IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

DAWN RANDALL, as administrator of the ESTATE OF BRITTANY REID, and as guardian of RAILYNN REID and RYANN REID, surviving minor children of BRITTANY NICHOLL REID, Plaintiff, v. ATLANTA HEART SPECIALISTS, LLC, ZOUBIN ALIKHANI, M.D., BOSTON SCIENTIFIC CORP., and JOHN DOES 1-50, Defendants.	CIVIL ACTION FILE NO.: 23A05888

PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT BOSTON SCIENTIFIC CORPORATION

COMES NOW, Plaintiff Dawn Randall ("Plaintiff"), and brings this motion for sanctions against Defendant Boston Scientific Corporation ("Defendant" or "Boston Scientific"), showing this Honorable Court as follows:

INTRODUCTION & FACTUAL BACKGROUND

This case involves the death of Plaintiff's 36-year-old daughter, Brittany Nicole Reid, who passed away at her home in January 2022 from cardiac arrest. At the time of her death, Plaintiff's daughter was being treated for a heart condition with an Emblem S-ICD medical device. In this case, Plaintiff is bringing product liability claims against the manufacturer of Plaintiff's medical device (Boston Scientific) as well as a medical malpractice claim against Plaintiff's treating physician (Zoubin Alikhani, M.D.) and the facility involved in implanting the S-ICD device (Atlanta Heart Specialists, LLC).

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Shortly after Plaintiff's complaint was filed, Boston Scientific moved to dismiss Plaintiff's product liability claims on the grounds of federal preemption. That motion was denied by the Court on June 21, 2024.

After Boston Scientific's motion to dismiss was denied, Boston Scientific refused to participate in meaningful discovery, asserting a frivolous "judicial estoppel" objection to almost every discovery request, along with other boilerplate objections on relevancy and burden. Because of Boston Scientific's refusal to comply with Plaintiff's discovery requests and after a failed attempt to meet and confer, Plaintiff was forced to file a motion to compel against Boston Scientific. That motion was granted by this Court on September 11, 2024.

In this Court's September 11, 2024 order granting Plaintiff's motion to compel, this Court expressly set forth as follows:

> This matter is before the Court on Plaintiff's Motion to Compel, filed on July 29, 2024. The Court has reviewed the law and evidence presented in briefs. Plaintiff has shown that Defendant Boston Scientific Corporation's ("Defendant") discovery responses include a frivolous "judicial estoppel" objection, fail to produce responsive documents, and otherwise omit substantial amounts of discoverable information.
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> Accordingly, and in the exercise of the Court's discretion, IT IS HEREBY ORDERED that Plaintiff's Motion to Compel is GRANTED. Defendant shall provide full and complete responses to Plaintiff's Requests for Production Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 38, 39, 41, 42, and 43 and Interrogatory No. 18., including the production of native format documents and ESI, within twenty (20) days of entry of this Order.

Rather than comply with the Court's order, Boston Scientific is *still* refusing to produce relevant, responsive documents in its possession.

As justification for its non-compliance, Boston Scientific claims that the parties did not meet and confer on Boston Scientific's boilerplate objections on relevancy/burden and that the meet and confer was limited only to Boston Scientific's frivolous "judicial estoppel" objection. In

other words, Boston Scientific is still hiding behind the same frivolous, boilerplate objections and refusing to produce relevant, discoverable materials in its possession as ordered by the Court.

Notably, this is the exact same argument Boston Scientific already made in its briefing on the motion to compel – *an argument that was already considered and rejected by the Court*. Specifically, in response to Plaintiff's motion to compel, Boston Scientific argued:

> Perhaps because she also short-circuited the meet and confer process (see Exhibit D to Plaintiff's Motion), the Motion is only targeted at BSC's estoppel objection. Plaintiff has failed to address BSC's other specific objections to the various discovery requests. Under State Court Rule 6.4(a), BSC's other objections are not properly before the Court. The Court should deny Plaintiff's Motion to Compel for that additional reason.

In her reply brief, Plaintiff expressly addressed and refuted Boston Scientific's argument regarding the pre-motion meet and confer:

> Finally, Defendant contends the motion should be denied because the 6.4 letter and motion were focused primarily on Boston Scientific's estoppel objection. Opposition at 3. Again, this is not true. The entire first section of the motion focused on the fact that the information sought in Plaintiff's requests is relevant and discoverable. See generally, Motion at 3-5. This addresses all of Defendant's remaining boilerplate objections, including those on relevance and burden. Plaintiff also never "short-circuited" the conferral process. Before moving to compel, Plaintiff exchanged multiple emails with Defendant's counsel, sent a 6.4 letter, and waited on Defendant's response. *See* Motion at 1-2. This is clearly sufficient under Georgia law. *See Mansell 400 Associates v. Entex Information Serv*, 239 Ga. App. 477, 481 (Ga. Ct. App. 1999) ("There is no requirement in [Rule 6.4] that counsel for the movant make more than one attempt to resolve the discovery matter.").

Ultimately, this Court rejected the Defendant's meet and confer argument and granted Plaintiff's motion to compel. As set forth in the Court, the Court found Boston Scientific "**fail[ed] to produce responsive documents, and otherwise omit[ted] substantial amounts of discoverable information**" in addition to Boston Scientific's frivolous judicial estoppel objection. The Court ordered Boston Scientific to produce "**full and complete responses**" to the requests at

issue in the order including "**the production of native format documents and ESI**, within twenty (20) days of entry of [the] Order."

Despite the clear language of this Court's order, Boston Scientific and its counsel have unilaterally determined (for no apparent reason) that the Court's order was somehow only limited to the judicial estoppel objection. In early October 2024, the parties' counsel exchanged emails regarding multiple deficiencies in Boston Scientific's production. In response to these deficiencies, counsel for Boston Scientific stated:

> As we see it, Judge Bailey only overruled the estoppel objections. BSC's other objections were not addressed in Plaintiff's Motion to Compel (as required by Rule 6.4(A)) and the parties have not conferred over those (as required by Rule 6.4(B)). Accordingly, we should set aside some time to confer when my leave of absence is over. I can be available anytime on October 18 or we can meet in person on 10/21 after Dr. Alikhani's deposition. Thx.
>
> *See* October 11, 2024 Email from J. Krawcheck to J. Foster, Exhibit A.

Boston Scientific's flawed interpretation of this Court's order is contradicted by the express language of the Court's order and not supported by any reasonable belief.

Based on these facts, and for the reasons set forth below, Boston Scientific should be sanctioned for its willful non-compliance with this Court's order to compel.

LEGAL STANDARD

Under O.C.G.A. § 9-11-37(b), a trial court may impose sanctions against a party for failing to comply with a court order compelling discovery, including establishing facts, striking evidence, striking claims, or striking pleadings or parts thereof. The imposition of sanctions by the trial court does not require that a party display, or that the trial court find, actual willfulness; instead, it requires at least a conscious or intentional failure to act, as distinguished from an accidental or involuntary noncompliance. *N. Druid Dev., LLC v. Post, Buckley, Schuh & Jernigan, Inc.*, 330 Ga. App. 432 (2014); *Howard v. Alegria*, 321 Ga. App. 178 (2013); *Resource Life Ins. Co. v. Buckner*,

304 Ga. App. 719 (2010); *Ga. Cash Am., Inc. v. Strong*, 286 Ga. App. 405 (2007). The only defenses to a contempt action are that the order was not sufficiently definite and certain, was not violated, or that the violation was not willful (e.g., inability to pay or comply). *Schiselman v. Trust Co. Bank*, 246 Ga. 274 (1980); *Hamilton Capital Group, Inc. v. Equifax Credit Info. Servs.*, 266 Ga. App. 1 (2004); *see also, Vautrot v. West*, 272 Ga. App. 715 (2005). *State Farm Mut. Auto. Ins. Co. v. Health Horizons*, 264 Ga. App. 443, 446, 590 S.E.2d 798 (2003) ("[t]he trial court's job is to control its litigation, and it has broad discretion in ascertaining whether a party has made a good faith effort to comply with its orders or has wilfully failed to comply").

In determining whether a party has abused discovery, the trial court sits as trier of fact, and its findings regarding a willful discovery abuse are discretionary. *Howard*, 321 Ga. App. 178. Importantly, the trial court may apply sanctions after giving the obstinate party an opportunity to be heard and determining that the obstinate party's failure to obey was willful. *McConnell v. Wright*, 281 Ga. 868 (2007); *Porter v. WellStar Health Sys.*, 299 Ga. App. 481 (2009). However, "[t]he trial court need not conduct a hearing on the issue of wilfulness in every case. Such a requirement serves no purpose where the trial court can otherwise determine wilfulness on the part of the party against whom the sanctions are sought." *Schrembs v. Atlanta Classic Cars, Inc.*, 261 Ga. 182 (1991).

ARGUMENT & CITATION OF AUTHORITY

Boston Scientific has willfully disregarded this Court's September 11, 2024 order to compel. *See supra* pp. 2-4. There is no justification for Boston Scientific's ongoing refusal to produce "full and complete responses" to Plaintiff's discovery requests, including "the production of native format documents and ESI," as required by this Court's order. *See generally*, *id.*

Boston Scientific's gamesmanship is continuing to delay and impede discovery, including hindering Plaintiff's preparation for two depositions scheduled for later this month. In addition, this is now the second order by this Court that Boston Scientific has refused to acknowledge – first by asserting a frivolous "judicial estoppel" defense following the Court's order denying Defendant's motion to dismiss and now by refusing to acknowledge the clear language of this Court's order to compel.

Boston Scientific should be compelled to immediately produce the responsive documents sought by Plaintiff (as expressly required by this Court's order to compel) and Boston Scientific should be sanctioned by the Court for disregarding this Court's order. *See* O.C.G.A. § 9-11-37 (trial court may impose sanctions against a party for failing to comply with a court order compelling discovery, including establishing facts, striking evidence, striking claims, or striking pleadings or parts thereof); *see also State Farm Mut. Auto. Ins. Co.*, 264 Ga. App. at 446. (trial court has broad discretion in ascertaining whether a party has made a good faith effort to comply with its orders). A proposed order is included for the Court's consideration.

This 17th day of October, 2024.

Respectfully submitted,

/s/ *James Z. Foster*
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