UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: COOK MEDICAL, INC., IVC FILTERS MARKETING, SALES PRACTICES AND PRODUCT LIABILITY LITIGATION

Case No. 1:14-ml-2570-RLY-TAB
MDL No. 2570

This Document Relates to All Actions

COOK DEFENDANTS' SUBMISSION ON PROPOSED BELLWETHER TRIAL PLAN

Despite the Court's direction at the September 8, 2016, status conference that the bellwether trials in this matter should be scheduled at regular intervals, Plaintiffs continue to insist that all case management deadlines for all three bellwether cases must be identical. The parties agree on the schedule for *Hill*, but there is not an agreement on the schedule for the second and third bellwether trials. Cook, in keeping with the Court's direction, proposes a natural course of discovery where the deadlines for subsequent bellwethers follow the agreed plan in *Hill* and run on parallel tracks, as detailed in the proposed Case Management Order 19 (Bellwether Trial Plan), attached as Exhibit A.

While Plaintiffs continue to insist that they have no intention of dismissing the *Hill* matter before trial, they simultaneously refuse to consider staggered deadlines that follow the Court's requested trial plan, insisting instead that the case management deadlines in all three bellwether cases should be the same and all three case should be ready for trial at the same time. For multiple reasons, Cook respectfully submits that Plaintiffs' proposal is neither practical nor fair, and respectfully requests that the Court enter Cook's proposed Bellwether Trial Plan.[1]

[1] Cook notes that it proposes a 20-week interval between the first and second bellwether trials so that the *Daubert* and summary judgment briefing in the second bellwether are due sufficiently after the close of the *Hill* trial to allow the Court and parties to use the information gained in *Hill* to better address the issues in the dispositive motions in

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I. Plaintiffs' Proposed Simultaneous Deadlines For Bellwether Trial Preparation Are Not Practical And Unnecessarily Burden The Court, Key Witnesses, And The Parties

Despite the Court's instruction for staggered bellwether trials approximately four months apart during the September 8, 2016, status conference,[2] Plaintiffs again insist on simultaneous deadlines for all three bellwether cases. Plaintiffs' proposed schedule unnecessarily places an excessive burden on the Court, on the witnesses (fact and expert), and on the parties. Under Plaintiffs' proposed plan, the parties and Court would engage in rapid-fire depositions of more than 30 fact witnesses in three bellwether cases by January 16, 2017; the preparation and disclosure of 10-20 experts per side between January 16 and March 16, 2017; and the depositions of likely 20 or more experts between January 16 and April 20, 2017. Given that this is a medical device product liability case, the vast majority of those witnesses will be highly specialized physicians with challenging schedules from multiple disciplines and jurisdictions. Scheduling those depositions simultaneously is not practicable, and likely is impossible, particularly in the now 3 and 1/2 months before Plaintiffs' expert disclosure deadline.

Even if the parties wanted to begin case-specific fact witness depositions tomorrow, it is not possible. Aside from the challenging schedules of physician witnesses, Cook is currently collecting medical and other plaintiff-specific records required before the depositions of the fact-witness physicians can be taken. Plaintiffs' counsel has already stated that they cannot even be present for the deposition of Ms. Hill until November of this year,[3] and no physician in any case has reserved deposition dates. Indeed, medical and other records collection is ongoing in all

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the second bellwether under that schedule. Should the Court prefer otherwise, the schedule easily may be modified by two or four weeks.

[2] Transcript of September 8, 2016, Status Conference Regarding Case Management Plan at 60:20-25, attached as Exhibit B.

[3] See Correspondence between Joe Johnson and Andrea Pierson from September 19-21, attached as Exhibit C.

three bellwether cases currently, and both sides allege written discovery remains to be completed and have disputed issues regarding discovery responses that remain unresolved. *See* Correspondence to B. Martin from Andrea Pierson dated September 16, 2016, as Exhibit D.

From an expert witness perspective, having an expert, even one you are paying, clear three to six months to prepare intensive reports in three cases simultaneously and prepare for and be deposed in three separate cases simultaneously is enormously challenging and needlessly complicates the important and difficult work the parties need to complete in these bellwether cases.

Put simply, these are the first three bellwether trials of this MDL. Plaintiffs' allegations are complex, and there are complicated medical, engineering, regulatory and factual issues involved. To suggest that discovery and briefing in these cases should occur simultaneously is impractical. Parallel and overlapping discovery tracks, as suggested in Cook's Bellwether Trial Plan, is an orderly and fair method for proceeding to bellwether trials.

II. Simultaneous Deadlines Are Impracticable And Unnecessarily Burdensome To The Court

In addition to the unnecessary burden of simultaneous discovery in three complex bellwether cases, Plaintiffs' proposed schedule means that the expert reports and *Daubert* motions (not to mention motions for summary judgment) in all three cases will unnecessarily become the work of this Court all at once. With 10 or more experts expected per side per case, and 20 or more experts in total for three bellwether cases providing extensive reports, extensive *Daubert* and summary judgment briefing is anticipated. While some experts will overlap, the three bellwether cases selected by the Court involve different products, different alleged device malfunctions, and different alleged clinical consequences. Further, the implants and complications occurred at different times and the state of knowledge in the relevant medical

communities differs. The *Daubert* and summary judgment motions before the Court also will be decided under the substantive law of three different states, presumably Florida, Georgia, and Illinois. Given these issues, the Court's workload likely will be extraordinary.

Staggering the briefing required in these cases will benefit the Court and the parties. The Court and the parties should not have to address all potential, outstanding dispositive and expert issues in three cases at one time in these matters, particularly not when the trial dates have been staggered.

III. Plaintiffs' Plan Eliminates The Efficiencies For Which The MDL Was Created

Plaintiffs' proposed plan also disregards the value to all involved in this litigation of using the lessons from the first bellwether trial process to streamline preparation of and rulings in the subsequent bellwethers. After an initial round of *Daubert* motions and motions for summary judgment, the issues may be narrowed, the Court's views on the underlying causes of action will have been set out in its rulings, and the parties will have the benefit of streamlining subsequent presentations through motions and of the evidence accordingly. Staggered deadlines also will allow the parties to adopt the Court's rulings from the first (and later the second) bellwether case, limit the issues in dispute, and reduce the workload for all substantially.

IV. Cook's Proposed Case Management Plan Allows The Orderly And Fair Administration Of Justice

A better plan, as Cook articulated during the September status conference, is to stagger the case management dates just as the bellwether trial dates will be staggered, with parallel tracks of discovery occurring simultaneously.

Cook understands that the Court is concerned about Plaintiffs dismissing *Hill* and leaving a gap in its schedule. Plaintiffs have repeatedly said they do not intend to dismiss *Hill* and, if true, no void will be created. The Court, however, should not set the schedule up to reward

Plaintiffs if they do dismiss *Hill*. "Courts must be exceedingly wary of mass litigation in which plaintiffs are unwilling to move their cases to trial." *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 628 F.3d 157, 163 (5th Cir. 2010). Indeed, the Fifth Circuit has held that dismissal can "manipulate the integrity of the court's Bellwether process" and the Court should not allow this to happen. *Id.*

Plaintiffs' proposed CMO suggests that Plaintiffs can dismiss a bellwether trial *at any time*, without consequence, and that Cook and the Court should immediately adjust to try the next case. Plaintiffs' plan is neither fair nor efficient. This Court should reject that approach and adopt a procedure that allows the Court flexibility and the ability to select the next most representative case in the event of dismissal. Otherwise, the integrity of the process could be manipulated through selectively timed dismissals in order to try Plaintiffs' "best" case. That tactic undermines the efforts of this Court to ensure that bellwether cases are representative and fair to both parties. And yet, that is just the type of scenario that could play out in this litigation.

Cook's proposed trial plan includes steps to prevent a late dismissal and a procedure for addressing such a dismissal. First, it includes a deadline, simultaneous with Plaintiffs' expert disclosures, for Plaintiffs' counsel to certify that they have consulted in detail with their client and that they intend to proceed to trial. Consistent with the practice of other Courts, such a deadline discourages serial dismissals.

Then, should a dismissal occur, the plan requires the parties to immediately meet and confer and recommend an appropriate course of action based on the timing and nature of the dismissal. *See* Cook's Proposed Case Management Plan at Ex. A, ¶ 12. This procedure allows the Court flexibility to accelerate deadlines and trials to appropriately address any dismissal. For instance, the Court could accelerate the schedule in the second and/or third bellwether trials, if it deems appropriate. Or, should Plaintiffs dismiss *Hill*, the Court could select another case from

the New Discovery Pool that involves the same product and alleges similar injuries, such as *John Alford*. Like *Hill*, *Alford* involves a Celect filter with allegations of perforation and lacks the outlier allegations such as fracture or open removal procedure. The procedure for managing dismissal proposed by Cook would promote efficiency, economy, and fairness and would allow the Court to adapt the trial plan as the circumstances warrant and fairness to all parties merits.

Gamesmanship through one or more dismissals should be discouraged, and the Court should – in its first Bellwether Trial Plan – afford itself flexibility to address that scenario should it happen. Potential dismissals alone are no reason to require simultaneous work-up of three cases and all of the inefficiencies and difficulties such a plan would create.

V. Conclusion

Cook respectfully requests that the Court enter the attached CMO 19 (Bellwether Trial Plan), which follows the parties' agreed deadlines for the *Hill* matter and which creates a logical and natural progression of parallel tracks of case management deadlines for the second and third bellwether based on the trial schedule requested by the Court.

Dated: September 22, 2016

/s/Andrea Roberts Pierson

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2016, a copy of the foregoing Cook Defendants' Submission On Proposed Bellwether Trial Plan was filed electronically, and notice of the filing of this document will be sent to all parties by operation of the Court's electronic filing system to CM/ECF participants registered to receive service in this matter. Parties may access this filing through the Court's system. Lead Co-Counsel for Plaintiffs will serve any non-CM/ECF registered parties.

/s/ Andrea Robert Pierson

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: COOK MEDICAL, INC., IVC FILTERS MARKETING, SALES PRACTICES AND PRODUCT LIABILITY LITIGATION

Case No. 1:14-ml-2570-RLY-TAB
MDL No. 2570

This Document Relates to All Actions

CASE MANAGEMENT ORDER # 19
(BELLWETHER TRIAL PLAN)

Following the Court's selection of three matters as bellwether trial cases in this MDL, the Court issues this Bellwether Trial Plan, which supersedes and amends the Court's Case Management Order No. 17.

1. Motions for Leave to Amend: All motions for leave to amend the pleadings or to join additional parties in bellwether trial cases shall be filed on or before the dates listed below.

Hill	*Second Bellwether*	*Third Bellwether*
October 14, 2016.	March 14, 2017	July 14, 2017

2. Bellwether Depositions: Case-Specific Fact Depositions in Bellwether Cases shall be limited to (1) Plaintiff(s); Plaintiff's treating physicians, (3) sales representatives directly associated with the sale of the specific product implanted in the plaintiff, and (4) two additional fact witnesses. The parties agree that the sales representative depositions will generally occur prior to implanting/retrieval physician depositions. If the parties disagree regarding the proper sequencing of depositions, and sequence of question in depositions, in a specific Bellwether case, they will meet and confer prior to contacting the Court for assistance in resolving the issue. Additional Case-Specific depositions may be taken by agreement or by leave of Court upon good cause shown.

3. Expert Disclosures: Plaintiffs and Defendants shall make the disclosures required by Fed. R. Civ. P. 26(a)(2) on or before the dates listed below. The parties agree to provide dates each of their experts are available for deposition with their expert disclosures.

	Hill	*Second Bellwether*	*Third Bellwether*
Plaintiffs	January 16, 2017	June 16, 2017	October 18. 2017
Defendants	March 16, 2017	August 16. 2017	December 18, 2017

4. Certification of Intent to Proceed to Trial: Concurrent with their expert disclosures for each bellwether case, Plaintiffs' Counsel shall file and serve a certification that they have had a detailed conversation with the plaintiff(s) in the relevant bellwether case regarding the status of the case, the strengths and weaknesses of the plaintiffs' legal claims, the time, expense, and cost of proceeding through to the end of trial, and the potential consequences of losing at trial, and that plaintiff(s) and their counsel intend, at the time of the certification, to proceed to trial in the relevant bellwether case.

5. Independent Medical Examinations: Any independent medical examinations of the plaintiff shall be requested by Defendants on or before the dates listed below. The parties shall work together to establish a protocol for IMEs.

Hill	*Second Bellwether*	*Third Bellwether*
February 20, 2017.	July 20, 2017	November 20, 2017

6. Close of Discovery: Discovery must be complete the dates listed below.

	Hill	*Second Bellwether*	*Third Bellwether*
Non-Expert	April 20, 2017	September 20, 2017	January 19, 2018
Expert	May 19, 2017	October 20. 2017	February 20, 2018

7. Motions for Summary Judgment and *Daubert* Motions: Motions for summary judgment and *Daubert* motions regarding the limitation or exclusion of expert testimony are due on or before the dates listed below. The briefing schedule for motions for summary judgment and *Daubert* motions is controlled by Local Rule 56-1.

Hill	*Second Bellwether*	*Third Bellwether*
June 9, 2017.	December 8, 2017	April 9, 2018

8. Summary Judgment Requirements: Absent prior leave of the Court, and for good cause shown, all issues raised in a motion for summary judgment under Fed. R. Civ. P. 56 must be raised by a party in a single motion. If a party intends to use expert testimony in connection with a motion for summary judgment to be filed by that party prior to the deadline for motions for summary judgment, such expert disclosures must be served on opposing counsel no later than 90 days prior to the filing of a motion for summary judgment. If such expert disclosures are served, the parties shall confer within 7 days to stipulate to a date for responsive disclosures (if any) and completion of expert discovery necessary for efficient resolution of the anticipated motion for summary judgment.

9. Bifurcation: Any party who believes that bifurcation of trial is appropriate with respect to any issue or claim shall notify the Court as soon as practicable and no later than the dates listed below

Hill	*Second Bellwether*	*Third Bellwether*
July 20, 2017.	January 19, 2018	April 20, 2018

10. Witness and Exhibit Lists: All parties shall file and serve their final witness and exhibit lists for each of the bellwether trial cases 30 days before the final pretrial conference for each case. The lists should reflect the specific potential witnesses the party may call at each bellwether trial. It is not sufficient for a party to simply incorporate by reference "any witness listed in discovery" or such general statements. The list of final witnesses shall include a brief synopsis of the expected testimony.

11. Trial Date: Trial in the *Hill* matter is set to begin Monday, October 2, 2017. Trial in the Second Bellwether will start April 5, 2018, and trial in the Third Bellwether will start August 9, 2018.

12. Dismissal: Should any bellwether case be dismissed, the parties shall immediately meet and confer and shall present their recommended course of action to the Court within seven days of the dismissal. The Court will determine which case, if any, will take the place of the dismissed case, and further will identify any adjustments to the schedule contained herein to best ensure the fair and efficient administration of justice.

SO ORDERED this:

_____

Hon. Richard Young
United States District Court
Southern District of Indiana

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: COOK MEDICAL, INC., IVC FILTERS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	) CAUSE NO. 1:14-ml-2570-RLY-TAB) MDL No. 2570) Indianapolis, Indiana) Thursday, September 8, 2016) 10:12 o'clock a.m.

Before the
HONORABLE RICHARD L. YOUNG, CHIEF JUDGE

TRANSCRIPT OF CASE MANAGEMENT PLAN
REGARDING STATUS CONFERENCE

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PROCEEDINGS TAKEN BY ELECTRONIC RECORDING

(In open court.)

THE CLERK: All rise.

THE COURT: Good morning. Good to see all of you again. We are here today in In Re: Cook Medical IVC Filters Marketing, Sales Practices and Products Liability Litigation. This is MDL-2570, and we are here on a status, monthly status conference. And there has been an agenda filed, and I have been requested from court staff in submitting your agendas if you can do that seven days in advance of our hearing, of our status conference, that would be much appreciated.

Here on behalf of the Plaintiffs are Joe Williams, Michael Heaviside, and Ben Martin; and all representing Cook is Doug King, Andrea Pierson, John Schlafer, and Jim Boyers.

I checked this morning, and there are 918 cases in the MDL now. Andrea, is that your --

MS. PIERSON: I think that is pretty close to correct, Your Honor. We put together just a couple of slides to illustrate so you can see where we are in terms of total numbers, product breakdown, and I wanted to give you a bigger picture too of what it looks like in state courts as well. So with Your Honor's permission, just a couple of things that we will show you.

First, here is the breakdown of cases --

THE COURT: Hold on, I am not turned on up here --

MS. PIERSON: No problem.

THE COURT: -- and I don't know how to do that. Okay.

MS. PIERSON: May I approach, Your Honor?

THE COURT: You may. Thank you.

MS. PIERSON: So this is what the filings look like in total, 906 Plaintiffs in this MDL, 186 in state court cases. There are a couple of multi-Plaintiff cases in Illinois that make up a lot of the 186 there, and then we have four Plaintiffs and other federal courts that are awaiting --

THE COURT: In the state cases, where in Illinois are those?

MS. PIERSON: In St. Louis County.

THE COURT: Okay.

MS. PIERSON: Your Honor.

THE COURT: Southern.

A VOICE: That is --

MS. PIERSON: I am sorry, Missouri, Missouri. Thank you. Before you, Your Honor, is how the cases break out between states, just so you can get a feel of where jurisdictionally these are.

THE COURT: Uh-huh.

MS. PIERSON: And then we go to the next slide, just a couple of slides that help you understand where we are in terms of the product division. You remember we talked about that at the bellwether selection argument.

So this is the count, by product, in the MDL. The proportion between Tulip and Celect is about the same as it was when I talked to you the last time, maybe a little more on the Tulip side than we had previously.

THE COURT: Yes, appears to be.

MS. PIERSON: Forty-one percent of the cases are Tulip. Fifty-three percent of the cases are Celect. The Celect Platinum number there at 11 is a little bit deceiving, Your Honor. Although we don't have all of the PFSs on those, we know that a significant number of those are cases where the product was implanted actually before the Platinum was even on the market. So it is -- it is likely that those Plaintiffs are confused as to what product that they had, but Celect Platinum continues to be a very, very small number.

THE COURT: Uh-huh.

MS. PIERSON: Then go to the next slide just so you --

THE COURT: What is the unknown?

MS. PIERSON: It is Plaintiffs who filed and haven't identified yet what product was implanted in them, so we don't yet know. Do they have a Tulip or a Celect, not identified in their short form complaint, and more than likely we don't have a PFS from them yet that identifies the product.

THE COURT: Okay.

MS. PIERSON: Then if you combine what I have shown

you so far, that is just what is on the slide before you, Your Honor. We look across the MDL cases and across the state court cases. You can see how the breakdown goes between products.

The difference between Celect and Tulip in the state court cases is very similar to what you are seeing here in the MDL. As I said, in the MDL the division is 41 percent Tulip, 53 percent Celect. And the state court cases, Tulip is 33 percent, and Celect is 50 percent. But there is a higher number of unknown products in the state court cases than there are in the MDL.

And then one last slide for you, Your Honor, just so you know what the MDL is shaping up like in terms of filing trends. This is a graph that I have shown you before that shows filing trends per month, and really, I think the most telling part for our purposes is the last fourth of that graph on the right-hand side of the page.

You can see that we had a big spike in filings in May. We talked last time, at least our view, is that is attributed to we believe that some people thought there was a trigger for statute of limitations that caused a big spike. Since that time, filings have slowed, but they certainly continue at a significant clip.

So where this MDL lines up by the end of 2016, I think, is not yet known. Now the question is, do the filings

continue at this pace beyond the third quarter of this year or not?

As Your Honor knows, just by virtue of filing a new case, there is a heavy burden that is placed on Cook in terms of production of documents and other things, and Plaintiffs have that burden as well, obviously. I mention that not to suggest that the burden is disproportionate in some respect, but to say that there is a lot of work that is going on behind the scenes with all of these new filings and the work that has to be done with the new filings, that is happening really separate and apart from the work that the parties are doing currently on bellwether trial preparation.

THE COURT: Uh-huh.

MS. PIERSON: So a lot of people involved --

THE COURT: Sure.

MS. PIERSON: -- doing a lot of different things to meet the demands of these Plaintiffs.

Any questions, Your Honor?

THE COURT: No, not really.

MS. PIERSON: Thank you. That is all we have in terms of an overview of the MDL.

THE COURT: Okay. Gentlemen? Joe? Ben? Mike?

MR. HEAVISIDE: (Inaudible) overview of the MDL.

THE COURT: All right. All right. Motion for state court coordination is the next item I see.

MS. PIERSON: Thank you. Your Honor, if you don't mind, I will go first with Cook's motion. We filed a motion outlining the reasons why we think state court coordination is appropriate.

THE COURT: Yes.

MS. PIERSON: And as Your Honor knows -- John, could you take that slide down?

As Your Honor knows, it is quite common in MDLs for a judge in your position to issue an order that encourages coordination between the MDL and state court cases. Certainly all of the treatises that deal with best practices for MDL encourage coordination with state courts. We have cited in our papers a number of other MDLs in which courts have entered similar orders to what we have proposed to you.

The order that we have submitted to the Court is based on the order that was entered by Judge Pallmeyer in the Nexgen MDL, but it also tracks very closely with the order that has been entered by Judge Kennelly in the testosterone MDL.

And you can find similar orders in the Actos MDL and Syngenta, in the Durom MDL, and a number of others. There is a lengthy list of MDLs in which courts have entered similar orders that are cited in our brief.

Cook acknowledges in our brief in here that, of course, this Court does not have the ability to dictate what happens in state, state courts and vice, vice versa.

THE COURT: Being a former state court judge, I understand that.

MS. PIERSON: And we are not asking you to do something that you can't do. We won't ask them to do something that they can't do, but the purpose of coordination, obviously, is to encourage efficiency between the cases. And efficiency and fair treatment of the claims ought to be a goal of both our state and federal courts.

THE COURT: Do you have any knowledge on any of the state cases, their status? Are any of them on the eve of trial?

MS. PIERSON: Yes.

A VOICE: Your Honor, if I may, there is a case called Kennington, which is a Cincinnati --

THE COURT: Sure.

A VOICE: -- which has a trial setting for next June. That is the only case to my knowledge that is set. That is a case, the reason it can't be removed is they sued the doctors as well --

THE COURT: I see.

A VOICE: I think that is the only case that is set.

MS. PIERSON: That's correct, and actually, that makes the timing of this coordination order, I think, particularly appropriate to issue an order like this and to encourage communication between you and the state court judges

and the parties in that litigation. It, it -- it best happens if it happens early in the process. And that is really where we are, both in this MDL and in the state court proceedings in terms of scheduling.

The order that we have proposed would allow Cook and the Plaintiffs in those cases to access the documents that have been produced in the MDL so that there is an efficiency in terms of discovery. It would encourage the state court judges to encourage the parties to work cooperatively to use and access both the written discovery and the depositions that have occurred thus far in the MDL.

THE COURT: Has any of that occurred yet just voluntarily between you and any of the state court --

MS. PIERSON: Where there is overlap between the attorneys, the cases aren't far enough along for that to have happened yet. But I would say where there is overlap in the attorneys, we certainly expect that the parties will work cooperatively.

THE COURT: Okay.

MS. PIERSON: There are a number of state court cases that have been filed by attorneys who don't have any cases in the MDL. So to their benefit, it would allow them access to materials in depositions that we use in the MDL. We would be working together to the extent that depositions were taken in one proceeding or the other that they could be used

in both proceedings.

So it gives really the parties the opportunity, and the order encourages the judges in those proceedings to encourage the parties in state court to work cooperatively and achieve efficiencies between the two proceedings.

As mentioned in our brief, there are some things that have happened already in the MDL that suggests the Plaintiffs are open to coordination, and certainly, their responsive brief indicates that they are in isolated circumstances. Our view is that dealing with issues of coordination on a one-off basis from now until this MDL concludes is really not the correct approach, but that instead, it would be more appropriate for you now to send a letter to the state court judges indicating the presence of the MDL and a desire to work together.

If there are specific tasks that the parties and you believe will be appropriate for coordination that are not covered in this order, there is nothing that prevents this Court and the parties from agreeing later to do a more, a second communication to state court judges or to work cooperatively independently. This is really the opening salvo to state court judges to encourage those courts to work with this MDL and to encourage the litigants in those courts to work together.

I have had a chance to look at the Plaintiffs' response

brief, and I will just make a couple of comments. The primary argument from the Plaintiffs' perspective seems to be that there is an issue of due process somehow, but there is nothing about coordination that in any way violates the Plaintiffs' rights to due process.

Of course, a state court judge could choose to enter a schedule that doesn't track the schedule in this MDL. Of course, the state court judge could choose to order Cook to put witnesses up for second depositions in the state court proceeding when they have already been put up in this proceeding. There is nothing about this order that is mandatory. So, of course, there is no way that a Plaintiffs' state court due process right could be violated by the order.

You know, in addition to all of that, the manuals that I have mentioned, the manual for complex litigation, there is this very good article out of Duke that talks about best practices in MDLs. All of those treatises, and many of the courts who have entered similar coordination orders, they have addressed this question of due process and have come to the conclusion rightfully so that there is nothing about coordinating that isn't some way violative of a plaintiffs' rights in state court. Rather, quite to the contrary, it ensures that plaintiffs have access to materials that are, are produced and handled in the MDL and vice versa so that there is efficiencies on both sides.

I would say just one last thing, Your Honor, about the response. The Plaintiffs' response does not include any notations of courts in circumstances similar to yours that have refused coordination, and there is a reason for that. The reason is that judges in your position, if the parties do what they should do, which is to present the issue to you early on and at a time when coordination can still be beneficial, it, it is the right thing to do.

It is the right thing to do in terms of fairness for the parties in state and federal court and the right thing to do in terms of achieving efficiencies both for the parties and for the courts that are overseeing these matters. That is my belief why coordination is routinely entered, and we would ask, Judge Young, that you do the same here.

THE COURT: Thank you. Mr. Williams?

MR. WILLIAMS: May it please the Court. The state court plaintiffs already have access to everything that is going on in this MDL. Back in March, Judge Baker signed a common benefit -- signed a common benefit order which allows state court plaintiffs access to the discovery materials in this case as long as they sign on to the protective order in the common benefit agreement.

So I think we need to look at what Cook's true motivation is here, and I think they tell us in their brief on page 5 when they tout the reasons coordination is necessary. They

say, "The parties may spend significant time and resources testing claims and defenses of specific state court cases that are not easily applied to the litigation as a whole. While the limited resources of the parties and is most often important in these matters, the witnesses are diverted from the bellwether process." I think what that broadcasts is what Cook wants to do is effectuate something from this Court that will have state courts have their trial courts -- or trial schedules stand down in favor of the bellwether process.

And while the statement that "no due process is violated in these situations," it makes me think of when this Court ruled on the bellwether selections. The Court was very deliberate in finding cases that were selective -- or selecting cases that were representative of the cases of the whole. Not looking for outliers, not looking for cases where injuries or damages were far too low or injury or damages were far too high looking for representative cases.

So what do we tell then, for example, Andrew Kuhn who has a state court case in Pennsylvania who couldn't participate in this MDL because he has viable claims against his treating physician and there was no diversity, who has what Cook would call an "outlier injury."

He was 22 years old, had a strut that broke, got lodged in his heart. He had one open heart surgery. The physicians couldn't retrieve the strut or find it, and they have told him

now that that strut is most likely going to have to stay in his heart because it is too dangerous to reopen.

What Cook wants to say, I think, is I am sorry, but there are cases in several states away that you couldn't participate in because you have claims against your doctor, so you are going to have to wait a year, maybe two years before you get your day in court. Andrew Kuhn -- in fact, all the state court plaintiffs have due process rights to have their cases heard and have them heard on a schedule that is dictated by the state courts.

But if Cook is right in their motion, I think that right goes away. And how that happens is because Judge Young, respectfully, the state courts will listen to you. They will follow your guidance, whether that guidance is express or implicit. They know that the JP, MDL asked you to shepherd what is now over 900 cases in this federal system through the pretrial and bellwether trial process.

If you look at the letter that Cook drafted for Your Honor, that they want Your Honor to send to the state courts, it says that there have been 18 corporate depositions so far, that there are 900,000 documents that were produced, and I think Cook meant to say 900,000 pages.

There have been multiple case management orders entered. There has been multiple protective orders entered, there has been privilege designations, there has been bellwether trials

that have been set. Respectfully, what I think the state court judges will hear when they read that letter is, we have got this case under control in the federal courts, and we would like -- we would like you to fall in line with the schedule that we are proposing.

Just a couple months ago I was appearing in a state court case against Cook for a filter issue over in Marion County in front of Judge Osborn. And, of course, that case couldn't have been filed here because it was an Indiana resident, and Cook being an Indiana defendant, there was no diversity. Rather than entering a case management order in that case, Judge Osborn asked, well, let's wait and see what happens in the federal court settlement conference that was held before Judge Baker several months ago.

And I think if this letter gets sent, that is what the state court judges are going to do, they are going to defer to this case and to this Court. And we know that that is what Cook wants to do because they told us that on page 5 of their brief.

THE COURT: Well, that was the purpose of my question earlier as to what was the status of some of these state court cases, whether they are on the eve of trial or what. I mean, at least my position would be, if I was a state court judge, if I had a trial that -- a Cook case that was ready to go to trial, I would try it no matter what was going

on in the federal court. I don't think if I -- if I do follow what Cook wants to do and send out a coordination order and letter, I will certainly include in something like that that this is not intended in any way to disrupt any type of trial schedule in the state court system.

MR. WILLIAMS: And Your Honor, that brings up a good point. The Plaintiffs are not, in concept, adverse to coordination. In fact, we have already agreed to do it with regard to discovery, but when we enter -- if we were to enter -- the Court would enter what Cook wants as kind of general discovery, general discovery -- general coordination order, that suggests and is, I think, intended to encourage the state courts to pull back and allow the bellwether cases in this, in this MDL to proceed. You know, a general coordination order raises some other problems too, because these state court cases are governed under different procedural rules.

You know, I think in their motion they talk about, you know, maybe joint hearings and the order that they have proposed to Your Honor mandates the Plaintiffs' counsel may then, Mike and David, stay in continuous contact with all state court lawyers and advise them of motions, hearings, scheduling issues in this case.

Just, for example, in Indiana, which there is going to be -- there is already, I think, 15 or so cases in state

courts in Indiana with Indiana residents as plaintiffs. You know, a couple of years ago Chief Justice Rush said in her Hughley decision, "Indiana's summary judgment procedure is the opposite of what summary judgment procedure is in federal court. It is much more adverse to the entry of summary judgment."

In Indiana, our courts have said that we are not bound by Daubert and its progeny. In fact, our courts have said there is no specific test on the admission of expert testimony. So I question what utility held in joint hearings in those types of situations would yield.

So what I think what the Plaintiffs would suggest that we do and what we can coordinate on is, for example, discovery, which we have already done. And there is no need to enter a separate order on that, and it is in all of our interests to assist each other. In fact, considering that we have got a lot of these state court cases ourselves and speaking ourselves to the PSC to facilitate and ease in the discovery process in those cases.

We don't need another order for that, we already have one. We can still cross-notice depositions in state court cases and federal court cases, which is done in MDLs all the time. Rather than a general coordination order, we think these issues should be dealt with one at a time. If Cook believes or if the Plaintiffs believe that there is a specific

issue that would benefit from federal state court coordination, we should raise that issue one at a time and allow, particularly the Plaintiffs' counsel, to evaluate the issue in context and say, is this really beneficial to the state court plaintiffs that we represent?

THE COURT: For example?

MR. WILLIAMS: For example, if they were to say well, you know, we are going to move to exclude a causation expert, and then we could come in and analyze that situation and say, well, the state court is at issue here. We may be using this same expert, apply wholly different standards. There are different facts and issues that are necessary for the state court judges to make that decision, and there is no utility. There is no, there is no assistance in that type of coordination. I think to do anything else will chip away at the due process rights of the state court plaintiffs and the notions of federalism.

There is a mention of the Actos MDL that Judge Doherty had or still has, I believe, and in an opinion that is cited in Cook's brief, she quotes the United States Supreme Court. It says: "The national Government will fare best if the states and their institutions are left free to perform their separate functions in separate ways," which I know is not a concept that Your Honor would disagree with. But I think that keeping that in mind, we can't request efficiency when it

costs the sacrifice of due process or fundamental rights of those folks who had their claims in state court.

And so before I conclude, Your Honor, there was just one more thing I needed to mention. In the order, another reason we -- this order that Cook proposes shouldn't be entered, it places the -- they attempt to place a very large discovery burden on the PSC, meaning Mike -- I am sorry, Mr. Heaviside, Mr. Martin, Mr. Matthews, and myself. They request the Court, in that order, to order us, as lead counsel, to respond to discovery requests that are served to Cook in the state courts.

They suggest that they tell the PSC, the four of us, what they want to produce in response to state court discovery requests, and then the burden would be on Plaintiffs' counsel to respond to that discovery. And before I sit down I just wanted to say that we have a specific objection to handling their state court discovery. But unless Your Honor has any other questions, we would ask that the motion be denied.

THE COURT: All right. Thank you, Mr. Williams.

MS. PIERSON: Final reply, Your Honor?

THE COURT: Sure. Reply, Ms. Pierson?

MS. PIERSON: Just a couple of points in response to Mr. Williams. First, Mr. Williams mentions a couple of times that because there is a common benefit order, that somehow we don't need a coordination order. It is probably not a

surprise to you to know that the common benefit order does not benefit Cook in any way. The common benefit order benefits only the Plaintiffs' lawyers.

So while it allows them to essentially tax one another in state court or federal court to the extent that materials are used and shared between those lawyers, there is nothing about the common benefit order that enables Cook to in any way achieve any efficiencies between the cases. A coordination order is entirely different than a common benefit order.

A coordination order like this would give Cook the ability to say to the state court, look, to the extent that there have been depositions taken in the MDL proceeding and those depositions have not been cross-noticed, we would ask that you, state court, allow the Plaintiffs to use these depositions if they choose to use them. The state court could allow the Plaintiffs in those cases to take a second deposition if they want to, but it really encourages the use of discovery that we have already done in this MDL.

Likewise, absent a coordination order -- or speaking of the common benefit order, the common benefit order, for example, doesn't do anything to address the issue that Cook will face, which is redundant discovery between this proceeding and state court proceedings.

Could a state court judge still allow a plaintiff to serve redundant discovery if they choose to? Yes, they could.

But informing state court judges of the fact that there exists discovery that has already been taken and that plaintiffs have access to that discovery, it helps to encourage the parties to work together and with the state court to avoid redundant discovery.

THE COURT: Well, wouldn't that be done in any case, if you are defending a state court, in a state court case and plaintiff requests a deposition, couldn't you tell and inform the state court judge that, hey, this deposition has already been taken and they are free to have it?

MS. PIERSON: We could, on a one-by-one individual basis issue by issue by issue by issue. And we will still have to address some of those issues individually. All the coordination order asks you to do, Your Honor, is to send a letter to state court judges letting them know this is out there. This MDL is out there. Here is what has been done, and issues may come up from time to time in your litigation where there is the ability and need to think about what has already been done. It is the opening salvo. It is not the be all, end all of what happens with respect to coordination.

The primary argument that I heard Mr. Williams make was that coordination order is just simply too heavy handed with state court judges, and I disagree. If you look at the content of the letter, it is not at all heavy handed, and candidly, there is no one in this courtroom that can make a

state court judge do anything that they choose or don't choose to do.

The act of somebody else, great example of that, although there was a coordination order and a very positive coordination there. In fact, the court there noted that coordination is advised, encouraged, and welcomed by both the federal and state courts.

There were still state court cases that proceeded to trial during the pendency of the MDL. So a Louisiana state court judge chose to do just that. So there is nothing that prevents state court judges from advancing their own trials if they choose to. We are early in the process, so we have the opportunity to reap the benefits of efficiency, and while Mr. Williams' description of Mr. Kuhn is very dramatic, the fact of the matter is that an answer has not even been filed in that case yet. It is incredibly early in the process, and the judge there can decide to advance the Kuhn case ahead of this MDL or for it to follow the MDL. He, he will make the decision that is right for Mr. Kuhn and for Cook in that case. I trust that well.

Your sending a letter to judges informing them of the existence of this MDL and where the MDL stands, I believe, will be interpreted as it is intended, which is informative, opening the lines of communication between you and those judges and encouraging all of us to think globally about how

can we be efficient, and how can we be fair?

Just a couple of last points, Your Honor. There are nine Indiana state court cases today, a slightly different number than what Mr. Williams mentioned. The difference between nine and 15 is not the point, but I say that to tell you there are nine plaintiffs in Indiana. Remember, there were 186 total across the state court cases. So mini coordination in the State of Indiana, that alone will not solve the issue. There really is a need to open a channel of communication nationwide as it relates to this litigation.

When Mr. Williams raises the point of handling issues, issue by issue, things like Daubert, we will still have to handle those issue by issue. If either party thinks that joint Daubert hearings, for example, are a good thing, this order doesn't prevent that. But instead, it opens the door so that the first time a state court judge hears from you about maybe we should have a joint Daubert hearing. It is not 12 months down the road, but instead, is today. Our hope is that there will be communication between you and the judges and the state court proceedings, and to the extent that the letter that we proposed in your view is somehow heavy handed, you can modify that letter, of course.

The Plaintiffs' response includes no specific changes to the letter or to the order whatsoever, but Your Honor has the ability to modify that. The letter includes the status of

this MDL in terms of what discovery has been taken, depositions and documents produced. But if Your Honor views that as too heavy handed, take that part out.

Instead, Cook will inform this, each of the state courts about that, but I think the state court judges would appreciate hearing from you and your position as to what the status of the MDL is. Those are just facts. They are not conveyed in the letter in any kind of heavy handed way. Thank you, Your Honor.

THE COURT: All right, thank you.

Mr. Williams?

MR. WILLIAMS: Your Honor? In suggesting that the state courts are free to do whatever they want to do because they have, you know, they are judges of a separate sovereign, I think in concept, is fine. The order that they ask this Court to enter says the court encourages state courts with actions to adopt this order or a similar order. The Court also encourages the parties in those state court actions to agree to abide by the terms of this order.

Those statements, in conjunction with a letter coming from Your Honor, I think respectfully will be interpreted by state court judges as if even out of a notion of comity or respect amongst judges, Judge Young is running his MDL, and it seems to be going well. I am not going to do anything at this point because I don't want to frustrate the hard work that is

going on in the federal courts.

And while that is a good -- it can be considered a laudable notion in some respects, that is when the rubber meets the road with regard to individual plaintiffs and their rights to press their cases and get before a jury so that their claims can be heard.

THE COURT: What would the harm be if I sent a letter to the state court judges just informing them, bringing them up to date on the MDL, 918 cases? We are coordinating all of these cases in the MDL, this is some of the stuff, some of the procedures that we have already implemented in this MDL, and I am writing to advise you of what we are doing and take a look at these procedures and case management plans and other things that we have done. If it looks good to you, happy to have you do it. If you have got your own procedures in place and you want to use those, that is fine, too.

Just wanted to open up a line of conversation here between us. If you have got concerns about your cases and I have got concerns about mine or the lawyers on either side would sit down and discuss, certainly understand. I can tell them I was a former state court judge myself, that I understand that they run their docket, and certainly any suggestion of the MDL taking precedent or asking the state court cases to stand down is not intended, something along those lines just to -- what would that hurt?

MR. WILLIAMS: If that communication, Your Honor, I think came by way of a phone call, I don't know that it would hurt.

THE COURT: I am not going to make that.

MR. WILLIAMS: No, I understand, I understand. But there is something about a letter coming from the federal court and the federal judge in charge of this MDL that has -- if this order gets entered, states that you are --

THE COURT: I am not saying that I would issue that particular order.

MR. WILLIAMS: My, my fear is that any written document from this Court talking about what is happening here will be read -- no matter what, no matter what I -- and this is just what I believe.

THE COURT: You are not saying it would give state court judges an excuse not to work on the case, right?

MR. WILLIAMS: That is not what I am saying at all.

THE COURT: Okay. All right.

MR. WILLIAMS: But if, if the state court judge is aware that the federal judge in this case is managing almost a million pages worth of documents and tens upon tens of depositions and all of these other complicated issues, they may very well be inclined to see how that case develops rather than push their case to trial even if that is the plaintiffs' desire.

THE COURT: Yes, give them an excuse not to work on it.

MR. WILLIAMS: That is it -- that is not -- I appreciate Your Honor's insight. If I can have one moment, Your Honor.

THE COURT: Sure, sure.

MR. WILLIAMS: That is all I have, Your Honor.

THE COURT: All right, thank you.

MS. PIERSON: Your Honor? (Inaudible)coordination orders from other (inaudible) you would be welcome to look at.

THE COURT: Sure. Please. Okay. Is that all on this?

MS. PIERSON: That is all.

THE COURT: Okay, all right. I will take a look at all this and get something out. Okay, thank you.

A VOICE: Your Honor?

THE COURT: Yes.

A VOICE: If you wouldn't mind reading to me the docket entry on the Syngenta GM2 orders?

MS. PIERSON: I will do that.

A VOICE: Okay. I just want to make sure we have them.

MS. PIERSON: (Inaudible).

THE COURT: Okay.

MS. PIERSON: The next issue I will present, Your

Honor (inaudible).

THE COURT: Yes, proposed case management plan.

MS. PIERSON: Your Honor -- couple slides that lay out the deadline. We can do that (inaudible) case management plan by e-mail (inaudible).

THE COURT: I have got, I have an e-mail from you I think from this morning --

MS. PIERSON: Yes.

THE COURT: -- regarding some corrections.

MS. PIERSON: Yes. We conferred late yesterday. So we have not yet supplied to the Court the actual text of the order, but we will do that after the hearing today.

THE COURT: Okay.

MS. PIERSON: We were able to reach agreement on what the schedule ought to look like for Hill, but we can use some direction from Your Honor as it relates to the Gage and Brand cases. So I have put together in just a quick couple of slides so Your Honor can see an overview of what we are going to be doing in the Hill case in the next few months. We will spend this fall doing fact discovery, written discovery, depositions of Plaintiffs.

We are in the process of collecting medical records currently for Miss Hill, and then there will be depositions of the treaters and fact witnesses. These, these cases, unlike some, some others that Your Honor may have handled or that I

have handled, these cases have a lot of fact witnesses.

They are frequently multiple doctors from different disciplines who treated the plaintiffs in these cases. The Hill case is a good example. There are nine different doctors who will testify on core issues in the case and may cross a number of different disciplines.

So we will spend this fall doing that good work. The Plaintiffs would disclose their experts in January. We will disclose our experts and request IMEs in February and March. Our hope is that we will be able to take the Plaintiffs' experts' depositions between January and March, and then between March and May the Plaintiffs will be taking the expert witnesses of Cook.

Again, just to give you a picture of what will be happening during that period of time, Your Honor, our estimate is that the Cook side will have probably between six and ten different experts in these cases. I can't speak for Plaintiffs. I know that the Bard Plaintiffs, in requesting the creation of an MDL there indicated they believe that those cases would take ten expert witnesses on the Plaintiffs' side. But these fine lawyers probably have an ability to streamline their side more than that, but I will let them speak to it.

Regardless, we are talking about a lot of experts and a lot of expert depositions that have to happen in the two, 60-day time periods that are described here. Cook

will -- both sides have the ability to file motions for summary judgment and Daubert, of course, and that will happen by June the 9th, really, a very quick turnaround from the time that expert discovery closes.

So under the local rules of this Court, briefing will be complete on motions for summary judgment and Daubert on July the 29th. Presumably the Court will order a hearing on those motions which are likely to be very extensive, and then the case should be trial ready by October of 2017.

That gives Your Honor 90 days to address the motions in this case, which as I indicated at the last hearing, we anticipate will be extensive, particularly for the first bellwether trial. So sorry about that in advance, and hopefully 90 days will be enough for you to do the good work that you need to do. That is the schedule that we have agreed to in Hill.

THE COURT: Okay.

MS. PIERSON: Okay. As it relates to Gage and --

THE COURT: Mr. Williams or Mr. Martin, anything to add to that?

A VOICE: Yes, Your Honor.

THE COURT: Okay.

MS. PIERSON: Sorry.

A VOICE: So with respect to, with respect to this, there are several aspects, Your Honor. Shall I just start

from the beginning?

THE COURT: Well, Miss Pierson said this is what the parties have agreed to, and I -- when I asked you if you had anything to add, I thought you would say, Judge, that is our agreement.

A VOICE: No. I -- and I don't want to -- we do have an agreement on a lot of dates.

THE COURT: Okay.

A VOICE: We don't have agreement on a couple of very important issues that -- I don't want the Court to be under the misunderstanding that we are agreeing -- that, for instance -- I will give the Court a for instance. That Hill case management plan, we don't agree that this should be the Hill case management plan. We believe this should be the Hill, the Brand, and the Gage case management plan because all three of those cases need to be worked up over the next year.

THE COURT: All right.

A VOICE: Not just Hill, and there, there are numerous reasons for it. First would be if Hill happens to settle or it -- now, and I believe that Cook will tell the Court and has told us we are not going to settle Hill, but things do change. We don't know what is going to happen in the next year with Mr. Hill. I think it is Mr. Hill; is that -- Elizabeth Hill. Okay.

We don't know how, how she is either going to or not

going to go forward to the end. Now, we believe that it will be tried, and we believe that at this point there is no reason to believe that it will not. However, it could go away.

Secondly, it -- we are already suggesting now a court date in October. Now, I guess it is 13 months, 13 months away. And if we work up that one case, and Hill is a defense pick, and it was the one that was ordered to be the first trial, then we are essentially giving up a year of, of being able to work those two cases up. And it is not going to be that much more significant work, it is just work that needs to be done.

It would be, I think, a travesty if we got -- well, it would be a travesty if we got there and Hill was no longer the case. We would have nothing to back us up. Now secondly, and I think it is going to be said, you know --

THE COURT: I don't mean to interrupt, but if I set aside three or four weeks to try Hill and it, and it is resolved, I am going to want to have something ready to go to fill that three or four weeks. Because, on my docket, to find you another three or four weeks, would put you probably in the mid-to-late 2018.

A VOICE: Right, if we start over.

THE COURT: Right, yes. So I understand what you are saying, and certainly, I would want to make sure that if we do have set aside basically October to try Hill, that if

that case is not ready to go or is not going for whatever reason, I would want something in this MDL to fill that time slot.

A VOICE: Right.

THE COURT: Our docket is just too busy to, to give up three or four weeks of schedule.

A VOICE: To further give the Court some comfort that it would be efficient and fairly simple to do this, to prepare all --

THE COURT: Remember the old days in federal court when some of the judges would ride the circuit because there wasn't a resident judge in that courthouse, and the judge from Dallas or wherever would go down to wherever and say okay, we have got six cases here that are set for trial. If this one settles, you are going to try this one. If this one settles, you are going to try this one. You have to use your time efficiently.

MR. MARTIN: I think that is largely from where I practice in Dallas, it is largely how the state courts even do it, you know.

THE COURT: Yes.

MR. MARTIN: One goes away, you have the next one up.

THE COURT: Right, right.

MR. MARTIN: But I think further comfort is the fact

that there are, and we are agreeing to some limitations on the numbers of witnesses, the fact witnesses to be deposed. I think that the, that the --

THE COURT: Stipulations?

MR. MARTIN: -- two fact witnesses, you know --

THE COURT: Surely there will be a bunch of stipulations here, I would imagine.

MR. MARTIN: Yes. We have got very limited discovery on case specific. We will have, you know, an implanting physician and a sales representative probably and maybe a regional manager or something. And we have -- and then there will be the damages witnesses for that, particular experts for that particular case if there are any damages testimony such as economic damages and economists or a life care planner. There may not even be an economist and a life care planner in these cases, given what these cases are about.

However, I can, I can foresee that in Gage there might be a life care planner and things, but anyway, largely -- well, I want to point out that largely the experts that we will have and we will name and we will provide reports on will be general -- they will write a general report. And then with respect to the experts, for instance, it might be an interventional radiology expert that is going to talk globally about these things, about whatever their opinions are about the product and to the extent that they have knowledge about

those particular areas.

There may be, for instance, a hematologist that may talk about -- those are going to be probably not only these three cases will benefit from them all but can be named -- will be named in all three. But they will have probably precisely the exact same report on each case on the general area.

In case specific the way I have seen it done and the way I know it is being done in the TVM litigation, I have taken some recent depositions myself in those cases of the case specific experts. What happens is, the expert will draw up a report. If he has an opinion as to -- I am talking about defense experts now -- defense experts that I will be deposing will draw up a report, and then it will say, this is my general report.

And then if there is -- if he or she is going to testify as to that case, a case, bellwether case, then they will have an addendum. I would call it an addendum on the report or a separate report that is literally called case specific report. So the only ones we have, because we only have three trial cases, then it should work very easily.

Your Honor, you know, and I believe this is covered within the agenda. We do have three cases. The first one is a Plaintiffs' pick, and when the Court is making its determination as to which case should go next, either after Hill or possibly in place of Hill if something happens to

Hill, we believe that it should be the Plaintiffs' pick, Brand, and we believe that would be a fair way to -- because I think we are going to need to look at it pretty quickly if not now. Put the Plaintiff pick next, and the third case is another defense pick.

So if we know that Brand and Gage would go in that order, then we can also then talk, talk about -- or whatever the order is, we can also then maybe talk about how to go about if Hill does get tried, okay? And we presume that it will, then when will the next trial setting be?

If we have worked these cases up such that they are all going to be ready in case Hill does not go or settles or dismisses his case, then there is no reason why to, we believe, to have a significant difference and a significant lag in time until the next trial. If October, for instance, is Hill and it goes -- and I don't think it will be a four-week trial, but, you know, it might. Maybe it will be a two-week trial, could be three. I don't think it will be a four-week trial, but whatever it is.

Then we get through the holidays and maybe have the next one up November, December, January, have that one teed up and try it in January, and then try the next one in April. I, I think that kind of a quick one, two, three, if they all go, and I think everybody expects them all to, we can really make some progress in putting a value on the case as a whole, which

I think is, is the purpose of the bellwether trials in an MDL anyway.

So that would be kind of my suggestion, Your Honor, that we -- we work them all up, and we have got plenty of folks to do it. We have, I think 23, 24 folks on the Plaintiffs steering committee that are chomping at the bit to do something, and their law firms are chomping at the bit to help and are enthusiastic about these things. And, of course, we know -- we know the abilities and the numbers that Cook has two different law firms that are fine law firms and have a lot of lawyers already on these cases.

We can certainly work up three cases at the same time so we don't end up wasting a year if something happens.

THE COURT: Thank you.

MR. MARTIN: Even if Hill goes, if we don't work up the other ones, we are not going to be able to try another one, you know, fairly soon thereafter. So thank you for your free time this morning, Your Honor.

THE COURT: Sure.

MS. PIERSON: Your Honor? I promise, Your Honor, this is the last issue I will address, and then you will hear from one of the finer lawyers on this side of the table or multiple. Just a couple of responses. The reason I raise this issue with you today, Your Honor, as here is the schedule that we have agreed to in Hill, but we would ask for some

direction on the other, other cases and what your preferences are. And even what you have said so far is very helpful.

I think that the best solution coming out of today, once we, with Your Honor's permission, once we understand what your preferences are, is for the two sides to confer again and do much like we did in Hill and come up with a schedule that we think is workable.

A couple of just points as, as an opening matter, though, Your Honor. We are not suggesting that Your Honor set the Hill case for trial, wait around until October of 2017 and then all of a sudden we work up another case for trial. It wouldn't be efficient for the Court, it wouldn't be efficient for the parties. It is not at all what we have in mind, but the fact of the matter is, that these are big cases. They, they are important cases to both sides, and they are very, very fact intensive.

As I mentioned to you, the numbers that we were talking about on Hill in terms of nine different disciplines of doctors, potentially ten experts on each side. You have got six fact witnesses that are involved in addition to the doctors. The numbers, when you look at Gage and Brand, are also very similar. So preparing one of these cases, even just for the summary judgment stage and expert stage, that will be a tremendous amount of work. I mean, it literally is not possible for Cook to simultaneously do discovery in these,

these three cases on the same schedule.

It is possible, though, and we are prepared to put all the manpower and resources that we need to do this. It is possible for us to run parallel tracks of discovery on the three cases with staggered deadlines just as Your Honor would try these cases presumably in a staggered fashion. And, you know, my experience in some other MDLs has been that the first -- the break between the first bellwether trial and the second bellwether trial is helpful for the parties and the Court.

It gives Your Honor an opportunity to rule on motions or consider issues, get your staff a chance to catch up on the other matters on their, on their own docket, and it gives the parties a chance to streamline their cases so that we all learn from the first bellwether trial. And we will all do a better job in the second bellwether trial by virtue of having done the first bellwether trial. It forces all of us to narrow the issues and think about what witnesses do you really need and not need.

So setting the gap between the first trial and the second trial, particularly if the first trial is in October and then we run into Thanksgiving and Christmas, that gap probably needs to be about six months. I don't know if that is workable on Your Honor's schedule, but if it is, that is likely what it will take to do the intensive trial preparation

that happens between the first and the second trial.

That doesn't mean we are sitting around on the second trial until then, quite to the contrary. The deadlines for the second trial and my experience in some other MDLs has been that those deadlines are staggered by a few months, three months or two months, something that gives the parties an opportunity to do the good and thoughtful work that they need to do.

You know, contrary to what Mr. Martin said, the experts in these cases are not likely to be identical between the cases. The cases present individual facts, different issues. Some of the Plaintiffs have had spinal surgery, others have not. It is possible that there may be experts related to that procedure that are called in one case that are not.

The other issue that we have in any medical products case is that both the experts and the fact witnesses, the vast majority of them are doctors, and good luck getting a doctor, even an expert that you are paying to basically clear a six-month period of time so that he can prepare or she can prepare expert reports in multiple cases, be deposed in multiple cases, potentially testify at trial in multiple cases. It is, frankly, just not possible to get any physician to do that with his schedule unless the only thing the physician does is testify, and I don't think either side wants an expert like that in these proceedings that require really

thoughtful testimony.

What Cook would propose, and if you could, John, go to the next slide. What Cook would propose is this, that now -- now that we know that Your Honor's preference is to stagger these trials somewhat, if you can tell us based on your schedule the amount of time that you would like to see between the trials that we, in turn, work together to come up with a schedule to try those cases, and it would be a discovery schedule that is not in parallel to but is working side by side the schedule with Hill.

There were a couple of other things that Mr. Martin said that I just want to comment on. A couple of times I heard Mr. Martin say we need to have these cases simultaneously scheduled for trial in October of 2017 so that it is kind of a next-man-up situation if one case goes away, and I heard him -- I heard him suggest that these cases might go away for whatever reason.

You know, let me be clear to you as I have been clear to the Plaintiffs. Cook will not settle these three cases. We will try these three cases, so if these cases are to go away, they will go away for only one reason, and that is because the Plaintiff dismisses these cases.

The fact that Mr. Martin is suggesting to Your Honor now the possibility that Hill and Gage can go away --

THE COURT: It is a little bit -- I am worried

about, as we all know, certainly in Northern District of Illinois this is happening. That on the eve of trial, these cases are dismissed, and then the schedule, three, four weeks of blank are on a schedule, and it -- although you can backfill it in a little bit, but it is difficult.

MS. PIERSON: Yes. So here is how Judge Pallmeyer dealt with that, and fortunately, we did not have dismissals on the eve of trial. But there were dismissals around the middle of discovery or towards the end of discovery. What Judge Pallmeyer ultimately -- eventually she entered a Lone Pine order, but before that what she did was to enter an order that told the Plaintiffs directly by this date, you will tell the Court and the other side whether you are going to dismiss or not.

Now, it is reasonable for Cook and this Court to know at some months before the trial whether the Plaintiffs intend to prosecute it to trial or not, and I have talked to Mr. Martin and Mr. Williams about this. I understand the Plaintiffs' perspective that things can happen in discovery. You get a Plaintiff who turns out to be a train wreck in deposition or something is said in a physician deposition that you don't anticipate. I understand that that happens, but plaintiffs always have an obligation to screen their the cases under Rule 11, and there is a date by which during discovery that the Plaintiff should be able to assess whether they intend to

proceed with the case or not.

This Court should, in its case management order, include a date by which the Plaintiffs have to affirm to you and to us, will they proceed or will they not proceed? And if on that date the Plaintiffs tell Your Honor or Cook it is our intent to dismiss the case, then we can adjust the schedule to move up the second case that will be tried.

You know, we -- we are talking about trial plans for these three cases, but we are fully prepared to adjust the second and the third case if the Plaintiff should dismiss the case. But what would not be fair would be for the Plaintiffs to do that after all the work has been done on all the experts and all of the depositions and on the eve of trial.

The order that Plaintiffs provided to the Court, the language that deals with this section, it literally proposes that the Plaintiffs could decide the day before the Hill trial that they are going to dismiss and all of a sudden we should stand up and be ready to try the next case up, whatever it is. That is impossible. It just won't work.

I can't get physicians, and Plaintiffs won't be able to get physicians to hold dates on their schedule.

THE COURT: I agree with that.

MS. PIERSON: It won't work.

THE COURT: I agree with that.

MS. PIERSON: The other place that it becomes very

complicated for Your Honor and your staff is when it comes to deciding motions for summary judgment, Daubert, and the parties briefing those motions. It won't make sense to brief Daubert motions and motions for summary judgment and for you to be forced to decide those simultaneously in three cases. You know, the paper would fill your office, if that is what we were asked to do. So we particularly need to have staggered deadlines for the three trials for that significant motion practice.

So that is a long way of saying, Your Honor, this: Trust us to work out a schedule for these two cases and how they can proceed. I believe we can do it. We conferred well together yesterday, come to agreement on this.

What we need to hear from you, Your Honor, is your preference as to the amount of time that you want between the trials, and our recommendation is that you schedule six months between the first trial and the second trial and you could shorten that time between the second trial and the third trial. If you give us that direction, I think we can do the heavy lifting from there, Your Honor, and come up with a joint proposal that would be helpful.

Mr. Martin made this comment at the end, and I feel like I need to address about what the second trial should be and which case Your Honor should hear second. Your Honor doesn't need to decide that issue today, and I think that is an issue

that the parties ought to be entitled to brief. And we may be able to reach agreement on it, but that is something that really deserves some time and attention and thought.

You know, our thought right now is that the Gage case really ought to go second, that it represents a different class of product and the Tulip product and that it will be important for Your Honor to address the significant issues related to the Tulip product which are different from the significant issues related to Celect. And that if Your Honor were to issue rulings on motions for summary judgment or Daubert in those cases, it could impact significant groups of cases in the MDL and really help to win the issues or even the number of cases in the MDL.

So that is our position, but we think that is something that is worth conferring about and then submitting a paper to you on that point. But there is no reason the Court has to decide the issue today.

THE COURT: You know, I would -- I am inclined to follow Mr. Martin's suggestion here. Hill is the defense pick. The other case, Brand is Plaintiffs' case. More than likely I would -- you know, I can change my mind, but at this point I would think that might be the best way to do it.

MS. PIERSON: Well, we, of course, defer to your judgment, Your Honor, on the order of trials. Certainly the process that we went through to get to the bellwether

selection we believe makes these picks the Court's picks and not the picks of the Plaintiff or Defendant.

THE COURT: I understand.

MS. PIERSON: That kind of logic about who picked it isn't really, what we believe, is a thoughtful logic about how to approach what is the second case that will decide issues most likely to influence the number of cases in the MDL. But we defer to whatever Your Honor decides.

THE COURT: Absolutely. I am just telling you what I am inclined -- not whether I will do it, but I am inclined.

MS. PIERSON: Understood. We would ask for an opportunity to brief that issue but, of course, will defer to your judgment.

THE COURT: Sure.

MS. PIERSON: Thank you, Your Honor.

THE COURT: Mr. Martin.

MR. MARTIN: Yes. I would suggest, Your Honor, that we have briefed that and to each case and gave its relative -- the facts of the relative merits, and that -- that briefing is the briefing from which the Court made its order. So I would simply suggest that that briefing has been done, and if the Court needs to look at what is the Brand case, what is the Gage case, certainly I don't think there is anything more that could be said than being specific about each case as we were. So I think it, it is ripe for the Court's ruling on that.

I would also -- I would simply want to now respond to this. This has been brought up on this portion of the argument. On the parties to confer on schedule, I can tell the Court that we did -- we have conferred on the schedule, and we can agree.

And I can tell you what we -- and I believe that is ripe for the Court to decide, and I don't need to go into detail because I think the Court has already heard. And I think we should have a short period of time, not a long period of time between trials, especially, especially when -- if what is meant by counsel the discovery schedule to parallel Hill.

So, and I think that is a good thing if we are talking about parallel, parallelling Hill, that the discovery schedule parallel, that means working them all up under the, under the deadlines and that we are going to be doing hopefully over the next 13 months before trial. So if that is the case, yes, discovery schedule to parallel Hill, that is what we want too, Brand and Gage.

And then finally on the, on the -- and we would suggest that if we do that, Your Honor, there is not much left to do if, you know. I mean, what are be going to be doing for six months if the discovery is complete and all of our experts have been deposed and, you know, with nothing to do but sit around? And I guess maybe have a motion in limine heard or something, but I know there is stuff to do, but not six

months. And finally on the --

THE COURT: You understand that I have got other cases on my docket as well, so I am not going to be sitting around for that period of time.

MR. MARTIN: Well, that is my suggestion -- well, no, I didn't suggest the Court would be sitting around. I am suggesting that the parties, with respect to the prep, any further preparation for the cases, not the Court. The Court has plenty of trials going on, but the parties will be -- we won't be sitting around either. I am simply saying it doesn't take six months to prepare a trial after all of the discovery has been done and after all of the depositions have been taken and you have prepared the case for trial, six months to, you know, get your opening statements ready or, you know, those types of things. That is what I am suggesting, Your Honor. So we would suggest more like, more like a two-month after. I think it would benefit the MDL.

As to the deadline, I can affirm right now because Mike Heaviside is the lawyer on Hill, along with Joe Johnson in the Hill case, and they intend to try that case. Mike gave me -- you know, certainly if it doesn't go for whatever reason, if it is dismissed or settled, I don't think there ought to be punishment for maybe that just happening. But I can affirm right now, so this will be my deadline if they want a deadline. Right now I can affirm that there is an intent to

proceed to trial, having spoken to Mike Heaviside and having spoken to Joe Johnson, the lead lawyers on that case. They intend to do it in 13 months, if the Court does that.

So that -- here is a little note from Mike. "Ben, if my client tells me to dismiss her case, ethically what do I do, force her to try it?" And so this sort of affirmation business isn't probably going to benefit anyone, and it creates some ethical problems anyway. So thank you, Your Honor.

THE COURT: All right, thank you.

MS. PIERSON: Just a couple of responses (inaudible) if the lawyers for Hill are saying now they will try this case, and we are telling you we will not settle this case, we have asked for staggered deadlines. We know we are going to try the Hill case in October. We will work up a schedule that gives us staggered deadlines. The only issue is when do you want to try the second case, and when do you want to try the third case?

But this point that Mr. Martin is making about, you know, what do I do if my client wants to dismiss? The whole, the whole point of including in a plan a date by which they have to dismiss is that they have that conversation with Mrs. Hill now and have the conversation with Mr. Gage now and have the conversation with Mrs. Brand now about whether they intend to proceed or not.

I have suggested that we create a date that is somewhere in the middle of discovery so that they have some time to hear the important witnesses and assess their case. It is more than what the Plaintiffs are asking for, but it seems very reasonable to me to have a deadline by which there is a forced conversation between the lawyer and the client about will they pursue their case to trial or not.

THE COURT: Okay.

MS. PIERSON: Is there anything else? Thank you, Your Honor.

THE COURT: Thank you.

MR. BOYERS: Your Honor? Jim Boyers on behalf of the Cook Defendants. I would open with some statistics that I will share on the status of discovery.

THE COURT: All right.

MR. BOYERS: May I approach?

THE COURT: You may.

MR. BOYERS: Your Honor, I will open, and Mr. King will close on this status report. But initially I wanted to go over the written discovery and ESI status, which was addressed somewhat in the briefing on the coordination order. But, Your Honor, we have responded to three sets of general written discovery served by the Plaintiff, their master -- their initial master set in April of 2015 and more recently, their second set and third set of requests for

production in June and May.

So at this point, we have produced over 941,000 pages of documents. That includes 173,000, almost 174,000 actual documents. The total pages is likely more than the 941,000 because many documents were produced natively. So, for example, a 50-page PowerPoint would only get one Bates number because it is produced as a native, one document, one Bates number.

The total gigabytes is now approaching 160, and we have produced 25 custodial files chosen by the Plaintiffs for general corporate discovery. And in the course of discovery pool, discovery, we have produced five custodial files from district managers or sales representatives. And to further that point, we also responded to case specific discovery in the discovery pool cases as well.

So we have gone beyond custodial files, we have done productions from databases. We have done productions from nonindividual custodial files through the course of discovery. We think we are getting to the end of general corporate discovery. It has been a lot of work, and we have had a lot of discussions.

And one point I wanted to raise on that, Your Honor, is we think it would be helpful to the process if we had discovery liaison counsel on the Plaintiffs' side and the defense side. Mr. King and I have served in that role on

discovery issues not formally but in practice, and we have had some discussions recently where -- and not just recently but dating back into the litigation we had an issue where we went back and forth with Mr. Heaviside's partner, Miss Reed Zaic, on a particular issue. We had some correspondence over several months, and then it was quiet. Then we heard from another attorney on that issue, a Mr. Stoller out of Arizona, and we had correspondence back and forth on that.

And more recently, I have talked to Mr. Schultz out of Florida on discovery issues. And I think something gets lost in translation every time because it is a new person getting involved and not having updated information.

We have also been working more recently on modifying Case Management Order No. 4 dealing with the Plaintiff Profile Form Defendant Fact Sheet, and I have worked with three different attorneys from the Plaintiffs' side on trying to reduce the burden for both of us on doing that discovery in nonbellwether cases. And I think in that correspondence, issues have been lost between the different people that I have been communicating with on those issues, so we would ask that the Court direct the Plaintiffs to select two point people for them on discovery issues so that we can avoid repeat conversations on those issues. And I think it would add efficiency to the process going forward.

THE COURT: All right. Mr. Martin? Any thoughts

about that?

MR. MARTIN: Yes. And, you know, I don't want to appear to be fighting with the Court on every point, but I do have to inform the Court. I have asked since this question of they want a liaison or two to be, I guess, the spokespeople for any issue regarding the case.

Number 1, that is an impossibility because what -- what that would entail are two people out of a group of 25 plus their law firms dealing with separate aspects of issues in this case. That is a great thing about having a steering committee, but if every time we speak with Cook about a sub-issue that one of our folks like Matt Schultz is the guy who has been dealing with now, is the point person, and I told them he would be the point person. But he got to the point of being the point person for the Defense Profile Forms and now the changes that are being suggested and made in the Plaintiffs' fact sheets and profile forms too.

So I, I certainly don't want to be the person that has to have knowledge of all of the sub-issues. No one person should be able to, very inefficient. And I would simply suggest also, I have asked for some specificity by counsel. I asked yesterday again. I have not seen that this is an issue.

Nobody has ever given me any details on -- that would have come to me, I think, and suggest or Mr. Heaviside or Mr. Williams to come to us and tell us if there is a specific

problem as you have got with somebody's, somebody's lines being crossed.

I think, I think the real issue is we do have a small group of people that we have put in charge of, you know, looking at the discovery, finding out what has not been responded to, going ahead and moving for, moving for, to compel, if necessary, just getting this discovery in order. And I don't know if that is the impetus for this, but I, I don't think anything is broke, and as Darrell Royal would have said, "If it ain't broke, don't fix it." And I don't think it is broken, and I have not once been told any of the specifics, and I am still not hearing specifics, really.

THE COURT: Mr. Boyers?

MR. BOYERS: Your Honor, I can give specifics. In fact, I did. I did -- the one example would be with Miss Reed Zaic addressing an issue, having it sit for months and then having Mr. Stoller come and raise a similar issue with me on the same topic. And it was no coordination between them, but more recently, and I would expect Mr. Martin to be familiar with this because we had an exchange last week.

I negotiated with Mr. Williams on Defendant Profile Forms and Case Management Order No. 4 and the changes we are trying to implement together, and we were working very well together. And then Mr. Martin took issue with some of our exchange, and then it shifted from Mr. Martin to Mr. Schultz coming into the

fore. And Mr. Schultz and I had a very productive conversation yesterday, but I had to have three different discussions where I talked about the same things, the same points three times. That is the problem, Your Honor. It is a burden on us when there is a lack of coordination on their side, and that is why we are asking for a point person or, or point persons.

THE COURT: I think Mr. Martin has just indicated that Mr. Schultz will be the point person.

MR. BOYERS: On all? Just on --

MR. MARTIN: On the order.

MR. BOYERS: Or on other issues?

MR. MARTIN: As we go, as we go specifically with an issue, the issue of the change in the Defense Profile Form and the changes in the Plaintiffs' fact sheets and profile forms, Mr. Schultz is now the -- we can call him the liaison on that issue. If there is another issue that comes up, I am certain that there will be a point person for that, but this isn't the only issue that is going to come up.

And Matt doesn't have time to be the point person on every discovery issue. That, that is the problem. We have got a big group, and we want to use our group. Now, I will say this. I will certainly go back to our group, and I will have a conversation that there has been a suggestion that maybe the lines are getting crossed.

THE COURT: Yes.

MR. MARTIN: And if that is the case, whether it is or not from here forward, let's make sure that we, we, that we have our bases covered on that, guys. And I think that will solve any problem. We have got some normal order that I or whoever is going to be in charge of having these conversations, but I can't do it.

THE COURT: Mr. Boyers?

MR. BOYERS: Your Honor, if they narrow the field and define who is going to be responsible for issues, the issue I see is, I recently received correspondence from five different people who were identified who would be talking about written discovery issues. Five people is a lot of people to talk to, and who has the final word?

Am I going to get down the line in discussions and then suddenly there is a sharp turn to the left or to the right? That is what we are looking for is a liaison point person to be involved in those discussions so that we can be efficient. I am dealing with a lot of different people. Thank you, Your Honor.

MR. MARTIN: Let me have my conversation with my folks, and if there truly is a problem that develops, by all means, I --

THE COURT: What Mr. Boyers is saying, I think, is legitimate concern, and if you would address your group on

that. And if we continue to have problems at our monthly status conferences we can address that, but it makes sense to me not to have Mr. Boyers discussing the same issue with four, five different people.

MR. MARTIN: If there is a problem, we will get that solved.

THE COURT: Okay, good.

MR. MARTIN: Thank you, Your Honor.

THE COURT: Okay. Mr. King, you have been waiting patient.

MR. KING: Your Honor, I will just briefly report to the Court on the status that is summarized under section Roman Numeral No. 2.

As Jim pointed out, he has been basically our point person when it comes to written discovery and document production, and I have been basically the point person when it comes to depositions. And Mr. Martin and I have worked together to schedule those without really any incidence so far as I am aware.

We have produced, at this juncture, 18 Cook employees for corporate depositions. Seven of those were, I think, noticed as 30(b)(6), 11 not noticed as 30(b)(6), I guess individually. And we have got a 19th scheduled for September 27th and a 20th scheduled for -- well, we are trying to schedule that. And, in fact, we are bringing back Mr. Molgaard-Nielsen from

Denmark to complete his deposition, and also the Plaintiffs have asked for more time beyond the seven hours that are allowed by Case Management No. 2 and the rule, and we have agreed to that. They wanted five, I proposed three, we have compromised on four. So we are getting along pretty well, I think, on depositions.

THE COURT: Great.

MR. KING: They have asked to take a few more, and we are talking about whether we will agree to anymore or not. And that is under discussion, but we have been getting along, I think, pretty well. And I would echo Mr. Boyers' comments, we appear to be pretty close to being done, at least in my mind, with general discovery on Cook, general depositions. We have done quite a bit.

THE COURT: All right.

MR. KING: Thank you, Your Honor.

THE COURT: Mr. Martin?

MR. MARTIN: You know, I will say that what has gone extraordinarily smoothly so far is our dealings with Doug and my dealings with Doug on the depositions. That has worked out beautifully, and I commend to the extent that it, it means anything, I certainly commend Mr. King in the way he has worked with us. And, Your Honor, I wanted to tell, tell you, Doug, that deposition, just because it is on, on the sheet and I want to clarify --

MR. KING: Sure.

MR. MARTIN: -- that 20th deposition on regulatory reporting, we are thinking about pulling that one down and just not doing 30(b) -- another 30(b)(6) and maybe replacing one with -- but we will talk about that. We, we will chat about that.

THE COURT: Okay.

MR. KING: (Inaudible).

THE COURT: Well, I appreciate very much your -- the high level of cooperation you are showing here. It is gratifying to the Court to see, to see that. You are all very professional and highly competent lawyers, and we want to get these matters resolved. I think Plaintiffs do and Defendants do as well, and we are going to push into that October 2017 trial date. And hopefully that cooperation will continue.

Ben, you will talk to your folks about the discovery issues raised by Mr. Boyers?

MR. MARTIN: I sure will. I will follow it up with an e-mail to Jim.

THE COURT: Right. And then I want you to work, continue your good cooperation in working up a case management schedule for, for these trials. I think a four-month interval between trials would work, and I do have -- as I mentioned earlier, I do have concern here about getting close to trial and the case being dismissed. So I want you to discuss

how -- and you are right, Mike. If your client tells you to dismiss it, you have got to dismiss. I mean, you can't say no, you are going to go to trial. You can't -- so that is something that --

MR. HEAVISIDE: You know -- everybody in this room has probably had tons of cases throughout the years where something happens. I don't know what it is, somebody is killed, somebody is whatever.

THE COURT: Sure.

MR. HEAVISIDE: So the point is, there is no smoke and mirrors here (inaudible). I don't know what to say on that.

THE COURT: Yes. Okay. What else do you need from me here?

MS. PIERSON: Your Honor (inaudible) if we try Hill in October (inaudible) do you know what your October looks like? With the holidays (inaudible) some flexibility --

THE COURT: Yes. You know -- 16 weeks, 18 weeks, whatever, something along those lines that we can get it. I just want to avoid having too much of an interval between -- because quite frankly, although you people are living with this case, I am not, and one of the problems we have if we get too much time in between is I start forgetting about things. And I have to go back and refresh myself and review and that type of thing as well, so let's --

MS. PIERSON: (Inaudible) work together on schedule, we can work it in such a way that Your Honor has motions (inaudible) during this fact period (inaudible) trial goes off --

THE COURT: Right.

MS. PIERSON: -- we can work together.

THE COURT: Okay.

MS. PIERSON: (inaudible) we should.

THE COURT: Okay. That would be great.

MR. MARTIN: Your Honor, this may be a question more for me to ask our liaison, Mr. Williams. But does the Court know as we sit here, I guess, or stand here, what date that would be available in October so if we --

THE COURT: Well, let me see.

THE CLERK: (Inaudible).

THE COURT: Okay. The first Monday in October is October 2.

MR. MARTIN: We will take it.

THE COURT: And if this is just going to be a two-week trial, which I find hard to believe, maybe three?

MS. PIERSON: I would think maybe four, Your Honor.

THE COURT: Normally when I have a lengthy trial like that that is in excess of two weeks, I only have trial days on Monday through Thursday. We take Friday off. It is easier for me to get a jury that way if I can tell juries you

are going to have one day during the workweek to be able to catch up and also, it is a little easier on trial counsel as well.

And it allows the Court to take care of other matters on the docket as well, so that is, that is usually my practice on lengthy trials is to work Monday through Thursday and then take Friday off. So --

MS. PIERSON: Your Honor, are there any conferences or things since you usually (inaudible) in the month of October, our case (inaudible) we ought to be aware of?

THE COURT: No. My judicial conference stuff is in June and December, and the MDL conference is -- well, it is in October this year. Well, we can work around those things. That is -- so October 2nd. Let's shoot for that, okay?

A VOICE: Thank you, Your Honor.

THE COURT: Anything else you need my help on? I will get something out here on the coordination. I want to think about that a little more, and we will get something out on that. Anything else you need?

A VOICE: Your Honor, nothing from the Plaintiff.

MS. PIERSON: Nothing.

THE COURT: Thank you very much. This has been very helpful to me and also, I think, having these monthly meetings when necessary to keep us all up to speed on this and, again, I commend you on your level of cooperation in trying to work

this case down.

A VOICE: Thank you, Your Honor.

THE COURT: Thank you so much.

A VOICE: Thank you, Your Honor.

THE CLERK: Court is adjourned.

(Concluded at 11:43 o'clock a.m.)

CERTIFICATE OF COURT TRANSCRIBER

I, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

s/s Jean A. Knepley_____ September 16, 2016
Signature of Approved Transcriber Date

EXHIBIT C

From: Joe Johnson [mailto:JJOHNSON@BABBITT-JOHNSON.COM]
Sent: Wednesday, September 21, 2016 11:18 AM
To: Pierson, Andrea Roberts
Cc: Kim Aguilera; Reilly, Patrick H.; Rutigliano, Anna C.; Ben Martin; Michael Heaviside; David Matthews
Subject: Re: Hill deposition - Cook IVC Filter

I am the attorney on the team who has the relationship with her. She prefers that I'd be present at the deposition. I am sure you understand.

Sent from my iPhone

On Sep 21, 2016, at 5:12 PM, Pierson, Andrea Roberts <Andrea.Pierson@FaegreBD.com> wrote:

Joe – I understood Mike to be co-lead on the Hill case. Is there no other lawyer (Mike or otherwise) who can cover in your absence? If no one else can do it and you cannot put Mrs. Hill up before Nov 1, so be it. Please confirm that is the case.

From: Joe Johnson [mailto:JJOHNSON@BABBITT-JOHNSON.COM]
Sent: Wednesday, September 21, 2016 10:37 AM
To: Pierson, Andrea Roberts
Cc: Kim Aguilera; Reilly, Patrick H.; Rutigliano, Anna C.; Ben Martin; Michael Heaviside; David Matthews
Subject: Re: Hill deposition - Cook IVC Filter

Neither she is or me.

Sent from my iPhone

On Sep 21, 2016, at 4:35 PM, Pierson, Andrea Roberts <Andrea.Pierson@FaegreBD.com> wrote:

Kim, what dates is she available between today and October 21?

Sent from my iPhone

On Sep 21, 2016, at 10:17 AM, Kim Aguilera <kaguilera@babbitt-johnson.com> wrote:

Mrs. Hill is available on November 1, 2016 for her deposition. As you are aware, she is a resident of Dunnellon, Marion County, Florida.

Please let me know if this date is agreeable.

Kimberley Aguilera
Paralegal
Babbitt & Johnson, P.A.
1641 Worthington Road, Suite 100
West Palm Beach, FL 33409
(561) 684-2500
(561) 684-6308 - Facsimile

From: Joe Johnson
Sent: Tuesday, September 20, 2016 8:35 PM
To: Pierson, Andrea Roberts
Cc: Reilly, Patrick H.; Rutigliano, Anna C.; Ben Martin; Michael Heaviside; David Matthews; Kim Aguilera
Subject: Re: Hill deposition - Cook IVC Filter

In trial next week

Sent from my iPhone

On Sep 20, 2016, at 11:11 PM, Pierson, Andrea Roberts <Andrea.Pierson@FaegreBD.com> wrote:

Look forwarding to receiving them. I can also do late next week with a little planning, if we can get Mrs. Hill's discovery responses back early next week. Thanks.

From: Joe Johnson [mailto:JJOHNSON@BABBITT-JOHNSON.COM]
Sent: Monday, September 19, 2016 11:24 PM
To: Pierson, Andrea Roberts
Cc: Reilly, Patrick H.; Rutigliano, Anna C.; Ben Martin; Michael Heaviside; David Matthews; Kim Aguilera
Subject: Re: Hill deposition - Cook IVC Filter

I am not refusing anything. Your emails simply select dates out of thin air without regard for my schedule or my clients schedule. I have asked my office to coordinate Mrs. Hill's availability with my schedule and will provide dates to you.

Sent from my iPhone

On Sep 19, 2016, at 11:08 PM, Pierson, Andrea Roberts <Andrea.Pierson@FaegreBD.com> wrote:

Joe – I want to be sure I am understanding you correctly. Are you refusing to put Mrs. Hill up for deposition prior to November? Please confirm.

From: Joe Johnson [mailto:JJOHNSON@BABBITT-JOHNSON.COM]
Sent: Monday, September 19, 2016 4:48 PM
To: Pierson, Andrea Roberts
Cc: Reilly, Patrick H.; Rutigliano, Anna C.; Ben Martin; Michael Heaviside; David Matthews; Kim Aguilera
Subject: Re: Hill deposition - Cook IVC Filter

I know without looking at my calendar those dates do not work. I am on vacation this week and start a trial the week of September 26 after which I am in Seattle Washington, followed by depositions and a mediation October 6 and seventh. The dates you are suggesting are just not workable given my schedule. We are going to have to look at November dates.

Sent from my iPhone

On Sep 19, 2016, at 7:46 PM, Pierson, Andrea Roberts <Andrea.Pierson@FaegreBD.com> wrote:

Thanks, Joe. Please also check on Oct 4, 5, 10, and 12. Safe travels.

From: Joe Johnson [mailto:JJOHNSON@BABBITT-JOHNSON.COM]
Sent: Monday, September 19, 2016 1:43 PM
To: Pierson, Andrea Roberts
Cc: Reilly, Patrick H.; Rutigliano, Anna C.; Ben Martin; Michael Heaviside; David Matthews; Kim Aguilera
Subject: Re: Hill deposition - Cook IVC Filter

I have a conflict on October 11. I am currently on vacation but will contact the client and provide you with dates of our availability along with a suggested location.

Sent from my iPhone

On Sep 19, 2016, at 6:16 PM, Pierson, Andrea Roberts <Andrea.Pierson@FaegreBD.com> wrote:

Joe – We'd like to take Mrs. Hill's deposition on October 11. Does that work for you and Mrs. Hill? Should we notice for your office or another location. Thanks.

Andrea Roberts Pierson
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EXHIBIT D

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September 16, 2016

VIA E-MAIL, ORIGINAL TO FOLLOW BY OVERNIGHT MAIL

Ben C. Martin
The Law Offices of Ben C. Martin
3219 McKinney Avenue, Suite 100
Dallas, Texas 75204

Re: *In Re: Cook Medical, Inc., IVC Filters Marketing, Sales Practices and Product Liability Litigation,* MDL No. 2570, Case No. 1:14-cv-06018

Dear Ben:

I am writing to you about the discovery requests that certain Cook defendants served on Plaintiffs Tonya and Allen Brand on December 1, 2015. Tonya Brand's responses are missing certain information, and Allen Brand's responses are long overdue.

The deficiencies in Tonya Brand's responses to Defendants' First Set of Interrogatories and Request for Production of Documents ("Requests") are described in detail below. Also, Ms. Brand did not verify her interrogatory responses. Please provide supplemental, verified answers to the First Set of Interrogatories and supplemental responses to the Requests for Production as requested below on or before October 13, 2016.

In addition, Allen Brand did not serve responses to the Requests. Because his answers are late, any objections to the First Set of Interrogatories are untimely and are therefore waived. *See* Fed. R. Civ. P. 33. Please provide Mr. Brand's responses to the Requests on or before October 13, 2016.

DEFICIENCIES IN RESPONSES TO INTERROGATORIES

Interrogatory No. 2, 4-13, 21, 23:

You objected to these Interrogatories as seeking information protected by the attorney-client privilege, protected by the work product doctrine, and/or protected by physician-patient privilege. Pursuant to Fed. R. Civ. P. 26(b)(5)(A), if a party withholds information otherwise discoverable by claiming that the information is privileged, the party must "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Ms. Brand's answer does not comply with Rule 26(b)(5)(A). Please supplement the answer with the necessary information as described by the rule.

Interrogatory Nos. 3, 14:

Ms. Brand answers these Interrogatories by stating only "No." Please provide a supplemental answer confirming that she did not and still does not have information that is responsive to these Interrogatories other than by writing only "No."

Interrogatory Nos. 4-14, 17:

You objected to these Interrogatories because you assert that they seek information that is only able to be provided through expert witnesses. Please explain why the information Cook seeks can only be provided by expert witnesses, and confirm that any responsive information that does not require an expert witness will not be relied upon in this lawsuit in any way.

Interrogatory Nos. 4-12:

In Ms. Brand's answers, she states that discovery is not yet complete and she will supplement these answers when discovery is complete. Please either provide supplemental responses with any information now known to Ms. Brand, or confirm that she still does not have knowledge of any information that is responsive to these Interrogatories. Please also confirm that when she learns of responsive information, she will supplement these answers accordingly.

Interrogatory Nos. 13, 17:

In Ms. Brand's answers, she states that discovery is ongoing and that she does not have knowledge of any responsive information. Please either provide supplemental response with any information now known to Ms. Brand, or confirm that she still does not have knowledge of any information that is responsive to these Interrogatories. Please also confirm that when she learns of responsive information, she will supplement these answers accordingly.

Interrogatory Nos. 15, 16, 18, 20, 21, 23, 24:

You objected to these Interrogatories as seeking information that is neither relevant nor material. Please explain why the information Cook seeks in these Interrogatories is indeed irrelevant and immaterial, and confirm that any responsive information will not be relied upon in this lawsuit in any way.

Interrogatory Nos. 4-12:

In Ms. Brand's answers, she states that she is "not required to marshal all evidence to respond to this Interrogatory." Please provide a citation to authority that supports this assertion. Ms. Brand is required to answer each interrogatory "separately and fully in writing under oath" to the extent it is not objected to. *See* Fed. R. Civ. P. 33(b)(3). Accordingly, please supplement the answers with the necessary information as described above or confirm that Ms. Brand does not have any information that is responsive to these Interrogatories.

Interrogatory No. 16:

This interrogatory asks for information regarding alternative treatment options. Ms. Brand states that the "Filter implantation was presented to the Plaintiff as an appropriate treatment." Please supplement this answer with responsive information. Please state whether Ms. Brand's physicians presented any alternative treatment options to her, identify those treatment options, and identify the physician that presented each option.

Interrogatory No. 21:

This interrogatory asks Ms. Brand to identify all healthcare providers who provided any consultation or treatment to her after her deposition. You object, stating that the interrogatory is overly broad, not reasonably limited in scope, not reasonably calculated lend to the discovery of admissible evidence, and that it seeks information that is protected by the physician patient privilege and is neither relevant nor material. As such, please confirm that Ms. Brand's medical treatment or condition after December 10, 2015, is not at issue, and that she will not rely on any evidence regarding her medical treatments or condition after December 10, 2015, in this lawsuit.

DEFICIENCIES IN RESPONSES TO REQUESTS FOR PRODUCTION

Request Nos. 1-4, 6-31, 35-39:

You objected to each of these Requests for various general reasons. Fed. R. Civ. P. 34(b)(2)(B) requires that the response must "state with specificity the grounds for objecting to the request, including the reasons." Please provide supplemental responses that describe the reasons for each objection you are making, not just the name of the objection.

Additionally, Fed. R. Civ. P. 34(b)(2)(C) requires that an "objection must state whether any responsive materials are being withheld on the basis of that objection." Please provide supplemental responses that state whether responsive materials are being withheld on the basis of your objections to each of these requests.

Request Nos. 2, 6-12, 15-20, 24, 27, 28, 30, 36:

You objected to the production of items due to attorney-client privilege, the attorney work product doctrine, the spousal privilege, and/or the psychotherapist privilege. Pursuant to Case Management Order 10, entered on July 10, 2015, parties must provide a privilege log for all responsive documents withheld from production based on a claim of privilege. Please produce a privilege log as required by Case Management Order 10.

Request Nos. 21, 23-28, 35, 38, 39:

You object to these Requests as seeking information that is neither relevant nor material. Please explain why the documents Cook seeks in these Requests are indeed irrelevant and immaterial and confirm that any responsive documents you have withheld on the basis of relevancy or materiality will not be relied upon in this lawsuit in any way.

Request Nos. 6, 7-13:

You objected to these Requests because they seek documents and information requiring expertise. I assume by "expertise" you mean an expert witness. Please let me know if that is incorrect. Please explain why the documents Cook seeks in these Requests can only be provided by an expert witness and confirm that any responsive documents that do not require an expert witness will not be relied upon in this lawsuit in any way.

Request Nos. 5, 19, 20, 27, 28:

In response to Request Nos. 5 and 20, Ms. Brand stated that she does not have any responsive documents in her possession. In response to Request No. 19, she stated that she did not have any responsive documents in her "care, custody, or control." In response to Request Nos. 27 and 28, she stated that she did not have any responsive documents. As you know, Ms. Brand is obligated to produce documents or things that are in her "possession, custody, or control." *See* Fed. R. Civ. P. 34(a)(1). Please confirm that Ms. Brand does not have possession, custody or control of any information or documents that are responsive to these Requests. If she does have responsive information or documents in her possession, custody, or control, please supplement these responses accordingly.

Request No. 23:

This Request seeks all research that Ms. Brand conducted regarding the medical complaints or conditions that she alleges relates to her filter. You responded with various objections and concluded that "Plaintiff cannot possibly comply with such a discovery request." Please state whether Ms. Brand has information or documents that are responsive to this Request. If so, please supplement this response accordingly, or confirm that Ms. Brand will not rely on any evidence that is responsive to this Request in this lawsuit in any way.

Request No. 31:

This Request seeks all medical bills and documentation of medical charges and expenses of any kind incurred as a result of Ms. Brand's claimed injuries. You object to this Request as overly broad and do not provide any responsive information or documents. Please state whether Ms. Brand has information or documents that are responsive to this Request, or confirm that her medical bills and expenses are not at issue and that she will not rely on any evidence that is responsive to this Request.

Request No. 32:

This Request seeks all documentation of out-of-pocket expenses and other damages sought beyond medical bills and expenses. Ms. Brand states that she has "[n]one at this time." Please confirm that her response is still accurate. If she learns of any responsive documentation, please supplement this response.

Request No. 37:

You object to this Request under the Collateral Source Rule. The collateral source rule is not a proper objection to a discovery request, as this rule "dictates what types of collateral source payments will be admitted as evidence" not what is discoverable. *Brumfiel v. U.S.*, 2005 WL 4889255, *9 (S.D.Ind. Oct. 25, 2005) (applying Indiana's collateral source rule in a bench trial); *see also Mallette v. Nash*, 2011 WL 720201, *2 (M.D.Ga. Feb. 22, 2011) (stating that "Indiana's collateral source statute is narrower (i.e. excludes less evidence) than the Georgia common law collateral source rule" in granting plaintiff's motion in limine). Thus, this information must be provided and the application of the collateral source rule should be decided by the judge in a motion in limine or in response to an objection at trial, not unilaterally by the objecting party during discovery. Accordingly, please supplement this Request with a complete response.

I look forward to receiving Ms. Brand's supplemental, verified responses and Mr. Brand's initial, verified responses by October 13, 2016. Please do not hesitate to contact me if you have any questions or concerns about the discovery Cook has served on the Brands or my requests for supplementation above.

Very truly yours,

Andrea Roberts Pierson

ARP:acr

cc: John T. Schlafer *(via email)*
Patrick C. Reilly *(via email)*
Douglas B. King *(via email)*
Michael W. Heaviside *(via email)*
David P. Matthews *(via email)*