

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

CHARLESTON DIVISION

**IN RE: BOSTON SCIENTIFIC CORP.
PELVIC REPAIR SYSTEMS
PRODUCT LIABILITY LITIGATION**

MDL No. 2326

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER #114
(Motion of Boston Scientific Corporation to Quash and
For Entry of a Protective Order Related to Rule 30(b)(6) Depositions)

Currently pending is the motion of Boston Scientific Corporation to quash amended notices of Rule 30(b)(6) depositions and to enter a protective order prohibiting Plaintiffs from taking depositions of corporate designees on topics that Defendant describes as “irrelevant, overbroad, vague, ambiguous, improperly duplicative of discovery Boston Scientific has already produced in MDL 2326, and unduly burdensome.” (ECF No. 874). Plaintiffs have filed a response in opposition to the motion, and Boston Scientific has replied. (ECF Nos. 877, 885). After consulting with the parties and determining that a hearing was not required, the undersigned carefully considered the materials submitted.

For the reasons that follow, the court **DENIES** Defendant’s motion to quash and **GRANTS**, in part, and **DENIES**, in part, Defendant’s motion for a protective order as set forth below.

I. Relevant Facts

This multidistrict litigation (“MDL”) involves the design, manufacturing, marketing, and distribution of eleven¹ different pelvic mesh products by Defendant Boston Scientific Corporation (“BSC”) over a period of more than a decade. For approximately the past two years, the parties have engaged in discovery, which has resulted in BSC producing more than 490,000 documents and 36 former and current employees for deposition. On May 27, 2014, this court entered a docket control order requiring the parties to have 200 cases fully discovered by mid-January 2015. (ECF No. 794). Thus, the parties are diligently working to complete discovery involving a variety of products and claims in cases pending in different jurisdictions across the country. In addition, the parties are in the process of preparing consolidated cases for November trials in both Florida and West Virginia.

On April 18, 2014, Plaintiffs served Notices of Rule 30(b)(6) Deposition on BSC. Shortly thereafter, the parties met and conferred on several occasions regarding the scope of the depositions. Plaintiffs issued amended notices in July, but BSC continued to object to their scope as being overly burdensome and impossibly broad. Additional “meet and confer” sessions failed to resolve the disagreements. Accordingly, BSC filed the instant motion to quash and for a protective order.

II. Positions of the Parties

On July 31, 2014, Plaintiffs filed two Notices of Rule 30(b)(6) Deposition. (ECF Nos. 846, 847). One notice requires BSC to produce a corporate designee to testify about

¹ Eight products are named in the Master Long Form Complaint. Three additional products have been written in by Plaintiffs. (ECF No. 877 at 2-3). However, at other places in the memoranda, the parties assert that as many as thirteen products are being discovered. Indeed, the Notice of Rule 30(b)(6) Deposition pertaining to product development and manufacturing activities lists thirteen products. (See ECF No. 877 at 7, ECF No. 885 at 1, ECF No. 846).

the “[a]spects of the manufacturing and testing of the mesh components” of thirteen pelvic mesh products distributed by BSC. (ECF No. 846 at 2). The notice further specifies what is meant by the term “aspects,” which ranges from activities such as product conceptualization, development, assembly, testing, and validation to product characteristics, such as porosity, density, weight, burst strength, and tear resistance. In addition, the notice requires a designee who can speak to BSC’s relationship with various corporations and vendors. The second notice requires a corporate designee to testify regarding physician training, as well as BSC’s training of its sales representatives. (ECF No. 847). BSC objects to these notices on three grounds. First, the notices seek information that is irrelevant to the claims at issue in the litigation. Second, much of the information sought has already been provided to Plaintiffs in the documents produced by BSC. Lastly, Plaintiffs have already taken lengthy and detailed depositions of corporate employees, some of whom were Rule 30(b)(6) representatives, on many of the topics outlined in the notices. (ECF No. 875 at 2). Moreover, BSC argues that it will be forced to incur great time and expense preparing corporate designees for depositions that cover such broad topics and time periods. (ECF No. 885 at 10-12).

In response, Plaintiffs address BSC’s third argument first, pointing out that the only Rule 30(b)(6) witness depositions taken to date were cross-noticed in a Texas state court case. Therefore, they were limited to one product, Obtryx, and they were restricted to the time frame of that particular litigation. (ECF No. 877 at 7). Given that Plaintiffs must now obtain testimony relevant to twelve additional products spanning a much longer time period, the prior depositions are insufficient to meet Plaintiffs’ current discovery needs. Plaintiffs further assert that they cannot rely on BSC’s document production as a substitute for Rule 30(b)(6) depositions, in part because BSC has not

been forthcoming with all relevant documents. Plaintiffs also contend that while their notices request BSC's testimony on a variety of topics, all of the topics are relevant when bearing in mind the broad parameters of the MDL. Considering that Plaintiffs have different theories, legal requirements, evidentiary burdens, products, and time frames to address in the 200 cases currently being worked up for trial, their need for the requested information far outweighs the purported burden to BSC to prepare its witnesses for deposition. (*Id.* at 11-14).

III. Relevant Legal Principles

Federal Rule of Civil Procedure 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Although the Federal Rules of Civil Procedure do not define what is “relevant,” Rule 26(b)(1) makes clear that relevancy in discovery is broader than relevancy for purposes of admissibility at trial.² *Caton v. Green Tree Services, LLC*, Case No. 3:06-cv-75, 2007 WL 2220281, at *2 (N.D.W.Va. Aug. 2, 2007) (the “test for relevancy under the discovery rules is necessarily broader than the test for relevancy under Rule 402 of the Federal Rules of Evidence”); *Carr v. Double T Diner*, 272 F.R.D. 431, 433 (D.Md. 2010) (“The scope of relevancy under discovery rules is

² Under the Federal Rules of Evidence, relevant evidence is ‘evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ *Boykin Anchor Co., Inc. v. Wong*, Case No. 5:10-cv-591-FL, 2011 WL 5599283 at * 2 (E.D.N.C. Nov. 17, 2011) (*citing United Oil Co., v. Parts Assocs., Inc.*, 227 F.R.D. 404, 409 (D.Md. 2005)).

broad, such that relevancy encompasses any matter that bears or may bear on any issue that is or may be in the case”). For purposes of discovery, information is relevant, and thus discoverable, if it “bears on, or ... reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case. Although ‘the pleadings are the starting point from which relevancy and discovery are determined ... [r]elevancy is not limited by the exact issues identified in the pleadings, the merits of the case, or the admissibility of discovered information.’ Rather, the general subject matter of the litigation governs the scope of relevant information for discovery purposes.” *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 199 (N.D.W.Va. 2000) (internal citations omitted). The party resisting discovery, not the party seeking discovery, bears the burden of persuasion. *See Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243–44 (M.D.N.C. 2010) (citing *Wagner v. St. Paul Fire & Marine Ins. Co.*, 238 F.R.D. 418, 424–25 (N.D.W.Va. 2006)).

Simply because information is discoverable under Rule 26, however, “does not mean that discovery must be had.” *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005) (citing *Nicholas v. Wyndham Int’l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004)). For good cause shown under Rule 26(c), the court may restrict or prohibit discovery that seeks relevant information when necessary to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c). To succeed under the “good cause” standard of Rule 26(c), a party moving to resist discovery on the grounds of burdensomeness and oppression must do more to carry its burden than make conclusory and unsubstantiated allegations. *Convertino v. United States Department of Justice*, 565 F. Supp.2d 10, 14 (D.D.C. 2008) (the court will only consider an unduly burdensome objection when the objecting party

demonstrates how discovery is overly broad, burdensome, and oppressive by submitting affidavits or other evidence revealing the nature of the burden); *Cory v. Aztec Steel Building, Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005) (the party opposing discovery on the ground of burdensomeness must submit detailed facts regarding the anticipated time and expense involved in responding to the discovery which justifies the objection); *Bank of Mongolia v. M & P Global Financial Services, Inc.*, 258 F.R.D. 514, 519 (S.D. Fla.2009) (“A party objecting must explain the specific and particular way in which a request is vague, overly broad, or unduly burdensome. In addition, claims of undue burden should be supported by a statement (generally an affidavit) with specific information demonstrating how the request is overly burdensome.”).

Furthermore, Rule 26(b)(2)(C) requires the court, on motion or on its own, to limit the frequency and extent of discovery, when (1) “the discovery sought is unreasonably cumulative or duplicative;” (2) the discovery “can be obtained from some other source that is more convenient, less burdensome, or less expensive;” (3) “the party seeking the discovery has already had ample opportunity to collect the requested information by discovery in the action;” or (4) “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii). This rule “cautions that all permissible discovery must be measured against the yardstick of proportionality.” *Lynn v. Monarch Recovery Management, Inc.*, 285 F.R.D. 350, 355 (D. Md. 2012) (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010)). As every case has, to some degree, its own unique characteristics, the trial court has “substantial discretion” in managing issues related to

discovery. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 929 (4th Cir. 1995).

IV. Discussion

Initially, the undersigned considers BSC's motion to quash the notices of deposition. Clearly, BSC fails to state sufficient grounds to support such a motion. Plaintiffs are entitled to take the deposition of BSC under Rule 30(b)(6), and having taken depositions of various BSC employees in their individual capacities is simply not the same as deposing an employee who has been designated to speak on behalf of the corporation. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (Stating that when a corporate employee testifies in his individual capacity, he provides only his personal knowledge, perceptions, and opinions; when a 30(b)(6) designee testifies, he provides the knowledge, perceptions, and opinions of the corporation). While some Rule 30(b)(6) depositions have been taken, BSC does not dispute that they were limited by product and time frame. (ECF No. 885 at 5). Therefore, the motion to quash is **DENIED**.

On the other hand, principles of proportionality mandate the imposition of some restrictions on the taking of Rule 30(b)(6) depositions. The undersigned finds these restrictions necessary for several reasons. There has already been a substantial number of current and former BSC employees deposed. Consequently, Plaintiffs have had ample opportunity to collect a significant portion of the requested information by discovery in this MDL. Additionally, a least one case has been tried to verdict against BSC, and other pelvic mesh cases have been tried against other manufacturers, giving Plaintiffs, at a minimum, a rough blueprint of what information they need to focus on in their current discovery efforts. Equally as important, the parties have limited time remaining in which

to complete discovery in 200 cases. There simply is not enough time to engage in longwinded, duplicative and cumulative depositions. Along that line, the court has made it abundantly clear that it will not permit cumulative testimony at trial whether it comes from the one witness or different witnesses. Accordingly, depositions taken largely for trial purposes should not duplicate testimony already intended to be offered into evidence.

Therefore, as to the scope of the deposition notices, the court **DENIES** BSC's motion to limit the topics outlined in the notices. (ECF Nos. 846, 847). Although the topics are broad, the undersigned agrees with Plaintiffs that the unique nature of the MDL justifies the breadth of the topics. Taking into account that the parties agreed to a deposition protocol, (ECF No. 327), which limits each deposition to one seven-hour day of testimony, unless the parties agree to a different time limitation, and prohibits a second deposition of the same witness on the same subject matter, absent exigent circumstances, it is fair to expect that the protocol will naturally curtail Plaintiffs from going too far afield in non-essential topics.

In addition, the court **DENIES** BSC's motion to limit the scope of topics related to manufacturing and product development to a certain set of corporate documents. Once again, the court agrees with Plaintiffs that they should not be limited to a set of documents that BSC believes to be the most relevant.

However, the court **GRANTS** the motion to allow BSC to designate existing testimony by former or current employees as Rule 30(b)(6) testimony for some portions of the topics outlined in one of Plaintiffs' notices of deposition. Having reviewed the testimony supplied by BSC with its memoranda, the undersigned notes that particularly in the area of physician/employee training, Plaintiffs' counsel asked BSC's management

employees many questions typically posed to corporate representatives in the context of a Rule 30(b)(6) deposition; for example, questions regarding company practices, policies, and customs. Therefore, rather than duplicating this testimony, the better course is to allow BSC to adopt sections of these depositions as its corporate testimony. Accordingly, it is hereby **ORDERED** as follows:

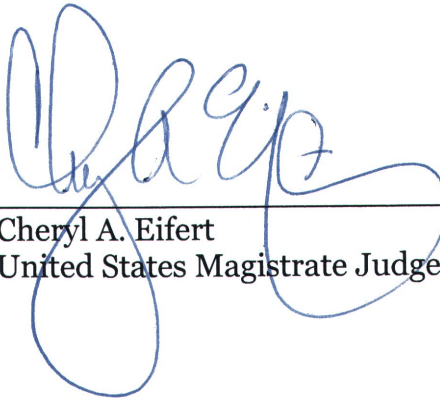
1. On or before **October 3, 2014**, BSC shall review each topic listed in the Notice identified as ECF No. 847 and provide Plaintiffs with either a designation of the prior testimony (by deponent, date, transcript page and line number) that BSC adopts as its corporate position on that topic, or with the name of a corporate representative who will appear at deposition. To the extent that the witnesses did not provide testimony reflecting BSC's corporate knowledge and opinions, or did not supply complete testimony, Plaintiffs shall be permitted to proceed with Rule 30(b)(6) depositions regarding that topic or unanswered portions of that topic. Plaintiffs shall supply BSC with a revised Notice specifying what topics or portions of topics remain to be covered at a deposition.

2. In regard to the Notice identified as ECF No. 846, the court understands that a corporate designee, Mr. Jim Goddard, previously provided testimony regarding some of the topics contained in the Notice as they relate to one product, Obtryx. Because Mr. Goddard's testimony already constitutes Rule 30(b)(6) testimony, BSC need not designate it as such. Plaintiffs are reminded they may not repeat any area of questioning already addressed by Mr. Goddard when they depose a corporate designee pursuant to the July Notice of Rule 30(b)(6) Deposition.

The court **DIRECTS** the Clerk to file a copy of this order in 2:12-md-2326, 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-26227. 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.wvsd.uscourts.gov>.

ENTERED: September 29, 2014



Cheryl A. Eifert
United States Magistrate Judge