

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

**CHARLESTON DIVISION**

IN RE: BOSTON SCIENTIFIC CORP.,  
PELVIC REPAIR SYSTEM  
PRODUCTS LIABILITY LITIGATION

MDL No. 2326

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THIS DOCUMENT RELATES TO ALL CASES

**PRETRIAL ORDER # 139  
(Order Clarifying PTO # 138)**

On February 11, 2016, the court entered Pretrial Order No. 138 [ECF No. 1314] (“PTO”), setting a briefing schedule regarding two motions now pending before the court: a Motion for Sanctions and to Strike All “Confidential” Designations from Defendant’s Documents [ECF No. 1294] (“Mostyn Motion”) and the plaintiff’s Challenge to BSC’s Designation of Certain Documents as Confidential [ECF No. 1307] (“Plaintiffs’ MDL Motion”). Specifically, the court required Boston Scientific Corporation (“BSC”) to do as follows:

On or before **February 21, 2016, at 5:00 p.m.**, BSC must file a joint response to the Mostyn Motion and the Plaintiffs’ MDL Motion discussing why it has designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL those documents listed in Exhibit A of the Mostyn Motion [ECF No. 1294-1] and why such designations are proper pursuant to Pretrial Order # 11 [ECF No. 161]. To the extent that different documents are listed in the Plaintiffs’ MDL Motion, BSC must include in its brief a discussion regarding the appropriateness of the designations applied to those additional documents listed in Exhibit A attached to the Plaintiffs’ MDL Motion [ECF No. 1307-1], filed on behalf of all other plaintiffs in this MDL.

PTO No. 138, at 2 (footnote omitted). The court’s PTO No. 138 provided BSC with a second opportunity to meet its burden to demonstrate that the documents at issue meet this jurisdiction’s test for showing good cause for the issuance of a protective order. Upon review of BSC’s filings

[ECF Nos. 1325 and 1338], the court **FINDS** that BSC has not met its burden to demonstrate good cause for a protective order with regard to the eighty-five documents remaining at issue.<sup>1</sup>

The court enters this Order to make quite clear what it expects from BSC regarding its burden pursuant to PTO No. 11 and Rule 26(c) of the Federal Rules of Civil Procedure. In PTO No. 138, the court did not specify that it intended for BSC to meet its burden with regard to *each* document at issue. The court has been more than lenient in response to the parties' cooperative effort to address this important matter, but the court's patience wears thin. Nevertheless, because the parties have been following the court's orders and guidance over a course of several years and have worked cooperatively with one another, the court will allow BSC one more attempt to demonstrate that it can meet its burden in this matter.<sup>2</sup>

The court **ORDERS** as follows:

- The nine documents contained in BSC's Exhibit 3 [ECF No. 1325-3] are no longer subject to PTO No. 11, as those documents have been previously used by BSC in

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<sup>1</sup> BSC states as follows: "After taking into account (i) duplicates, (ii) documents Boston Scientific agreed to de-designate, and (iii) documents admitted as exhibits in Boston Scientific trials, the confidentiality of 85 Boston Scientific documents remain at issue. Def.'s Joint Resp. 5-6 (footnotes omitted) [ECF No. 1325]. The plaintiffs do not contest BSC's assessment of the number of documents remaining at issue, but the plaintiffs oddly fritter away several pages to discuss BSC's Exhibit 3—an exhibit BSC specifically acknowledges as containing "judicial records" and not counted toward the eighty-five contested documents. *See* Pls.' Joint Reply [ECF No. 1337]; *see also* Def.'s Joint Resp. 6 ("Documents admitted as exhibits during trial are identified in Exhibit 3. Although these materials are judicial records, . . . Boston Scientific requests the Court to restrict Plaintiffs' use of these materials in the public domain and limit them to use in this action.").

<sup>2</sup> The court expects the parties (and their counsel) to continue to conduct themselves in a professional and cooperative manner. The court will not hesitate to use its discretionary power regarding scheduling, discovery, and the like to facilitate the complete disposition of this matter. Further, the court urges the parties to examine the mandatory sanction provisions of the Federal Rules of Civil Procedure.

public trials and are considered public records.<sup>3</sup> Likewise, all other documents specifically challenged by the plaintiffs in their motions and conceded by BSC as not comprising the eighty-five remaining documents at issue are no longer subject to PTO No. 11;

- BSC Exhibit 3 [ECF No. 1325-3] is **UNSEALED**;
- **On or before March 21, 2016, at the close of business, BSC must file a brief demonstrating why good cause exists to protect *each individual document at issue*. BSC must examine each document, independent of all other contested documents, and apply this jurisdiction’s test for demonstrating good cause for the issuance of a protective order with regard to “trade secret or other confidential research, development, or commercial information” pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.<sup>4</sup> In other words, BSC must clearly justify why each document, examined alone, satisfies the requirements of Rule 26(c)(1)(G). **BCS’s filing may not exceed eighty-five pages;****

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<sup>3</sup> The court acknowledges that “[a]bsent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit.” *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994); *see also Okla. Hosp. Ass’n v. Okla. Pub. Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984) (“While it may be conceded that parties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order, . . . it does not follow that they can be compelled to disseminate such information.” (citation omitted)).

<sup>4</sup> *Ohio Valley Envtl. Coal. v. Elk Run Coal Co., Inc.*, 291 F.R.D. 114, 118–120 (S.D. W. Va. 2013) (“First, the material sought to be protected must be ‘a trade secret or other confidential research, development, or commercial information.’ Second, there must be a ‘good cause’ basis for granting the restriction. The party seeking protection bears the burden of establishing both the confidentiality of the material and the harm associated with its disclosure. . . . To establish good cause for a protective order, the moving party must show that disclosure of its commercial information will give rise to an ‘identifiable harm.’”).

- **On or before March 28, 2016, at the close of business, the plaintiffs may file a response. Any response must be filed by the plaintiffs *jointly* and may not exceed forty-five pages; and**
- **No reply is to be filed.**

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 2:16-cv-02150. 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 [www.wvsd.uscourts.gov](http://www.wvsd.uscourts.gov).

ENTER: March 7, 2016



JOSEPH R. GOODWIN  
UNITED STATES DISTRICT JUDGE