BEFORE THE UNITED STATES JUDICIAL PANEL
ON
MULTIDISTRICT LITIGATION

In re: Cook Medical Pelvic Repair Products Liability Litigation	))	**MDL No. 2440**

THE COOK DEFENDANTS' OPPOSITION TO MOTION FOR TRANSFER TO THE SOUTHERN DISTRICT OF WEST VIRGINIA PURSUANT TO 28 U.S.C. § 1407

Defendants Cook Incorporated (sued in some cases as "Cook, Inc."), Cook Biotech Incorporated (sued in some cases as "Cook Biotech, Inc." and hereinafter sometimes referred to as "Cook Biotech"), Cook Medical Incorporated (sued in some cases as "Cook Medical, Inc." and hereinafter sometimes referred to as "Cook Medical"), Cook Group Incorporated (sued in some cases as "Cook Group, Inc."), Vance Products Incorporated (d/b/a Cook Urological Incorporated and sued in some cases as "Cook Urological Incorporated"), William A. Cook Australia Pty., Ltd., Cook (Canada), Inc., and Cook Ireland, Ltd. (sometimes collectively referred to hereinafter as "Cook" or the "Cook Defendants"), respectfully submit this Opposition to the Motion for Transfer to the Southern District of Virginia Pursuant to 28 U.S.C. § 1407 (Dkt. No. 1) ("Motion for Transfer").

I. Introduction

While Plaintiffs assert that there are "42 actions subject to [their] motion," (Motion for Transfer, p. 1), in fact twenty-seven (27) of the forty-two (42) cases cited by Plaintiffs in their Motion for Transfer, Brief, and listed in Plaintiffs' Schedule of Actions (Dkt. 1-2, 2, & 4) have either been dismissed as to the Cook Defendants or dismissed entirely. *See* Exhibit 1 (chart of cases) and Section B.1, *infra.* Thus, only fifteen (15) of the cases listed in Plaintiffs' Schedule of Actions are even pending against the Cook Defendants. By contrast, Judges Goodwin and Stanley in the Southern District of West Virginia are already overseeing 13,557 cases in the five

"pelvic mesh" MDLs.[1] The fifteen cases identified by Plaintiffs that are truly pending against Cook do not justify the creation of a new MDL. To the extent that discovery or other pretrial matters may be duplicative, there are alternative methods of dealing with such issues that do not involve transfer to the already overburdened Judges in Charleston, West Virginia pursuant to Section 1407.

In addition, as further explained below, the Biodesign® Surgisis® Advanced Tissue Repair Products ("Biodesign Products") manufactured by Cook Biotech and marketed by Cook Medical for the treatment and repair of pelvic organ prolapse ("POP") and stress urinary incontinence ("SUI") are simply **not** "surgical mesh" as defined by the United States Food & Drug Administration ("FDA"), and as described in the Judicial Panel on Multi-District Litigation's ("JPML") Transfer Order of February 7, 2012 that created MDL 2325, 2326, and 2327 (attached hereto as Exhibit 2). Cook simply does not belong in litigation with manufacturers of "pelvic mesh," and should not be forced to litigate the low number of cases against it in the Southern District of West Virginia, where it would suffer extreme prejudice and delay, as that Court is already overburdened with 13,557 cases of "pelvic mesh" in five MDLs.

Cook is entitled to have Plaintiffs' Motion for Transfer denied.

II. Factual Background

A. Cook's Biodesign Products

FDA has defined "[**s]urgical mesh** [as] a **metallic or polymeric** screen intended to be implanted to reinforce soft tissue or bone where weakness exists." 21 C.F.R. § 878.3300(a)

[1] The five "pelvic mesh" MDLs are: *In re C.R. Bard, Inc. Pelvic Repair System Prods. Liab. Litig.*, Cause No. 2:10-md-02187 ("MDL 2187"); *In re American Medical Systems, Inc. Pelvic Repair System Prods. Liab. Litig.*, Cause No. 2:12-md-02325 ("MDL 2325"); *In re Boston Scientific Corp. Pelvic Repair System Prods. Liab. Litig.*, Cause No. 2:12-md-02326 ("MDL 2326"); *In re Ethicon, Inc. Pelvic Repair System Prods. Liab. Litig.*, Cause No. 2:12-md-02327 ("MDL 2327"); and *In re Coloplast Corp. Pelvic Repair System Prods. Liab. Litig.*, Cause No. 2:12-md-02387 ("MDL 2387").

(emphasis supplied). FDA thus defines "surgical mesh" as a synthetic material. When the JPML created MDLs 2325, 2326, and 2327, it did so by its Transfer Order of February 7, 2012 (MDL No. 2327, Docket 115), which states that what are "[b]efore the Panel are three dockets involving allegations of defects in various models of pelvic **surgical mesh** products manufactured by three groups of manufacturers.[1]" [n.1 "American Medical Systems, Inc. and related entities (AMS); Boston Scientific Corp. (Boston Scientific); and Ethicon, Inc., Johnson & Johnson, and related entities (Ethicon)."] JPML Transfer Order, Case MDL No. 2327, Document 115, p. 1 (emphasis supplied; a copy of that Order is attached hereto as Exhibit 2).

However, the Biodesign Products manufactured by Cook Biotech and marketed by Cook Medical for the treatment and repair of POP and SUI are simply **not** "surgical mesh" as defined by the FDA, or as described in the JPML Transfer Order of February 7, 2012. Cook's Biodesign Products are non-dermis, non-crosslinked biologic grafts made from porcine small intestinal submucosa. As such, they are dramatically and materially different from the synthetic "surgical mesh" or "pelvic mesh" products manufactured by Ethicon, Inc. ("Ethicon"), C.R. Bard, Inc. ("Bard"), Boston Scientific Corp. ("Boston Scientific"), Coloplast Corp. ("Coloplast"), and American Medical Systems, Inc. ("AMS") (sometimes collectively the "MDL Defendants") and related entities out of polypropylene. A copy of the most current brochure describing the Biodesign Products is attached hereto as Exhibit 3 and is available on Cook's web site at http://www.cookbiodesign.com/resource-library as the "Biodesign Advanced Tissue Repair-Brochure."

More than 966 peer-reviewed articles have been published on Cook's breakthrough Biodesign® technology to date. 329 of those articles describe the use of Biodesign® in humans, and those include nine (9) randomized controlled trials and five (5) studies with more than a five-

year follow-up. 637 studies describe non-human use. *See* www.cookbiodesign.com/resource-library. This vast body of medical and scientific literature convincingly demonstrates that Cook Biotech's Biodesign® Surgisis® biologic grafts do not have the defects which Plaintiffs claim exist in the MDL Defendants' synthetic mesh products. Also attached hereto as Exhibit 4 is a hard copy of a Power Point presentation entitled "Biomaterials for Surgical Repair," prepared by Cook Biotech to illustrate the differences the Biodesign Products and synthetic graft material.

For example, as noted on the slide summarizing the article by Felder PC, Jr., et al., Anterior vaginal wall prolapse: a randomized controlled trial of SIS graft versus traditional colporrhaphy, *International Urogynecological Journal of Pelvic Floor Dysfunction*, 2010; 21:1057-63, there were **no** infections or erosions in the group studied who had Biodesign Products implanted. Further, as noted in the article attached as Exhibit 5 entitled "Special Report: Dispelling Myths about Biologic Grafts" (McMann Publishing, General Surgery News), "[s]ynthetic mesh has . . . been implicated in adhesions . . . . [and] may become rigid, which can lead to scarring and erosion" (p. 2), whereas "[w]ithin six to 12 months, Surgisis Biodesign is completely remodeled into strong, fully vascularized patient tissue. The new tissue, morphologically and physiologically, shows the same characteristics as native tissue. Surgisis Biodesign is undetectable, providing a permanent repair without leaving behind a permanent material—a repair that can even grow with the patient." (p. 3) (internal footnotes omitted). Consequently, the science is much different for Cook Biotech's Biodesign Products than for the MDL Defendants' polypropylene synthetic products.

The differences between Cook's Biodesign Products and the synthetic or crosslinked biografts manufactured by others who have been sued in the "pelvic mesh" litigation around the country are highlighted not only by the science described above and attached, but also by the

disparity in the number of pending lawsuits. For example, in *In re: Ethicon, Inc., Pelvic Repair System Products Liability Litigation*, MDL No. 2:12-MD-2327 (hereinafter "MDL 2327"), in West Virginia, 4,249 cases are currently pending against Ethicon that were filed between February 7, 2012 and March 4, 2013. As of March 4, 2013, only 37 cases against Ethicon in MDL 2327 had been closed. In *In re: American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation*, MDL No. 2:12-MD-2325 (hereinafter "MDL 2325"), also pending in West Virginia before Judges Goodwin and Stanley, 4,380 cases are pending against AMS that were filed between February 7, 2012 and March 4, 2013. Only 26 cases against AMS in MDL 2325 had been closed as of March 4, 2013. In *In re: Boston Scientific Corp. Pelvic Repair System Products Liability Litigation*, MDL No. 2:12-MD-2326 (hereinafter "MDL 2326"), also pending in Charleston, West Virginia, before District Judge Goodwin and Magistrate Judge Stanley, 2,517 cases are pending against Boston Scientific as of this writing, which were filed between February 7, 2012 and March 4, 2013. Only ten cases against Boston Scientific have been closed in MDL 2326 as of March 4, 2013. In *In re: C.R. Bard, Inc. Pelvic Repair System Products Liability Litigation*, MDL No. 2:10-MD-2187 ("MDL 2187"), 2,200 cases are pending against Bard that have been filed between September 1, 2010 and March 4, 2013. Only 18 cases against Bard have been closed in West Virginia as of March 4, 2013. Finally, in *In re: Coloplast Corp, Pelvic Support System Product Liability Litigation*, MDL No. 2:12-MD-2387 ("MDL 2387"), in West Virginia, 211 cases had been filed against Coloplast between July 10, 2012 and March 4, 2013 and only one Coloplast case has been closed.

Thus, as of March 4, 2013, a total of 13,557 pelvic mesh cases are currently pending in West Virginia before Judges Goodwin and Stanley. If Plaintiffs' Motion for Transfer is granted, then the 15 pending cases against the Cook Defendants listed in the Schedule of Actions will go

to the end of the line of 13,557 cases vying for the attention of two overburdened Federal Judges trying to resolve those five MDLs. As of this writing, the Cook Defendants are only in six (6) cases of the 13,557 cases then pending in the five consolidated West Virginia MDLs, whereas they should not be in any. Those reasons are clear: the science is different, the facts are different, the claims against the MDL Defendants and the claims against the Cook Defendants do not overlap, involve different products, and should not be tried together, but should be resolved separately so that the Cook Defendants can get a resolution of the claims against them in a reasonable amount of time.

B. Plaintiffs' Motion for Transfer and Schedule of Actions

1. Plaintiffs' Schedule of Actions Misrepresents Certain Actions Filed Against Cook.

The Motion for Transfer and Brief included a Schedule of Actions listing forty-two (42) cases purportedly pending in various district courts against one, some, or all of the Cook Defendants. Dkt. No. 1-2 (Schedule of Actions), 2, & 4 at 1-9. Plaintiffs also included in their filings the ECF dockets and/or complaints from most of these 42 district court cases. *See* Dkt. No. 1-4 through 1-43; *see also* Exhibit 1. The Schedule of Actions also listed the five MDLs pending in the United States District Court for the Southern District of West Virginia. Dkt. 1-2, 2, & 4 at 9-10.

In the Motion for Transfer, Plaintiffs refer to "Cook Medical, Inc. women's pelvic mesh product liability actions pending in 9 federal district courts, as reflected in the Schedule of Actions filed contemporaneously herewith . . . . The accompanying Schedule of Actions lists the 42 actions subject to this motion." Dkt. 1 at 1. In their Brief, Plaintiffs refer to "certain pending constituent civil actions listed in the attached Schedule of Actions . . . ." Dkt. 1-1 at 1. Plaintiffs also represent to the Panel that "[t]o date, 42 women (and, in most instances, their husbands)

have filed civil actions arising from the implantation of the women's pelvic repair devices designed, manufactured and sold by the Cook defendants. **There are 42 actions pending in 9 federal districts.**" *Id.* at 7 (emphasis added).

Contrary to these and other representations made in the Motion for Transfer, Brief, and Schedule of Actions, in twenty-five (25) of the cases listed in the Schedule of Actions filed and signed by Plaintiffs' counsel, no claims are currently pending against Cook. *See* Exhibit 1. While one or more of the Cook Defendants may have been originally named as defendants in these cases, they were later dismissed or otherwise terminated from the cases, including by exclusion from a subsequently filed amended complaint. *See* Exhibit 1. In addition, two of the cases listed in the Schedule of Actions are now completely closed. *See* Exhibit 1 at 6-7 (*Lambert* and *Newton* cases). Thus, twenty-seven (27) of the forty-two (42) cases listed in the Schedule of Actions and represented by Plaintiffs to be pending against Cook are, in fact, not currently pending against any Cook company.

This is further demonstrated by Plaintiffs' own filings with the Panel in the Motion for Transfer. The ECF docket printouts submitted by Plaintiffs with their Motion for Transfer indicate **on their face** that some of these cases have been dismissed against the Cook Defendants or dismissed altogether, listing the Cook Defendants as "terminated" and listing the date of termination from the case, or listing the date that the case was closed. *See* Exhibit 1; Dkt. 1-4 through 1-8, 1-10 through 1-22, 1-24 through 1-32.

2. Plaintiffs' Motion for Transfer and Brief Are Extremely Similar to the Motions to Transfer and Briefs in MDLs 2325, 2326, and 2327.

Plaintiffs' Motion for Transfer and Brief appear to be extremely similar (and, in some places, virtually identical) to the motions to transfer and briefs filed by the plaintiffs in MDLs 2325, 2326, and 2327. *See* MDL 2325 at Dkt. 7 and 7-1 (Second Motion to Transfer and Brief

filed by plaintiffs); MDL 2326 at Dkt. 1 and 1-1 (Motion to Transfer and Brief filed by plaintiffs); and MDL 2327 at Dkt. 1, 1-1 and 3 (Motion to Transfer and Brief filed by plaintiffs; a copy of plaintiffs' Brief at Dkt. 1-1 is attached hereto as Exhibit 6). Many of the differences between these documents appear to be the replacement of the names of the defendants and the names of their products. The "find-and-replace" nature of the Plaintiffs' Motion for Transfer and Brief is very apparent in certain passages, which simply do not make sense in the pending Motion for Transfer and Brief through which these plaintiffs are attempting to create MDL 2440. For example, on page 2 of the brief on the motion for transfer in MDL 2327, the moving plaintiffs state:

> The common defendants in these cases are Johnson & Johnson, Ethicon, Inc. and/or Gynecare, Inc.
>
> In accordance with 28 U.S.C. § 1407, the undersigned are seeking the transfer of all federal cases involving the Ethicon women's pelvic repair products, as well as the women's pelvic repair products sold by American Medical Systems, Inc. and those by Boston Scientific Corp. to the same Court for coordinated and/or consolidated proceedings. Contemporaneously with the instant motion, the undersigned are filing separate motions to transfer cases involving the American Medical Systems, Inc. and Boston Scientific Corp. women's pelvic repair products to the same Court for overall coordination and management of all of these related product liability litigations.

Exhibit 6 at 2 (footnote omitted).

Similarly, on page 2 of Plaintiffs' Brief in this matter, Plaintiffs state:

> The common defendants in these cases are Cook Medical Inc. and Cook Group, Inc.. [sic] In accordance with 28 U.S.C. § 1407, the undersigned are seeking the transfer of all federal cases involving the Cook women's pelvic repair products to the same Court for coordinated and/or consolidated proceedings. Contemporaneously with the instant motion, the undersigned are filing separate motions to transfer cases involving the Cook women's pelvic repair products to the same Court for overall coordination and management of all of these related product liability litigations.

Dkt. 1-1 at 2. The last sentence in the quoted section from Plaintiffs' Brief in this matter does not make sense, as it does not appear that, except for their Motion to Transfer, Plaintiffs have filed any other "separate motions to transfer cases involving the Cook women's pelvic repair products to the same Court[.]" Passages such as this indicate the lack of care put by Plaintiffs into their Motion for Transfer and Brief and further demonstrate how Plaintiffs have continued to attempt to improperly group Cook's Biodesign Products with the "pelvic mesh" products of the MDL Defendants, while ignoring the major differences between Cook's Biodesign Products and the MDL Defendants' mesh products.

Plaintiffs do acknowledge that, at a September 2011 FDA hearing, "Cook Medical made its own presentation touting the unique characteristics and qualities of its own product, attempting to contrast its products with those of its competitors." Dkt. 1-1 at 4; *see also* Exhibit 6 at 5 n.5 and 11 n.7. Yet, throughout the remainder of the brief, Plaintiffs essentially argue that Cook's Biodesign Products are "mesh" products, which, as demonstrated above, they are not.

III. Argument

A. Transfer under 28 U.S.C. § 1407(a)

28 U.S.C. § 1407(a) permits transfer of civil actions "involving one or more common questions of fact . . . to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made . . . for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." However, transfer is not appropriate in all cases, and alternative to transfer exist:

> [S]uitable alternatives to Section 1407 transfer are available in order to minimize the possibility of duplicative discovery. For example, notices for a particular deposition could be filed in all actions, thereby making the deposition applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all those actions; and

> any party could seek orders from the three [district] courts directing the parties to coordinate their pretrial efforts.

In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig., 446 F. Supp. 242, 244 (J.P.M.L. 1978). For example, in *In re DuPont Benlate Settlement Agreements Litig.*, Docket No. 1340, 2000 U.S. Dist. LEXIS 7378 (J.P.M.L. May 25, 2000), the Panel denied transfer of 26 actions, finding

> that Section 1407 centralization would neither serve the convenience of the parties and witnesses nor further the just and efficient conduct of this litigation. Movant has failed to persuade us that any common questions of fact (as opposed to questions of law) are sufficiently complex, unresolved and/or numerous to justify Section 1407 transfer in this docket in which some constituent actions have already been pending for several years. We point out that alternatives to transfer exist that can minimize whatever possibilities there might otherwise be of duplicative discovery and/or inconsistent pretrial rulings.

Id. at *2 (citing *In re Eli Lilly & Co.*, 446 F. Supp. at 244 and Manual for Complex Litigation, Third, § 31.14 (1995)).

The Panel has also found

> [t]he convenience of counsel, however, is not by itself a factor to be considered under Section 1407 in the Panel's decision whether to order transfer or in the selection of a transferee forum for a group of actions. Only if the inconvenience of counsel would impinge on the convenience of the parties or witnesses would the convenience of counsel become a factor to be considered by the Panel.

In re Anthracite Coal Antitrust Litig., 436 F. Supp. 402, 403 (J.P.M.L. 1977); *see also In re Directbuy, Inc., Mktg. & Sales Practices Litig.*, 682 F. Supp. 2d 1349, 1350-51 (J.P.M.L. 2010) (citing *In re Anthracite Coal*).

B. Cases Against the Cook Defendants Relating to Cook's Biodesign Products Should Not Be Transferred to an MDL.

The factors of § 1407 do not support Plaintiffs' Motion for Transfer. First, the facts of each plaintiff's case are as unique as the plaintiffs themselves. For example, whether each plaintiff was an appropriate candidate for the treatment of her pelvic organ prolapse ("POP") or stress urinary incontinence ("SUI") with Biodesign Products is as different a question for each plaintiff as are her unique physical and mental characteristics. Similarly, whether Biodesign Products were appropriately used in a given plaintiff depends on that plaintiff's unique medical situation, and the core and skill of that plaintiff's physician who used the Biodesign Product. The various plaintiffs' claims do not overlap. Individual discovery on each plaintiff's claim will be required, regardless of whether an MDL for Cook is created.

In addition, the number of cases for which transfer is proposed (15) is low. Transferring these fifteen cases to the Southern District of West Virginia would result in prejudice to Cook. As of March 4, 2013, the total number of cases in the five MDLs in Charleston is 13,557. The burden on Judges Goodwin and Stanley and their staffs imposed by having to resolve 13,557 cases is obviously substantial. Subjecting the Cook Defendants to the logjam in West Virginia created by all of those cases in one court before just two Judges means that the resolution of Plaintiffs' claims against the Cook Defendants would be delayed for years while bellwether cases against the MDL Defendants proceed. If the Plaintiffs' Motion for Transfer is denied, the fifteen cases on the Schedule of Actions that are still pending against Cook will return to or remain in their original district courts, capable of being resolved on the merits within a reasonable time, on a reasonable schedule.

The Cook Defendants will suffer prejudice if not permitted to defend Plaintiffs' claims against them in an expeditious manner. The power of the Internet and television advertising by

lawyers in today's world mean that when the Cook Defendants are drawn into highly publicized MDLs, there is a very real threat that they will be drawn into even more cases. That appears to be exactly what is happening, as more and more cases—cases that the Cook Defendants believe to be baseless—are being filed against the Cook Defendants.

The problem with an MDL from the Cook Defendants' perspective is that an MDL makes it easy for plaintiffs to file cases, and for plaintiffs' lawyers who have just a few cases, or who are filing cases later than others did, to live off the work-product of those plaintiffs' lawyers who have been in the MDL longer or who have more cases or resources. To paraphrase a movie line, if you build it, they will come. If you create an MDL, plaintiffs will flock to it, leading to a dramatic growth in the number of lawsuits filed against the defendants in that MDL. Indeed, that has been exactly what has happened in the five consolidated MDLs in West Virginia involving Ethicon, Bard, AMS, Boston Scientific and Coloplast.

For example, as noted by the lead plaintiffs' lawyers in their November 26, 2012, letter to Judges Goodwin and Stanley proposing "Plaintiffs' Bellwether Trial Plan, In Re: MDL Nos. 2325, 2326 and 2327" (Exhibit 7 hereto), "[a]s of September 5, 2012, there were 4562 cases on file in the MDL. In less than three months, the number of filed cases **increased by more than 60%**, **with 7431 cases currently pending before the Court**. (Exhibit 7, p. 3, emphasis in original).

Worse, the pace and volume of new filings in the MDLs in West Virginia seems to be increasing. On November 26, 2012, there were 7,431 cases. As of March 4, 2013, just a little more than three months later, there are 13,557 cases pending, an increase of 6,126 new cases or an increase of 82%. The recent 11.3 million dollar verdict against Ethicon in the New Jersey Superior Court will likely add fuel to this fire, threatening to engulf the Cook Defendants in a

conflagration in which they should not be involved since they simply do not make or sell pelvic mesh.

Plaintiffs assert in their Brief that to *not* create an MDL in the Southern District of West Virginia for cases against Cook would result in a situation where the "same attorneys for the same victims will be forced to unnecessarily exhaust their limited time and resources traveling to and from and dealing with multiple courts' and their different schedules, potentially conflicting rulings, and generally the redundancy that the MDL process is designed to avoid." Brief at 10. As noted above, the convenience of counsel is not, by itself, a factor to be considered in determining whether transfer is proper under Section 1407. *See In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403 (J.P.M.L. 1977); *In re Directbuy, Inc., Mktg. & Sales Practices Litig.*, 682 F. Supp. 2d 1349, 1350-1351 (J.P.M.L. 2010). The individual plaintiffs in the matters listed in the Schedule of Actions are located all over the country. If Plaintiffs' counsel did not wish to spend "time and resources traveling to and from and dealing with multiple courts' and their different schedules," they should not have filed these cases against Cook. They should be required to litigate these cases in the District Courts in which they are currently venued.

Plaintiffs also argue that a Cook MDL should be created because Plaintiffs in some of the cases listed on the Schedule of Actions (represented by three different attorneys) agree that it should. Brief at 15. All of the cases cited by Plaintiffs for this point are distinguishable. Cook opposes both the creation of a new MDL, generally, and also opposes transfer of these fifteen cases to the Southern District of West Virginia, specifically. Plaintiffs cite no analogous case in this section of their Brief. *In re Sierra Wireless, Inc.*, 387 F. Supp. 2d 1363, 1364 (J.P.M.L. 2005) ("All responding parties, consisting of plaintiff in another Southern District of New York action and several proposed lead plaintiffs, support the motion for Section 1407 centralization.");

In re Rubber Chems. Antitrust Litig., 350 F. Supp. 2d 1366, 1367 (J.P.M.L. 2004) ("All responding parties now agree upon centralization in this district."); *In re Primevision Health, Inc. Contract Litig.*, 206 F. Supp. 2d 1369, 1370 (J.P.M.L. 2002) ("All parties other than the movant and its parent company oppose transfer. If the Panel nevertheless orders centralization, then these opposing parties would favor selection of the Western District of Kentucky as transferee forum.") (ordering transfer but selecting responding parties' preference of transferee forum).

Here, the alternatives to transfer are sufficient to address any potential issues with duplicative fact and expert discovery. *See, e.g.*, *In re DuPont Benlate Settlement Agreements Litig.*, 2000 U.S. Dist. LEXIS 7378 (J.P.M.L. May 25, 2000); *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F. Supp. 242, 244 (J.P.M.L. 1978). In fact, three of the cases listed in the Schedule of Actions, *Johnson v. Cook Group, Inc., et al.*, *Dunnington et al. v. Cook Group, Inc., et al.*, and *Mansfield v. Cook Group, Inc., et al.*, have already been consolidated for pretrial matters before Judge Trauger of the Middle District of Tennessee. *See* Exhibit 8, Case Management Order in *Johnson*, *Dunnington*, and *Mansfield* cases. The Cook Defendants are not opposed to consolidating or coordinating discovery and other pretrial matters in the fifteen pending cases listed in the Schedule of Actions, including within federal districts (such as described above) or between different federal districts. As there are only a small number of cases and courts involved, such coordination should not be difficult to achieve. An MDL is not required for such coordination.[2]

[2] The Cook Defendants note that, if the Panel should grant Plaintiffs' Motion for Transfer, they would request that the transferee district be the Middle District of Tennessee before Judge Aleta Trauger, as Judge Trauger already has an understanding of the issues in cases involving Cook's Biodesign Products and the differences between those products and the "pelvic mesh" products of the MDL Defendants.

C. In Multi-Defendant Cases, Plaintiffs' Claims Against Cook Can Be Severed and Remain in the Original (Transferor) Court.

Of the fifteen cases against Cook listed on Plaintiffs' Schedule of Actions that are currently pending, nine of them name various MDL Defendants in addition to the Cook entities. In these cases, the claims against the Cook Defendants can be severed from the claims against other defendants under Fed. R. Civ. P. 19 and remain in the District Court in which they were filed.

Under Fed. R. Civ. P. 19(a),

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The Cook Defendants are not required parties to Plaintiffs' claims against the MDL Defendants under Rule 19. The absence of the Cook Defendants from these cases will not prevent the Court from according complete relief among the remaining parties. In addition, severing the Plaintiffs' claims against the Cook Defendants from the claims against the MDL Defendants will not impede those defendants' ability to protect their interests, nor will it subject those defendants to multiple or inconsistent obligations. Alleged joint tortfeasors are not necessary parties under Rule 19(a), and as such do not need to be named as defendants in a single lawsuit. *Temple v. Synthes Corp.*, 498 U.S. 5, 7-8 (1990).

Under Fed. R. Civ. P. 21, "[t]he court may . . . sever any claim against a party." Even though the rule is entitled "Misjoinder and Nonjoinder of Parties," neither misjoinder nor nonjoinder is required for the court to sever claims against a party. *See, e.g., Official Comm. of Unsecured Creditors v. Shapiro*, 190 F.R.D. 352, 355 (E.D. Pa. 2000) (citing 4 Moore's Federal Practice § 21.02(1)).

A court's discretion to sever claims has been described as "virtually unfettered." *Hartley v. Clark*, Case No. 3:09-cv-559/RV/EMT, 2010 U.S. Dist. LEXIS 28241, *13-14 (N.D. Fla. Feb. 12, 2010) (citing cases). One court has observed that "[w]here . . . judicial economy is not served by joining claims, as in this case, severance is appropriate and the fair thing to do." *Malibu Media, LLC v. Doe*, Case No. 8:12-cv-1667-T-27MAP, 2012 U.S. Dist. LEXIS 183969, *17 (M.D. Fla. Dec. 6, 2012).

> Among the factors to be considered by the court in exercising its discretion under Rule 21 are whether the claims arise from the same transaction or occurrence, whether they present some common question of law or fact, whether severance would facilitate settlement or judicial economy, and the relative prejudice to each side if the claim is severed.

Hartley, 2010 U.S. Dist. LEXIS 28241 at *12-14 (citing cases). These factors weigh heavily in favor of severing Plaintiffs' claims against the Cook Defendants from the cases in which they have sued multiple manufacturers.

As explained above, the technology of the Cook Defendants' Biodesign Products and the technology of the MDL Defendants' synthetic mesh products are fundamentally and drastically different. Consequently, there are very few, if any, common facts or issues involving these technologies. Thus, the evidence involved in the claims against the MDL Defendants will be very different. Even in the cases where Plaintiffs allege that they were implanted with a Biodesign Product on or about the same date as their implantation with a pelvic mesh product of

one of the MDL Defendants, this fact does not mandate that the claims against the Cook Defendants and the claims against those other defendants be tried together. *See Temple v. Synthes Corp.*, 498 U.S. 5, 7-8 (1990).

Using a similar analysis, the JPML has vacated in part an order conditionally transferring a case to an MDL, to the extent that claims involving one medical device (not the subject of the MDL) did not share sufficient questions of fact with actions in the MDL. *See In re: Kugel Mesh Hernia Patch Prods. Liab. Litig.*, 560 F. Supp. 2d 1362 (J.P.M.L. 2008). That case involved claims of injury resulting from the implantation of a hernia repair patch that was already the subject of a pending MDL. However, the case to be transferred also contained claims that the fixation device which was used to implant the hernia repair patch had defective staples. The JPML transferred the hernia repair patch claims to the MDL, but separated the claims related to the fixation device and remanded them to the transferor court, noting that "[w]hile there may be some slight overlap in discovery, claims involving the Davol Fixation device do not share sufficient questions of fact with previously centralized MDL No. 1842 actions, and coordination between the transferor and transferee courts can minimize any inefficiencies." *Id.* at 1363-64. The JPML's decision in *Kugel* should guide the decision here.

In a recent order in MDL 2326, the JPML vacated a conditional transfer order where the case to be transferred involved a product that was not at issue in the MDL to which it was transferred. "While the ProteGen Sling is a pelvic surgical mesh product manufactured by Boston Scientific, it was manufactured years before the products at issue in MDL No. 2326 and was recalled in 1999. The parties agree, and we are persuaded that, it is unlikely this case will share many factual questions or overlapping discovery with the actions in MDL No. 2326." *In*

re: Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326, Dkt. 348 (J.P.M.L. Oct. 1, 2012) (a copy of this Order is attached hereto as Exhibit 9).

In MDL 2327, the Cook Defendants have filed a Motion to Vacate In Part Conditional Transfer Order 77, which would have transferred the *Sitten*, *Sciarro*, and *Pittsley* cases to the Southern District of West Virginia. Ethicon, a co-defendant in those cases, recently filed a response to Cook's Motion to Vacate stating that Ethicon does not object to the severance of these plaintiffs' claims against the Cook Defendants. *See* Exhibit 10 (Ethicon's Response to Motion to Vacate CTO-77). Cook has also filed motions to vacate, in part, CTO-60 in MDL 2326 (the *Connell* case) and CTO-78 in MDL 2327 (*Holland* and *Wynn* cases), and will soon be filing a motion to vacate CTO-61 in MDL 2326 (*Myers* and *Pickard* cases). In cases that involve Cook which have already been transferred to one of the West Virginia MDLs, the Cook Defendants intend to move to sever the claims against Cook and remand them to their transferor courts.

The MDL Defendants will not suffer prejudice if the Cook Defendants' claims are severed from these multi-manufacturer cases. As explained above, there are very few, if any, overlapping factual issues or evidence between the claims against the Cook Defendants and the claims against the MDL Defendants, due to the extreme differences in their products. If the claims against the Cook Defendants are severed from the claims against the MDL Defendants in these cases, Cook has no objection to transfer of the claims against the MDL Defendants to the MDLs in the Southern District of West Virginia. However, for the reasons explained above, the Cook Defendants will suffer extreme prejudice if forced to litigate the very few claims against them in the Southern District of West Virginia, before an overburdened Court.

III. Conclusion

The fifteen pending cases against Cook listed in Plaintiffs' Schedule of Actions should not be forced to get in line behind the 13,557 other cases currently pending in the five "pelvic mesh" MDLs before Judges Goodwin and Stanley in the Southern District of West Virginia, especially given the extreme differences between the Cook Defendants' Biodesign Products and the "pelvic mesh" products of the MDL Defendants. To the extent that there are overlapping discovery and pretrial issues among the fifteen pending cases, these can be resolved through coordination between the district courts involved. Transfer under Section 1407 is not required.

The Cook Defendants should be permitted to defend the claims against them in an expeditious manner without being involved in a highly publicized MDL. Otherwise, the Cook Defendants will be substantially prejudiced by being unable to defend Plaintiffs' unsubstantiated claims against them on the merits, while remaining at the back of a logjam of cases and on the radar screens and websites of plaintiffs' lawyers soliciting and filing more and more meritless cases against the Cook Defendants. The Cook Defendants respectfully request that Plaintiffs' Motion for Transfer be denied.

Respectfully submitted,

/s/ Douglas B. King
Douglas B. King, Esq., #5199-49 (Indiana)
WOODEN & McLAUGHLIN LLP
One Indiana Square, Suite 1800
211 North Pennsylvania Street
Indianapolis, IN 46204-4208
Tel: (317) 639-6151
Fax: (317) 639-6444
dking@woodmclaw.com

Attorney for Cook Defendants
Cook Group Incorporated, Cook Incorporated,
Cook Biotech Incorporated, Vance Products

Incorporated, Cook Medical Incorporated, William A. Cook Australia Pty., Ltd., Cook Ireland, Ltd., Cook (Canada), Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2013, I electronically filed the foregoing document with the Clerk of the Panel using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this matter.

/s/ Douglas B. King
Douglas B. King, Esq.