UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION	**Case No. 2:18-md-2846** **Chief Judge Edmund A. Sargus, Jr.** **Magistrate Judge Kimberly A. Jolson**

This document relates to:
ALL CASES.

OPINION AND ORDER

This matter is before the Court on the parties' Protective Order. (Docs. 27, 28). For the reasons that follow, the Court adopts Plaintiffs' proposal.

I. BACKGROUND

This MDL is off to a positive start. The parties have worked together to resolve nearly all of their disputes without the need for judicial intervention. (*See, e.g.*, Docs. 13, 29, 43, 44, 45). This cooperation has extended to the Protective Order, and only one narrow issue remains for the Court to decide: whether a third-party witness should be required to sign the Protective Order before viewing Defendants' confidential documents at a deposition. Defendants believe this should be required. Plaintiffs maintain that a third-party's verbal promise to keep Defendants' proprietary information confidential is sufficient. The parties have submitted their respective briefs (Docs. 27, 28), and the issue is now ripe for resolution.

II. DISCUSSION

Defendants offer several arguments in support of their position that a third-party witness should be required to sign the Protective Order before viewing Defendants' confidential documents at a deposition. First, they argue, requiring third-party witnesses to sign the Protective

Order is necessary to protect their proprietary business information. (Doc. 27 at 4–7). Defendants contend that it is unfair to third-parties to ask them to keep proprietary information confidential without an understanding of the Protective Order or its requirements. (*Id.* at 5). Further, they assert that they will have no remedy if a third-party witness only verbally agrees to keep their proprietary information confidential. (*Id.* at 5–6). Defendants express particular concern that Plaintiffs will show confidential documents to treating physicians in ex parte meetings prior to depositions and that there will be no record of any promise by such a treating physician to maintain the confidentiality of those documents and the information contained therein. (*See id.*).

Second, Defendants contend that adopting Plaintiffs' proposal would impose a significant burden on Defendants to maintain the confidentiality of their proprietary information and undermine the Court's ability to enforce the Protective Order. (*Id.* at 7–8). Signatories of the proposed Protective Order subject themselves to the jurisdiction of this Court for purposes of its enforcement. (*Id.* at 7). In contrast, if a third-party witness breaches a verbal promises to keep Defendants' proprietary information confidential, Defendants would be forced to attempt to enforce that promise in various jurisdictions throughout the country, rather than this Court. (*Id.* at 8). In Defendants' view, they should not be required to bear this burden. (*Id.*).

Plaintiffs offer several counter-arguments in response. First, they emphasize that there is no reasonable basis to require third-party witnesses to sign the Protective Order once they have verbally agreed under oath to keep any documents or information shown in the deposition confidential. (Doc. 28 at 5–6). Third-party witnesses will not be permitted to retain any copies of confidential information, and, in the unlikely event that a third-party witness does disclose confidential information shown to him or her in a deposition, Defendants will have remedies under state law for a breach of that verbal promise. (*Id.* at 6).

Second, Plaintiffs argue that requiring a third-party witness to sign the Protective Order before viewing Defendants' confidential documents at a deposition will inhibit their ability to develop their case. (*Id.* at 6–8). According to Plaintiffs, at depositions of implanting physicians, they will need "to explore what risks the surgeon knew prior to implanting the device; what risks were disclosed to plaintiffs; and whether the addition of additional safety information would have impacted the physician's decision to recommend the device and/or affected physician's risk/benefit discussion with the patient" in order to responsd to Defendants' learned intermediary defense. (*Id.* at 4; *see also id.* at 7). Plaintiffs represent that, in their experience, third-party physicians are often reluctant to sign protective orders, but are typically willing to make a verbal representation on the record recognizing certain documents as confidential and promising not to disclose any confidential information. (*Id.*). Consequently, adopting Defendants' proposed Protective Order would significantly prejudice Plaintiffs ability to develop their case. (*Id.* at 7–8).

A district court may grant a protective order preventing the production of discovery to protect a party or entity from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). "To sustain a protective order under Rule 26(c), the moving party must show 'good cause' for protection from one (or more) harms identified in Rule 26(c)(1)(A) 'with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 236 (6th Cir. 2016), *cert. denied sub nom. Fears v. Kasich*, 138 S. Ct. 191, 199 L. Ed. 2d 128 (2017) (quoting *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012)). "Good cause exists if 'specific prejudice or harm will result' from the absence of a protective order." *In re Ohio Execution Protocol Litig.*, 845 F.3d at 236 (quoting *Father M. v. Various Tort Claimants (In re Roman Catholic Archbishop)*, 661 F.3d 417, 424 (9th Cir. 2011)). Ultimately, "Rule 26(c) confers broad

discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

Here, the parties have presented the Court with a series of hypotheticals illustrating why the Court should adopt their respective proposals concerning third-party witnesses viewing confidential documents at deposition. These hypotheticals are inherently abstract in nature. In this posture, the Court believes that the best solution is to balance the parties' competing interests.

On the one hand, the Court is mindful of the burden that Plaintiffs' proposal will impose on Defendants. Under Plaintiffs' proposal, if a third-party witness verbally promises to keep Defendants' proprietary information confidential and then breaches that promise, Defendants will not be able to seek relief in this Court. Instead, they will be obligated to seek redress in any number of jurisdictions under various states' laws. This is certainly less convenient than enforcing any signatory's breach of the Protective Order in this Court.

On the other hand, Defendants' proposal would impose a clear burden on Plaintiffs' ability to develop their case. The testimony of implanting physicians regarding their knowledge of Defendants' products and their decision to implant one of Defendants' polypropelene hernia mesh is relevant to this case. So too is whether Defendants had additional knowledge of safety information concerning those products and whether an implanting physician would have used those products if he or she had been made aware of that additional safety information. Under Defendants' proposal, if a third-party witness, like an implanting physician, refused to sign the Protective Order, Plaintiffs would not be permitted to question them using Defendants' confidential documents. As a result, Plaintiffs would be significantly limited in their ability to explore the relevant lines of questioning identified above.

On balance, and at this early stage of the case, the Court finds that it is the better exercise of its discretion to adopt Plaintiffs' proposal. Plaintiffs' proposal eliminates a potential impediment to the discovery of relevant information while imposing a modest burden on Defendants. This is an imperfect, but necessary balancing of the parties' interests. The Court finds support for its decision in the numerous examples of similar protective orders in other MDLs. (*See* Doc. 28, Exs. B–K).

The Court offers two observations in conclusion. First, to the extent Defendants have expressed concern that Plaintiffs will have ex parte meetings with treating physicians and show those physicians confidential information without requiring them to sign Protective Order, the Protective Order does not permit them to do so. Rather, Plaintiffs' proposal provides that:

> Confidential Information may be disclosed to a witness who will not sign an Acknowledgment *in a deposition* if the witness is represented by counsel for Defendants or the witness has been given notice that the document(s) or information shown *at deposition* is Confidential Information and the witness verbally agrees on the record that he/she will keep the information confidential.

(Doc. 28, Ex. A, ¶ 14 (emphasis added)). In other words, Plaintiffs can show confidential information to a third-party witness *at a deposition* if the requirements in paragraph 14 are satisfied. No such allowance is made for meetings with third-party witnesses outside of a deposition.

Second, as discussed earlier, much of the parties' arguments regarding this issue are based on hypotheticals. As discovery progresses and the factual record develops, either party is free to request modification of the Protective Order. *See DSM Desotech, Inc. v. Momentive Specialty Chemicals, Inc.*, No. 2:15-CV-70, 2016 WL 8193590, at *4 (S.D. Ohio May 31, 2016) (citing *In re Upjohn Co. Antibiotic Cleocin Products Liab. Litig.*, 664 F.2d 114, 118 (6th Cir. 1981)) ("District courts likewise have the power to modify protective orders.").

III. CONCLUSION

For the foregoing reasons, the Court adopts Plaintiffs' proposal. The Court will enter the proposed Protective Order in a separate order.

IT IS SO ORDERED.

10-31-2018
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE

10/31/2018
DATE

KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE