.** In federal multidistrict proceedings, a transferee court must apply the substantive law of the transferor courts. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation*, 745 F. Supp. 79, 81 (D.P.R. 1990) (quoting *Ferens v. John Deere Co.*, 494 U.S. 516 (1990)). The transferor courts in diversity cases would be bound to apply the law of the forum state, including its choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *See also Manual for Complex Litigation, Third* § 33.254 (1995). This MDL proceeding involves diversity-jurisdiction cases filed in, or removed to, federal courts in 92 of the 94 districts, located in every state, the District of Columbia, Puerto Rico, and the Virgin Islands. This Court must therefore look to the

laws of the several states to determine whether summary judgment is appropriate. In ruling on motions by defendants for summary judgment, this Court has based its decision on whether, under the substantive laws of each state, the movant would be entitled to such judgment in a federal court. Denial of such a motion means only that this court has concluded that under the substantive laws of at least one such jurisdiction the movant would not be entitled to summary judgment.

(c) **Corning Incorporated**.[5] On April 25, 1995, the Court confirmed an earlier order granting summary judgment in favor of Corning Incorporated, concluding that under the substantive law of all states Corning was entitled under Fed. R. Civ. P. 56 to dismissal of breast implant claims against it. 887 F. Supp. 1463 (N.D. Ala. 1995). This order was certified as a final judgment under Rule 54(b). An appeal was taken from this ruling, but later withdrawn. As a consequence, no breast implant claim may be made against Corning in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(d) **The Dow Chemical Company**.[6] On April 25, 1995, the Court vacated an earlier interlocutory order that had granted summary judgment in favor of The Dow Chemical Company. 887 F. Supp. 1463 (N.D. Ala. 1995). On December 26, 1995, the Court denied Dow Chemical's motion for reconsideration. The Court concluded that under the substantive laws of at least some states Dow Chemical was not entitled to summary judgment under Fed. R. Civ. P. 56 with respect to claims based on negligent undertaking, Restatement (Second) of Torts § 324A.[7] This remains an interlocutory order, and does not constitute a conclusion that Dow Chemical would be subject to potential liability under the substantive law of each state. It should be expected that a renewed motion for summary judgment or a motion for "directed verdict" will, after remand, be filed by Dow Chemical in many courts based on the substantive law of those jurisdictions, and it may well be that Dow Chemical will be entitled to judgment as a matter of law in some such jurisdictions.

(e) **Bristol-Myers Squibb Co.** On April 25, 1995, the Court denied a motion for summary judgment filed by Bristol-Myers Squibb Co. 887 F. Supp. 1447 (N.D. Ala. 1995). Bristol never itself manufactured or distributed breast implants, but was and is the sole shareholder of Medical Engineering Corporation, a major supplier of breast implants. The Court concluded that under the substantive laws of most, if not all, states Bristol could be held subject to potential liability both on "corporate control" theories and on certain "direct liability" theories.[8]

(f) **Scotfoam.** On April 25, 1995, the Court granted a motion for summary judgment filed by Scotfoam Corporation and its related entities.[9] 887 F. Supp. 1463 (N.D. Ala. 1995). Scotfoam

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5 . Corning has never manufactured or distributed breast implants or component parts or materials; it is and has been, however, a 50% stockholder of Dow Corning Corporation.

6 . Like Corning, Dow Chemical has never itself manufactured or directly distributed breast implants or component parts of materials, but is and has been a 50% stockholder of Dow Corning Corporation. Dow Chemical has, however, been involved in research and testing of silicone products and provided Dow Corning with at least some of its findings and with some technical assistance.

7 . Because summary judgment could not be entered in favor of Dow Chemical on the negligent undertaking claim, the Court did not address plaintiffs' additional theories of direct liability, which included strict liability, corporate conspiracy, concert of action, aiding and abetting, fraud, and fraudulent concealment. The Court did, however, grant partial summary judgment in Dow Chemical's favor as to the "corporate control" and "alter ego" causes of action.

8 . In denying summary judgment, the Court recognized that Bristol had likely been named as a defendant in some cases involving implants sold before its acquisition of MEC in 1982 or before it undertook to conduct and publicize tests relating to the safety of implants. It may also have been named as a defendant in some cases involving Natural Y and Aesthetech implants sold before acquisition of those companies in 1988. The extent, if any, of Bristol's potential liability in such cases will likely depend not only on questions of proximate causation but also on whether the particular jurisdiction imposes any post-sale duty to warn on manufacturers and suppliers of products. The Court's opinion did not attempt to resolve the special issues that may be presented in such cases; such issues may arise in particular cases after remand.

9 . These companies include '21' International Holdings, Inc.; '21' Foam Company, Inc.; Knoll International Holdings, Inc.; General Felt Industries, Inc.; Foamex, L.P.; Foamex Products, Inc.; Recticel Foam Corporation; and Scott Paper Company.

asserted that it was not liable for alleged injuries to breast implant recipients on the ground, inter alia, that, as a bulk supplier, it had no duty to provide warnings regarding polyurethane foam to breast implant recipients or their physicians. Scotfoam made polyurethane foam, some of which was sold to Wilshire Foam Company, which, in turn, after processing, was sold by Wilshire to several implant manufacturers. The Court concluded that no state would impose liability in a raw material supplier situation like the one that the Scotfoam facts presented. This order was certified as a final judgment under Rule 54(b). An appeal was taken from this ruling, but later withdrawn. As a consequence, no breast implant claim may be made against the Scotfoam defendants in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(g) **Surgitek, Inc. and Cabot Medical Corp.** On August 9, 1995, in an unpublished opinion, the Court granted motions for summary judgment filed by Surgitek, Inc. and Cabot Medical Corporation. Plaintiffs had apparently sued them because Medical Engineering Corporation, a defendant in many of these cases, previously used the trade name Surgitek in marketing its implants. On March 12, 1992, pursuant to an Asset Purchase Agreement, Cabot purchased MEC's surgical stent and urological fiberoptic scope business, but not its breast implant business. Cabot also purchased the trade name Surgitek, and then formed a subsidiary named Surgitek, Inc. Neither Cabot nor Surgitek, Inc. was ever involved in manufacturing, designing, marketing, distributing, or selling silicone gel breast implant products or any component parts thereof. The Court's summary judgment order was certified as a final judgment under Rule 54(b), and no appeal was taken from this order. As a consequence, no breast implant claim may be made against Surgitek or Cabot in any case that has been (or may hereafter be) filed in, removed to, or transferred to this court, whether or not it is later remanded or transferred to another state or federal court.

(h) **Federal Preemption**. In mid-1995, the Eleventh Circuit Court of Appeals issued an opinion applying the doctrine of federal preemption under the Medical Device Amendments of 1976, 21 U.S.C.A. §§ 360*c*-360*l*, in a case involving heart pacemakers. *See Lohr v. Medtronic, Inc.*, 56 F. 3rd 1335 (11th Cir. 1995). The United States Supreme Court has granted *certiorari* in *Lohr,* and has scheduled oral arguments for later this Spring. The Supreme Court's decision could significantly affect all breast implant litigation, whether in federal or state court. This Court will not consider summary judgment motions based on federal preemption until that decision is issued. This Court, moreover, suggests that Remand Courts should probably defer further trials in breast-implant cases until that decision is issued.

(i) **Baxter Healthcare; Baxter International.** Baxter International, Inc. ("BII")[10] moved to be dismissed from thousands of cases for lack of personal jurisdiction. In its motion, BII, a publicly-owned holding company incorporated in Delaware, asserted that, unlike its wholly-owned subsidiary Baxter Healthcare Corporation ("Baxter Healthcare"), also a defendant in these cases, it is subject to personal jurisdiction in only a few states.[11] The Court concluded that, given the form of the corporate merger and reorganization involving American Hospital Supply Corporation, BII was subject to suit throughout the United States to the same extent as would be American Hospital, and on November 29, 1993, denied BII's motion. 837 F. Supp. 1123 (N.D. Ala. 1993). Although interlocutory, this ruling relating to personal jurisdiction is not likely to be contested or raised again in Remand Courts. The conclusions of the Court regarding the nature and consequences of the 1985 mergers also have the effect of rejecting the argument sometimes made by BII and Baxter

10 . At the time of the November 1985 merger, the name of BII was Baxter Travenol Laboratories Incorporated; at early times, its name had been Don Baxter Intravenous Products Corporation and later Baxter Laboratories Incorporated. After the merger the name was changed to Baxter International, Inc., and for simplicity, the corporation has been known as BII.

11 . BII conceded that it is subject to jurisdiction in Delaware, Illinois, Kansas, Mississippi [note: Missouri in original], and the District of Columbia and did not contest jurisdiction in cases initially filed in those states.

Healthcare that they have no responsibility for claims against American Hospital (or Heyer-Schulte); if faced with a renewal of this argument, Remand Courts should be able to rely upon this Court's rejection of that position.

(j) **General Electric**. On March 20, 1996, the Court denied a motion for summary judgment filed by General Electric Company that was based on the "bulk supplier" and "learned intermediary" defenses. The Court concluded that there were sufficient factual differences from the Scotfoam defendants (see ¶ 5(f) above) that under the substantive laws of at least some states GE was not entitled to summary judgment under Fed. R. Civ. P. 56. This remains an interlocutory order, and does not constitute a conclusion that GE would be subject to potential liability under the substantive law of each state. It should be expected that a renewed motion for summary judgment or a motion for "directed verdict" will, after remand, be filed by GE in many courts based on the substantive law of those jurisdictions, and it may well be that GE will be entitled to judgment as a matter of law in some such jurisdictions.

(k) **Union Carbide**. There is presently pending in this Court a motion for partial summary judgment filed by Union Carbide Corporation based on the "bulk supplier" and "learned intermediary" defenses.

(l) **Koken's Motion to Dismiss**. Koken Co., Ltd. is a Japanese company that manufactured and sold a relatively small number of breast implants in the United States, either directly or through a distributorship agreement with Porex Technologies, Inc., a Georgia corporation. Koken moved to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, contending that it was not subject to personal jurisdiction anywhere in the United States and should therefore be dismissed from all actions and be relieved from further responsibilities to respond to discovery directed to it as a party. In denying this motion, the Court concluded that Koken was subject to personal jurisdiction for these product-liability claims, at least in Georgia which has a broad long-arm statute and where the bulk of Koken's contacts with the United States had occurred. The Court has not yet ruled on Koken's motion for reconsideration. Cases against Koken will not be remanded or transferred until that motion is ruled upon; and, if Koken's motion is denied, there will be additional discovery needed from Koken before remand or transfer would be appropriate.

(m) ***Forum Non Conveniens***. On April 25, 1995, the Court granted motions by the defendants to dismiss, on the ground of *forum non conveniens*, several breast implant cases brought by persons from Australia, England, and Canada who were not citizens or residents of the United States and who had received all their implants outside the United States.[12] 887 F. Supp 1469 (N.D. Ala. 1995). This ruling, which was certified as a final judgment under Fed. R. Civ. P. 54(b), has been appealed to the 11th Circuit Court of Appeals, and that appeal is still pending. In that same order, the Court denied similar motions with respect to certain New Zealand citizens because of unusual circumstances that, for some New Zealanders, had the effect of not affording them any alternative judicial or administrative forum for the resolution of breast-implant claims. The Court has not yet ruled on any similar motions that may be filed in cases brought by persons from other

12 . These dismissals were subject to certain conditions to which the defendants agreed:

(1) Each defendant will submit to the jurisdiction of, and accept service of process from, appropriate tribunals of Australia, Canada and England with respect to breast implant claims regarding implantations performed in those countries.

(2) Each defendant will, if so served, be bound to pay final judgments rendered against it by such tribunals relating to such claims.

(3) Each defendant will not, in raising any statute of limitations or similar defense in such tribunals, include the period that a suit, not barred by a statute of limitations in the United States, was pending against it in a court of the United States.

(4) Each defendant will not object to evidence offered in such tribunals that, if offered in federal courts of the United States, would have been admissible against it.

countries.

6. **Special Circumstances Relating to Particular Defendants**.

(a) **Mentor Limited-Fund Class Settlement**. In September 1993 the Court, after extensive briefing, evidentiary submissions, notice, and a fairness hearing, approved a limited-fund mandatory non-optout class-action settlement under Fed.R.Civ.P. 23(b)(1)(B) with Mentor Corporation.[13] *See* 1993 WL 795477 (N.D. Ala. 1993). The order was certified as a final judgment under Fed. R. Civ. P. 54(b) and there was no appeal from this judgment. One consequence is to bar all further breast-implant claims, whether in federal or state court, against the Mentor defendants relating to implantations that occurred before June 1, 1993.

(b) **Bioplasty Bankruptcy**. As a result of bankruptcy reorganization proceedings in the District of Minnesota, all further breast-implant claims, whether in federal or state court, against the Bioplasty defendants are barred.[14]

(c) **Dow Corning Bankruptcy**. The bankruptcy reorganization proceedings involving Dow Corning Corporation, which have been pending in the Bankruptcy Court for the Eastern District of Michigan since May 15, 1995, significantly affect not only the institution and pursuit of claims against Dow Corning, but also further discovery from Dow Corning and its employees. Applications for relief from the automatic stay provisions or from other orders of the Bankruptcy Court should be made in that Court.

(d) **"Settling Defendants"**. In general, institution and pursuit of claims against companies who are parties to the Revised Settlement Program (see ¶ 1 above), as well as discovery from such companies, is precluded unless and until a plaintiff opts out from that settlement or from the earlier global settlement. Bristol, Baxter, 3M, McGhan, and Union Carbide may, at the present time, engage in settlement discussions with persons who opt out from this class settlement only on an individualized basis (*i.e.*, not as part of a settlement of a group of cases or claims) and, with respect to those who did not opt out of the earlier global settlement, only if the case is specifically set for trial or if the discussions take place under a court-sponsored mediation or arbitration program.

7. **Remand and Transfer of Cases**.

(a) **Procedures**. The first large group of cases suggested to the JPMDL for remand to federal transferor courts, resulting ultimately in the remand by the Panel of approximately 300 cases, occurred only after extensive pre-trial hearings and conferences, and consumed about 3 weeks of time by this Court and counsel. State remand orders (and the few orders that have transferred cases under 28 U.S.C. § 1404) have, to date, generally been based on motions, without individual conferences. Given the large number of cases that are ready—or may be nearing the stage—for remand or transfer, this Court is reserving its decision on the procedures that may most efficiently and economically be employed to consider potential remand or transfer. This Court does anticipate, however, that, whatever the procedures, a substantial number of cases will, during the coming months, be remanded to state courts, be transferred to other federal courts, or be recommended to the JPMDL for remand to federal transferor courts.

(b) **Record on Remand**.

13 . The settlement provides for the payment by Mentor of approximately $25 million. The distribution formula for those benefits will be set by the Court at a later time, and it is anticipated that, because of the very limited funds set aside for such recipients, the Court will give preferential, if not exclusive, consideration to those who do not have potential claims against other manufacturers.

14 . The distribution formula for the approximately $5 million provided under Bioplasty's reorganization for implant claimants will be set by the Court at a later time, and it is anticipated that, because of the very limited funds set aside for such recipients, the Court will give preferential, if not exclusive, consideration to those who do not have potential claims against other manufacturers.

(1) The basic record in each constituent action or severed claim remanded or transferred to another court consists of the documents docketed and filed in the case file for that particular case, including the order from this Court or from the JPMDL remanding or transferring the case to the Remand Court.

(A) However, since the orders and other documents docketed and filed in the Master File, CV92-P-10000-S, are also, to the extent applicable (which in some cases will involve the adoption by reference of materials in that Master File), to be treated as docketed and filed in the individual cases, many documents in the Master File may also be needed as a part of individual case files. The most significant documents from the Master File (see Appendix A) will, therefore, be submitted to each Remand Court for inclusion, as court rules permit, either in a Master File in that court or in the individual case files as appropriate. Although not listed as part of the "record", the various documents produced to the depository in Cincinnati and the transcripts of the various MDL depositions should be viewed as also produced in each of the constituent cases.

(B) Litigants in a particular case may conclude that, in addition to those documents from Master File designated by this Court as meriting inclusion in the record, there are other documents filed in MDL-926 that should be also so designated. As this Court's designation is intended merely to reduce the size of the record on remand and not to prejudice any substantive rights of a party, this Court will liberally honor requests by parties to include additional documents as part of the record on remand for particular cases.

(2) The documents from CV92-P-10000-S that are viewed by this Court as ones to be submitted to each Remand Court for potential inclusion in the record on remand are listed in Exhibit A to this Order.

(3) It is impractical to require the parties to enter into a stipulation governing the record on remand for each individual action in these consolidated proceedings. Accordingly, this Order constitutes the designation required under Rule 14(g) of the Rules of the JPMDL, but without prejudice to the rights of the parties to seek designation of additional documents for inclusion as part of the record on remand.

(c) **Further Proceedings and Actions Needed in Remand Courts**. A few cases may be ready for trial at the time of remand or transfer. For most cases, however, one or more of the following pretrial actions will be needed in the Remand Court before the cases are ready for trial:

(1) Potential refinement of the complaint and answer, including dismissal of unnecessary or inappropriately joined defendants.

(2) In multi-plaintiff complaints, consideration of the extent to which severance for further pretrial proceedings or trial is appropriate.

(3) Developing and implementing a plan for completion of discovery, including potential modification of the provisions of ¶ 4(c) of this Order. (Remaining discovery should primarily be plaintiff-specific, including discovery from plaintiff, from plaintiff's treating physicians, from any physician examining the plaintiff under Fed. R. Civ. P. 35 or its state counterpart, and from experts who will testify on issues of specific causation relating to the plaintiff's claims.)

(4) Consideration of motions for summary judgment based on the substantive law of the particular jurisdiction.

(5) Possible referral of case to mediation or arbitration, or other procedures to foster settlement.

(6) Setting of case for trial, which may include additional provisions relating to listing of witnesses and exhibits, the reduction of objections at trial, and procedures for considering (and reducing) motions in limine.

(d) **Suggestions for Conducting Further Proceedings in Remand Courts**. Remand Courts that can expect to have a significant number of breast-implant cases should consider, if they have not already done so, the following:

(1) Creating a master file in the court in which all motions and orders having general application, are docketed and filed, eliminating the need for multiple docketing and filing in individual cases files.

(2) Assignment of all breast-implant cases, at least for further pretrial proceedings in the court, to one judge. Depending on the number of cases, it may be necessary to reassign some cases to other judges for trial.

(3) Conducting one or more additional pretrial and status conferences, whether on a case-by-case basis or for all breast-implant cases in the court. State and federal judges having responsibilities for implant cases in the same jurisdiction should consider holding at least one joint conference in order to develop a coordinated plan of management.

(4) Establishing a realistic plan for completion of discovery and trial settings of individual cases. For cases in which relatively little plaintiff-specific discovery has been completed, a period of 6 months or more may be needed for this discovery. Each court will need to consider the appropriateness of using multiple trial settings or consolidating cases for trial.

(5) Controlling further discovery to reduce the burdens and conflicts that may be imposed on persons who are potential witnesses in many cases in many states. In particular, Remand Courts should require parties seeking generic discovery to demonstrate that the information sought is not available from other sources, such as the Depository in Cincinnati or the CD-ROM disks or through depositions previously taken.

8. **Common Benefit Fund**. Under Order No. 13, establishing a Common Benefit Fund to compensate and reimburse attorneys for services performed and expenses incurred for the common benefit of breast-implant plaintiffs, all federal breast implant cases that are settled, compromised, dismissed, or resolved by judgment, are subject to an assessment of six percent of the gross monetary recovery, and the defendants are to withhold this assessment from amounts paid to Plaintiffs or their counsel. In Order No. 27, the Court extended Order No. 13 to impose that same assessment on recoveries, whether in federal or state court or without court action, by persons who did not exercise their initial right to opt out of the *Lindsey* class but who at a later date exercise such an opt-out right.

This the 25th day of March, 1996.

Sam C. Pointer, Jr. /s/
Sam C. Pointer, Jr.
United States District Judge

Appendix A: Documents from CV92-P-10000-S to be Transmitted to Remand Courts
Appendix B: Provisions relating to Retained Experts

APPENDIX A DOCUMENTS FROM CV92-P-10000-S TO BE TRANSMITTED TO REMAND COURTS

Order No. 1	Initial Case Management Order; entered June 26, 1992
Order No. 2	Designation of Liaison Counsel; entered August 24, 1992
Order No. 3	Extension of Opt-Out period for *Dante* class; entered September 8, 1992
Order No. 5	Revised Case Management Order; entered September 15, 1992, but with most current versions of Exhibits B (Service List) and C (Plaintiffs' National Steering Committee)
Order No. 6	Requiring production of certain Baxter documents; entered September 25,1992
Order No. 7	Modification/Clarification of Order No.5; entered October 6, 1992
Order No. 8	Restrictions on direct communications by defendants with class members; entered October 16, 1992
Order	Modifying Order No. 8; entered November 9, 1992
Order No. 9	Modifying service lists, further modifying Order No. 8, and miscellaneous other matters; entered January 11, 1993
Master Complaint	Amended Master/Sample Complaint; filed May 3, 1993
Master Answers	(filed seriatum by national defendants)
Order	Governing Expedited Discovery and The Taking of A Videotape Deposition for Preservation of Testimony for Trial; entered April 22, 1993
Order No. 11	Deposition Guidelines; entered June 30, 1993
Order No. 13	Establishing Plaintiffs' Litigation Expense Fund; entered July 23, 1993
Order No. 14	Order Approving Mentor Settlement; entered September 10, 1993
Order	Denying Baxter's Motion to Dismiss; entered November 29, 1993
Order No. 19	Confidentiality of class membership information; entered June 7, 1994
Order	Opinion and Final Judgment Global Settlement; entered September 1, 1994
Order	Granting Corning, Inc.'s Summary Judgment; entered April 25, 1995
Order	Denying Dow Chemical's Summary Judgment; entered April 25, 1995
Order	Denying Bristol-Myers Squibb's Summary Judgment; entered April 25, 1995
Order	Granting Scotfoam's Summary Judgment; entered April 25, 1995
Order	Granting certain *Forum Non Conveniens* motions; entered April 25, 1995
Order No. 24	Granting Surgitek, Inc.'s and Cabot Medical Corp.'s Summary Judgment; entered August 9, 1995
Order No. 25	Denying Koken's Motion to Dismiss; entered August 10, 1995
Order No. 26	Declaring Opt-out Rights and Procedures; entered October 10, 1995
Order No. 27	Approving Revised Settlement Program, with injunctions; entered December 22, 1995
Order No. 27A	Supplemental items relating to Revised Settlement Program, including listing of brand names; filed December 29, 1995
Order No. 28	Denying Dow Chemical's Motion to Reconsider; entered December 26, 1995
Order	Denying General Electric's Motion for Summary Judgment; entered March 20, 1996
Order No. 30	Pretrial and Revised Case Management Order (this order), entered March 25, 1996 (with Appendix B, entered April 2, 1996)
Stipulation	Regarding Potential Objections to Documents; to be entered shortly

A single copy of these documents will be provided to each Remand Court, which may, if its rules so require, copy these documents for inclusion in the case file of individual actions rather than merely filing in a master file for that court.

APPENDIX B TO ORDER No. 30 (CV 92-P-10000-S)
RETAINED EXPERTS—DISCLOSURE, DISCOVERY, AND TESTIMONY

1. **Scope and Definitions**. These provisions relate to disclosure of, discovery from, and testimony by "retained experts," meaning persons who have been retained or specially employed by plaintiffs or defendants (or appointed by a court) to provide evidence under Fed. R. Evid. 702, 703, or 705 (or state counterparts) and who are expected to provide such evidence at a trial (or in support of or opposition to a potentially dispositive motion). Absent a stipulation or a court order or rule, these provisions are not intended to apply to examining or treating physicians consulted by a plaintiff independent of, and not for the purpose of providing testimony relating to, pending or potential breast implant litigation.

(a) The phrase "generic opinions" means opinion testimony under Fed. R. Evid. 702, 703, or 705 on general subjects, including "general causation" issues and issues relating to a defendant's conduct.

(b) The phrase "case-specific opinions" means opinion testimony under Fed. R. Evid. 702, 703, or 705 concerning a particular plaintiff's medical claims, device history, or other plaintiff-specific matters.

(c) The phrase "trial-perpetuation deposition" means a deposition taken by a party of an expert retained or specially employed by that party, intended primarily for presentation at trial by that party (or other similarly situated parties) in lieu of (or potentially in lieu of) the expert's testifying *ore tenus*.

(d) The phrase "discovery deposition" means a deposition taken by a party of an expert retained or specially employed by another party, intended primarily to prepare for cross-examination either at trial or during a trial-perpetuation deposition.

These provisions apply not only to cases while pending in this court, but also to cases in Remand Courts after remand or transfer, subject to the power of a Remand Court to modify or vacate these provisions if impermissible under governing law or for good cause shown. With respect to state court cases never removed to federal court, these provisions should also be viewed as binding on national defendants if permissible under the governing law of the state and if agreed to by all other parties in such state court actions, subject to the power of the state court to modify or vacate these provisions *sua sponte* or on appropriate motion.

2. **Pretrial Designation and Disclosure of Retained Expert Testimony**. In advance of trial, and at the times and in the sequence to be set by stipulation or court order or rule, each party shall disclose to other parties the identity of each person who may be used at trial (or upon consideration of a motion) as a retained expert, indicating whether such person will present only generic opinions, only case-specific opinions, or both generic and case-specific opinions, and whether such person's testimony will be presented only by means of a previously conducted trial-perpetuation deposition or may be presented *ore tenus* at trial. Absent such a stipulation, order, or rule, this designation shall be due from plaintiffs at least 90 days in advance of any trial date (or the date the case is to be ready for trial) and from defendants at least 60 days in advance of such trial or trial readiness date. The time for disclosing additional retained experts (for example, to rebut testimony from a retained expert designated by an adverse party) shall, if permitted by the Remand Court, be set by stipulation or court order or rule.

(a) **Report**. At the time of disclosure, there shall also be provided a written report signed by such expert that fully conforms to the requirements of Fed. R. Civ. P. 26(a)(2) (as amended December 1, 1993).

(1) The report must describe—and, to the extent not available in the Document

Depository or in national journals or publications, must, subject to ¶ 2(a)(4) below, include or offer to make available for inspection and copying—all materials and data relied upon or used by the expert to form the basis of any opinion to be offered, including, but not limited to, all unpublished data, reports, studies, slides, medical records, laboratory notebooks, protocols, or other materials within the possession, custody, or control of the expert or the designating attorney.

(2) The report must also indicate the nature and extent of other contracts or agreements between the expert and any attorney or party involved in federal or state breast implant litigation.

(3) The expert may provide such a report submitted in another breast implant case, but must include a signed supplement indicating any changes or additions pertinent to the current case and time of submission, as well as information regarding the compensation to be paid in the current case.

(4) To the extent any materials otherwise required to be produced contain names or other identifying information of breast implant recipients or study participants for which other parties in a case do not have an identifiable need, such names and identifying information may be redacted. Motions for a protective order (or to compel) arising from requests to keep certain information confidential may be made to the trial court.

(b) **Limited Report**. In lieu of the full report required under ¶ 2(a) above, a retained expert who, through deposition or trial testimony in another breast implant case, has provided testimony that generally reflects the testimony to be given in the current case, may simply identify and adopt by reference such earlier deposition or trial testimony and provide a supplement, including such additional or changed information (and supporting materials) as needed, when considered with such earlier deposition or trial testimony, to comply fully with the requirements of ¶ 2(a)(1-3) above for the current case.

(c) **Report Not Required if Trial-Perpetuation Depostion to be Used**. A written report under ¶ 2(a) or 2(b) above is not required if the testimony of the retained expert at trial is to be presented by means of a trial-perpetuation deposition previously taken in accordance with these provisions.

(d) **Supplemental Report if Changes Made**. In the event a retained expert will present during direct examination at trial or in a trial-perpetuation deposition any opinions (or the basis, reasons, or support for such opinions) that are different from or in addition to those disclosed in the written report or in intervening depositions, a supplemental written report, disclosing those changes or additions, must be promptly provided to opposing counsel.

3. **Discovery Depositions of Retained Experts**.

(a) **Presumptive Limitations and Restrictions**. Discovery depositions of a retained expert taken after entry of this order, whether in this court or in a Remand Court, are subject to the following limitations and requirements, with time limits measured by hours of actual testimony. The parties are permitted, and encouraged, to agree to shorter or longer periods as appropriate, and may apply to this court (or, after remand or transfer, to a Remand Court) for a modification of time limits respecting a particular deposition. The parties are also encouraged, but not required, to conduct telephone depositions in appropriate circumstances.

(1) Discovery depositions of retained experts will be permitted only after the appropriate report described in ¶ 2 above has been provided and the supporting materials and data, as required, have been provided or made available.

(2) Until such time as a retained expert with generic opinions has been deposed in any breast implant cases on three or more separate occasions (or for at least two full days), further discovery depositions of that person may be scheduled when appropriate, but with a presumptive time limit for direct examination of 6 hours. Direct and cross-examination will not be permitted on subjects covered in any earlier depositions except to the extent of any indicated changes or additions, or because of newly-published materials or other new opinions, research, or other new matters since such prior deposition(s).

(3) After a retained expert with generic opinions has been deposed in breast implant litigation on three or more separate occasions (or for at least two full days), further discovery depositions of that person will, absent exceptional circumstances shown to this court or a Remand Court, be permitted only as follows:

(A) A supplemental discovery deposition may be conducted if—

(i) a trial-perpetuation deposition of such expert is noticed by the proponent of such person's testimony,

(ii) such expert has not been redeposed or testified at a trial in any breast implant case within the preceding 6-month period,

(iii) such expert, by a supplemental disclosure under ¶ 2(d) above, has indicated that, since last testifying or being deposed, the expert has changed or additional opinions (or changed or additional bases, reasons, or support for opinions), or

(iv) such expert will be expressing case-specific opinions in addition to generic opinions and has not been deposed with respect to such case-specific opinions within the preceding 6-month period.

(B) Any such supplemental deposition will be limited to subjects on which the expert's report indicates some changes or additions to prior testimony, or because of newly-published materials or other new opinions, research, or other matters that may affect such prior testimony.

(C) Presumptively, direct examination will be limited to a maximum of 3 hours, but with an additional 3 hours allowed if the expert is rendering opinions with respect to "company conduct." An additional 3 hours of direct examination per plaintiff is presumptively permissible if the expert is indicated as having case-specific opinions in addition to changed or additional generic opinions. Dow Chemical shall be entitled to depose for 12 hours any plaintiffs' expert expressing an opinion concerning Dow Chemical's or Dow Corning's conduct if such expert has not previously been deposed by Dow Chemical respecting that conduct.

(4) Discovery depositions of retained experts who will be providing case-specific opinions (but not generic opinions) may be conducted with respect to such case-specific opinions, subject to a presumptive limitation of 3 hours of direct examination per plaintiff. Any supplemental depositions, when justified as a case nears trial, will be limited to 2 hours and to subjects not previously covered or to any changes or additions in such testimony. For case-specific experts expressing causation opinions, these limits are increased to 6 hours per plaintiff, with supplemental depositions, when justified, limited to 4 hours.

(b) **Conduct of Deposition**. Discovery depositions of retained experts shall be conducted in accordance with Order No. 11 except to the extent inconsistent with these provisions. The party noticing the deposition may, at its election, record the discovery deposition by videotape as well as by stenographic means. If a discovery deposition is being taken because another party has noticed a trial-perpetuation deposition, the party who has noticed the trial-perpetuation deposition may videotape the discovery deposition only with permission of this Court or a Remand Court or with pemission of the party noticing the discovery deposition.

(c) **Documentation.** A party taking a discovery deposition of a retained expert (other than an expert providing only case-specific opinions), whether in state or federal court, shall provide a copy of the transcript, a computer disk of the transcript, and a copy of all exhibits, to the Cincinnati Depository. If the deposition is videotaped, a copy of the videotape shall also be provided to the Depository. The transmittal letter shall identify the court reporter and the person, if any, recording the deposition by videotape, and shall be served upon MDL Liaison Counsel for Plaintiffs and for Defendants.

(d) **Use**. Although, by definition, a discovery deposition is primarily intended as a means to *prepare* for cross-examination at trial or at a trial-perpetuation deposition, this does not preclude other uses of a discovery deposition under Fed. R. Civ. P. 32(a), Fed. R. Evid. 613 and 801(d)(2), or state counterparts.

4. **Trial-Perpetuation Depositions of Retained Experts**.

(a) **Noticing of Trial-Perpetuation Depositions**. To reduce burdens on retained experts and eliminate potential problems that may arise as a result of scheduling conflicts, health considerations, or similar problems, any party may notice a trial-perpetuation deposition of any of its retained experts for potential use at subsequent trials in lieu of such expert testifying *ore tenus*. The party noticing the deposition shall arrange with the witness and with opposing counsel a mutually convenient date on which the deposition is to commence, with due regard for the opportunity other parties are afforded to take initial or supplemental discovery depositions under ¶ 3 above. Also, if such expert is expected to offer any generic opinions, the deposing party shall serve on Liaison Counsel for Plaintiffs and for Defendants a notice of the deposition at least 45 days prior to its being conducted.

(b) **Conduct**. Trial-perpetuation depositions shall be conducted in accordance with Order No. 11 except to the extent inconsistent with these provisions, and with the right of any party under Fed. R. Civ. P. 30(b) (as effective Dec. 1, 1993) to designate the method, or an additional method, for recording the deposition. Split-screen video technology, with the integration of illustrative exhibits, may be used. A federal or state judge, magistrate, special master or other agreed-upon referee may be designated to preside over the deposition (or otherwise be available) to control the conduct of the deposition and to rule on such objections as leading questions, non-responsive answers, and claims of privilege. The parties may agree to take the deposition in topical segments or by subject matter—*e.g.*, direct, cross, redirect, and recross on a single topic before moving to the next subject.

(c) **Limitations on Undisclosed Opinions**. A retained expert will not be permitted during direct examination at a trial-perpetuation deposition to express any opinion (or the basis, reasons, or support for any opinion) that has not previously been disclosed in reports required under ¶ 2 above (or disclosed in a discovery deposition taken under ¶ 3 above) except with respect to matters so recent that they could not have been earlier disclosed (in which event other parties should, on request, be permitted an appropriate recess or suspension of the deposition before conducting cross-examination).

(d) **Effect**. Taking of a trial-perpetuation deposition under this order does not preclude a party from calling (upon notification under ¶ 5(a) below) the deponent to testify *ore tenus* at trial, but does excuse all parties who want to offer such deposition at trial—whether as part of their case-in-chief or for impeachment purposes—from any requirement to show unavailability of the deponent under Fed. R. Civ. P. 32(a) or its state counterpart.

5. **Final Pretrial Identification of Testimony by Retained Experts**.

(a) **Disclosure**. At the times and in the sequence to be set by stipulation or court order or rule, each party shall disclose to other parties the identity of each retained expert whose testimony will be offered at trial (and whether such person's testimony will be presented only by means of a previously conducted trial-perpetuation deposition or will be presented *ore tenus* at trial) and, except for those retained experts whose testimony will be presented through a trial-perpetuation deposition, also listing any exhibits that will be offered or referred to during the direct examination of such person. Absent such a stipulation, order, or rule, this final designation shall be due concurrently from the parties at least 14 days in advance of the trial date.

(b) **Limitations on Undisclosed Opinions**. A retained expert testifying *ore tenus* at a trial will ordinarily be permitted on direct examination to testify only to those opinions (and only to those bases, reasons, and support for those opinions) that have been disclosed by written reports or in depositions as indicated in this order. Any request for relief from this restriction—for example because of matters presented or to be presented through other witnesses at trial or because of intervening developments that could not reasonably have been earlier disclosed—shall be made to the trial court.

6. **Costs and Expenses Relating to Retained Experts**.

(a) **Expenses Relating to Taking of Depositions**. The cost of a discovery or a trial-perpetuation deposition of a retained expert, including the reasonable fees of the deponent in preparing for and in participating in the deposition, shall—unless the parties otherwise agree—be borne by the party noticing the deposition.

(b) **Cost-Sharing**.

(1) A plaintiff who, under ¶ 2 or ¶ 5 above, designates for potential use at trial the trial-perpetuation deposition of a retained expert noticed and conducted by and at the expense of the Plaintiffs' National Steering Committee shall pay to the PSC a charge of $1,500 (per implant recipient), whether or not the deposition is ultimately used during such a trial. Except to the extent such charge is, by agreement between the PSC and the expert, to be paid as a fee to the retained expert—a matter that can be inquired into during examination of the retained expert—any such charge paid by a plaintiff will reduce and be credited against any other charge that might be imposed under Order No. 13 against any gross recovery obtained by the plaintiff through trial or settlement. The defendants, who are obliged to notify the PSC of any such designation, may require a plaintiff, as a condition to use at trial of such a deposition, to demonstrate that the required charge has been paid to the PSC.

(2) A defendant who, under ¶ 2 or ¶ 5 above, designates for potential use at trial the trial-perpetuation deposition of a retained expert noticed and conducted by and at the expense of another defendant shall pay to such other defendant an appropriate charge to be agreed upon by the defendants, whether or not the deposition is ultimately used during such a trial. Any agreement to pay portions of such charges to the retained expert may be inquired into during examination of such retained expert.

So ORDERED, this the 2nd day of April, 1996, for attachment as Appendix B to Order No. 30.

Sam C. Pointer, Jr. /s/
United States District Judge