

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

IN RE: COOK MEDICAL, INC.,
PELVIC REPAIR SYSTEMS
PRODUCT LIABILITY LITIGATION

MDL No. 2440

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER # 38
(Plaintiffs' Motion to Compel Additional Time, for Reimbursement
Of Costs, and For Deposition Document Protocol)

Pending before the court is Plaintiffs' Motion to Compel Additional Time for Rule 30 and Rule 30(b)(6) Deposition, to Compel Reimbursement of Costs and Fees, and to Implement Deposition Document Protocol. (ECF No. 131). Defendants Cook Medical Incorporated, Cook Biotech Incorporated, and Cook Incorporated (collectively "Cook") filed a response in opposition to the motion. (ECF No. 137). On Friday, April 4, 2014, the undersigned conducted a hearing on the motion, at which the parties were represented by counsel. After considering the arguments of counsel, the court **GRANTS, in part,** and **DENIES, in part,** the motion as follows.

The primary concerns raised by the Plaintiffs relate to Cook's production of documents. First, Plaintiffs argue that Cook supplies materials in a slow and piecemeal fashion, making it difficult for Plaintiffs to match the documents with specific discovery requests and crippling their efforts to prepare for depositions. Second, Plaintiffs contend that Cook engaged in a "last-minute document dump," producing thousands of

pages of documents on the eve of a Rule 30(b)(6) deposition, forcing Plaintiffs to cancel the deposition. According to Plaintiffs, they had no forewarning that a significant portion of the materials relevant to the witness' testimony had not been produced, and only learned about the remaining documents after Plaintiffs' counsel had already traveled to the location of the deposition and spent hours preparing her examination. Finally, Plaintiffs complain that Cook's protracted responses to discovery requests, its haphazard productions, and its "sandbagging" have generally decelerated the discovery process. As a result, Plaintiffs have been severely prejudiced in their ability to conduct depositions and obtain expert opinions. Plaintiffs seek an extension of various deadlines in the docket control order, a deposition document protocol, and an award of reasonable costs incurred in the cancellation of the Rule 30(b)(6) deposition. Cook disputes Plaintiffs' claims in their entirety.

For the reasons explained at the hearing, the undersigned agrees that a deposition protocol is necessary, and the protocol should include a provision regarding the production of documents for use at depositions. Accordingly, the court **GRANTS** Plaintiffs' motion for a protocol. The parties were previously given sample deposition protocols to review and were **ORDERED** to meet and confer regarding the terms of a protocol to be used in this MDL. The parties shall be prepared to submit a proposed protocol at the status conference on Friday, April 18, 2014, and the court will enter an Order setting forth a protocol shortly thereafter.

The undersigned further agrees that the production of documents has taken longer than anticipated, although there does not appear to be an intentional effort on the part of Cook to delay discovery. Nonetheless, a modification of the docket control

order appears necessary. Therefore, the court **GRANTS** Plaintiff's motion for additional time. A revised docket control order has been entered as PTO #37. (ECF No. 149).

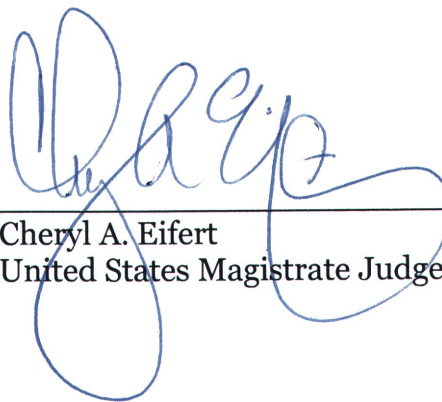
Finally, the undersigned **DENIES** Plaintiffs' motion for costs incurred in preparing for the Rule 30(b)(6) deposition. At the time the deposition was scheduled, no protocol was in place requiring Cook to supply documents well in advance of the deposition. At the same time, the parties had been advised on several occasions that the failure to produce all relevant documents prior to a deposition might lead to the need for a second deposition. Out of an abundance of caution, one day prior to the deposition Cook produced additional documents, which, according to Cook, were not particularly critical to the anticipated testimony, but were still relevant under the broad definition of relevancy. In fact, Cook argues that Plaintiffs did not need to cancel the deposition, because all of the documents that were key to the designated topics of inquiry had been in Plaintiffs' possession for weeks.

Nevertheless, Plaintiffs considered this production to be a well-orchestrated "document-dump" and undisguised "sandbagging." Cook considered it to be a conscientious effort to protect its employee from a second deposition. Either position is plausible, but no rule was in place at the time; consequently, the undersigned finds that sanctions are not justified in this particular case.

The court **DIRECTS** the Clerk to file a copy of this order in 2:13-md-2440, and it shall apply to each member related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:14-cv-14785. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or

transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at <http://www.wvsc.uscourts.gov>.

ENTERED: April 17, 2014



Cheryl A. Eifert
United States Magistrate Judge