

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

BOSTON SCIENTIFIC CORPORATION)
and BOSTON SCIENTIFIC SCIMED,)
INC.,)

Plaintiffs/Counterclaim)
Defendants,)

v.)

Civil Action No. 15-980-LPS-CJB

COOK GROUP INCORPORATED and)
COOK MEDICAL LLC,)

Defendants/)
Counterclaimants.)

MEMORANDUM ORDER

At Wilmington this **24th day of May, 2017**.

WHEREAS, on May 22, 2017 the Court held oral argument regarding discovery disputes between Plaintiffs Boston Scientific Corporation and Boston Scientific SciMed, Inc. (collectively, “BSC” or “Plaintiffs”) and Defendants Cook Group Incorporated and Cook Medical LLC (collectively, “Cook” or “Defendants”);

IT IS HEREBY ORDERED:

1. With regard to the parties’ dispute as to Cook’s Rule 30(b)(6) Notice of Deposition of Plaintiffs, (*see* D.I. 245; D.I. 247), the Court hereby GRANTS Cook’s request to compel BSC to provide a witness on Topics 30-32.

2. Defendants have shown that agreements entered into by Plaintiffs relating to the Resolution Clip, and other agreements related to the patents-in-suit, as well as the negotiation of any such agreements, may be relevant to the issue of standing. (D.I. 245 at 1-3) While Plaintiffs argue that ownership of the patents-in-suit is not an issue of serious dispute, (*see* D.I. 247 at 2),

Cook disagrees, and BSC has not explained how Topics 30-32 are not thus at least “relevant to any party’s claim or defense[.]” Fed. R. Civ. P. 26(b)(1); *see also Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 280 (3d Cir. 2014) (“[T]he jurisdictional issue of standing can be raised at any time[.]”) (internal quotation marks and citations omitted).

3. Moreover, it seems at least possible that the agreements addressed by Topics 30-32 may shed light on the valuation of BSC’s intellectual property, which would be relevant to damages in this case. While the Court is unsure of how much useful information will actually be gleaned from a deposition on these Topics, it cannot say that the Topics are irrelevant.

4. In considering Plaintiffs’ proposed compromise to provide interrogatory responses in lieu of providing a witness for Topics 30-32, (*see* D.I. 245 at 4; D.I. 247 at 3-4), the Court notes that a deposition on these Topics should not be long in duration, and Plaintiffs have not sufficiently explained how it would be so burdensome as to outweigh the benefit of permitting Defendants the opportunity to confirm the accuracy of Plaintiffs’ assertions as to the disputed issues. *See* Fed. R. Civ. P. 26(b)(1).

5. As to the dispute regarding attachments and embedded files that Defendants originally withheld from 735 e-mails in their document production, (*see* D.I. 246 at 1; D.I. 248 at 1), the Court notes that the best approach would have been to include such attachments and embedded files in Cook’s initial production. Cook could have then redacted non-responsive content, as opposed to withholding such documents in their entirety. This at least would have given BSC a better understanding of exactly what content was held back and what was not. The Court therefore ORDERS that as to each document listed at D.I. 248, ex. 3 at 10-12 (i.e., e-mails for which Defendants have withheld one or more purportedly non-responsive embedded files or

attachments), Defendants shall identify: (1) the e-mails as to which certain attachments or embedded files *have* been produced, and the corresponding attachments or embedded files; and (2) those e-mails for which *all* embedded files or attachments have been withheld in their entirety. Beyond that, the Court has no basis to order the production of documents that it does not know to be responsive to Plaintiffs' discovery requests.

6. With regard to the parties' dispute as to BSC's Third Notice of 30(b)(6) Deposition of Defendants, (*see* D.I. 246 at 1-3; D.I. 248 at 2-3), the Court hereby DENIES Plaintiffs' request for the Court to order Cook to designate a witness on Topics 28 and 29.

7. As to Topic 28, Plaintiffs have not offered any explanation as to how Defendants can meaningfully testify about agreements between Plaintiffs and Freudenberg/MedVenture that Defendants' employees are not permitted to see. (*See* D.I. 248 at 2) That, in turn, indicates that Topic 28 is really directed to seeking testimony regarding Defendants' contentions relating to their damages theories. Such subject matter is more appropriately addressed by an expert witness, who, in turn, can be cross-examined at a later stage of this case. *See In re Intel Corp. Microprocessor Antitrust Litig.*, Civil Action No. 05-441-JJF, 2009 WL 2921313, at *2 (D. Del. Sept. 8, 2009) (report of Special Master, adopted by District Court).

8. As to Topic 29, Plaintiffs have not explained how the Topic is not entirely duplicative of Topic 19, for which Defendants have already provided Plaintiffs with a Rule 30(b)(6) witness. (D.I. 248 at 2; *id.*, ex. 6 at 6)

9. The parties are hereby ORDERED to designate witnesses and make relevant identification of withheld attachments/embedded files, as required by the above decisions, by no later than Wednesday, **May 31, 2017** absent the Court's grant of a request for an extension to

such deadlines.

10. Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Order. Any such redacted version shall be submitted no later than **May 31, 2017** for review by the Court, along with a motion for redaction that includes a clear, factually-detailed explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.

A handwritten signature in black ink, reading "Christopher J. Burke". The signature is written in a cursive, flowing style. The first name "Christopher" is written in a larger, more prominent script, followed by "J." and "Burke".

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE