IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bosco v. Mentor Worldwide LLC,*
2026 BCSC 947

Date: 20260526
Docket: S190084
Registry: Vancouver

Between:

Denée Jesanna Bosco, Stephanie Nicole Marto, and Jaime Lyn Hoolsema

Plaintiffs

And

Mentor Worldwide LLC and Johnson & Johnson Inc.

Defendants

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for the Plaintiffs:	A. Leoni J.K. Paul K. Cunningham, Articled Student
Counsel for the Defendants:	R. Reinerston P. Elahi K. Russell
Place and Date of Hearing:	Vancouver, B.C. January 30, 2026
Place and Date of Judgment:	Vancouver, B.C. May 26, 2026

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I. OVERVIEW

[1] This certified class action concerns Mentor Worldwide LLC MemoryGel™ silicone gel-filled breast implants used in breast augmentation and reconstruction surgery (the "Implants"). At issue on this application is the scope of document production by the defendants, Mentor Worldwide LLC and Johnson & Johnson Inc. (collectively, "Mentor").

[2] The plaintiffs request that Mentor produce additional broad categories of documents, which they say are relevant to the certified common issues set to be tried summarily in February 2027 and intertwined with the other certified common issues. The plaintiffs submit that comprehensive production by Mentor of its internal documentation and communications relating to the medical conditions at issue is necessary at this stage in the litigation to ensure a fair trial.

[3] Mentor replies that it has produced all documents that are material to the certified common issues and that it will continue to do so if additional documents are identified. Mentor denies that the additional documents the plaintiffs have requested are relevant to the summary trial issues. Mentor submits that, to the extent these documents might be relevant to the other certified common issues, the principle of proportionality favours postponing production of them until after its summary trial.

[4] Mentor contends that it has produced extensive documentation to date and that compelling it to produce the substantial additional documents the plaintiffs request at this stage in the litigation would be both burdensome and inconsistent with the principle of proportionality. Mentor submits that relevant considerations on this application include the object of the *Supreme Court Civil Rules* [*SCCR*], the goals of the *Class Proceeding Act*, R.S.B.C. 1996, c. 50 [*CPA*], and ensuring a fair and expeditious determination of the issues on the merits for all parties.

[5] Having regard to the pleadings, the certified common issues, and the principles governing class actions, including proportionality, I conclude that some of the additional documents the plaintiffs request could relate to the certified common issues set to be tried summarily, and overlap with some of the other certified

common issues. I conclude that it is appropriate for Mentor to provide limited additional document production now, but that it would not be proportional to compel Mentor to produce all the requested documents at this stage in the action.

II. PROCEDURAL HISTORY

[6] The plaintiffs commenced this action by notice of civil claim filed on January 3, 2019, and amended on September 15, 2021, March 1, 2024, and October 2, 2025. On October 21, 2024, I certified this action as a class proceeding under the *CPA* in reasons indexed as *Bosco v. Mentor Worldwide LLC*, 2024 BCSC 1931. The twelve certified common issues are set out in the appended Schedule "A".

[7] The certified common issues relate to allegations that the Implants cause or contribute to adverse health effects in patients, including the development of specific connective tissue disorders ("CTDs") and systemic inflammatory and/or autoimmune symptoms commonly referred to as Autoimmune Syndrome Induced by Adjuvants or Breast Implant Illness (collectively, "BII"): *Bosco* at para. 2.

[8] The plaintiffs allege that Mentor breached the duty it owed to class members in its post-market surveillance and/or monitoring of the Implants, and that Mentor failed to warn class members and surgeons of the risk that the Implants can cause CTDs and BII: *Bosco* at para. 2. The plaintiffs also allege that Mentor's supply of the Implants to class members breached consumer protection and competition legislation: *Bosco* at para. 2.

[9] Mentor intends to proceed with a summary trial on certified common issues #2 to #4 in February 2027. Certified common issue #2 relates to whether BII is a "real disease" and, if so, what are its defining characteristics. Certified common issues #3 and #4 relate to general causation and whether the Implants have the capacity to cause BII or CTDs. The parties have agreed to the following schedule for Mentor's planned summary trial:

a) A ten-day hearing commencing February 22, 2027;

b) Service of Mentor's summary trial application materials by April 24, 2026; and

c) Service of the plaintiffs' application response materials by September 25, 2026.

[10] Plaintiffs' counsel advises that although the plaintiffs have agreed to these dates, they are likely to dispute the severance of certified common issues #2 to #4 and the suitability of a summary trial on those issues. He underscores that the plaintiffs' agreement to the February 2027 summary trial hearing date was contingent on Mentor's provision of timely and appropriate document discovery. He denies that this has occurred.

[11] Following a case management conference in September 2025, the plaintiffs updated their litigation plan to reference Mentor's pending summary trial application:

> The Plaintiffs' position is that appropriate document discovery on the Common Issues and examinations for discovery must be completed prior to the exchange of application materials for the Summary Trial; the Defendants dispute that completion of discovery is required before they serve their Notice of Application or a hearing date is set for a Summary Trial on Common Issues #2-4. In addition, the Plaintiffs reserve their right to argue that severance of Common Issues #2-4 for determination prior to other certified Common Issues and resolution by way of summary or hybrid trial are not appropriate.

[12] Plaintiffs' counsel suggests that, subject to Mentor's further document production, the February 2027 summary trial date is in jeopardy.

III. LEGAL FRAMEWORK

[13] The legal framework that governs document production is well-established and not controversial.

A. *SCCR*

[14] Parties to a class action have the same rights of discovery under the *SCCR* as would be available to them in any other proceeding: *CPA*, s. 17(1).

[15] The *SCCR* contemplate a “two-tier” discovery process. The first tier of production is limited to what is required to prove or disprove a material fact: *SCCR*, R. 7-1(1); *Biehl v. Strang*, 2010 BCSC 1391 at paras. 16–19; *Imperial Parking Canada Corporation v. Anderson*, 2014 BCSC 989 at para. 19 [*Imperial Parking*].

[16] Rule 7-1(1) requires production of: (i) all documents that are or have been in the party’s possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact; and (ii) all other documents to which the party intends to refer at trial. A “material fact” is the ultimate fact, sometimes called the “ultimate issue” to the proof of which evidence is directed, the last in a series or progression of facts, and the fact put “in issue” by the pleadings: *Jones v. Donaghey*, 2011 BCCA 6 at para. 18.

[17] Justice Kent discussed the concept of “material facts” in *Imperial Parking*:

> [20] The concept of “material facts” requires a careful analysis and understanding of the causes of action/defence in each case. Each cause of action, whether it is negligence, breach of contract, conspiracy or simple debt, is broken down into constituent elements i.e. the components that must be established on the evidence in order to make out the cause of action/defence. The factual underpinnings of these elements are the “material facts” and to the extent that they can be proved/disproved by way of documents, the latter are the documents that must be initially disclosed under Rule 7-1(1).

[18] If, pursuant to *SCCR*, R. 7-1(10), the opposing party challenges the listing party’s disclosure under R. 7-1(1), the court must review the pleadings to determine entitlement to further production: *Kaladjian v. Jose*, 2012 BCSC 357 at para. 61. Rules 7-1(10) and (11) provide for the second tier of document discovery: *Imperial Parking* at para. 23. This second tier contemplates further discovery on demand for broader classes of documents: *Imperial Parking* at para. 18.

[19] If an application is brought under R. 7-1(13) for the listing or production of documents, the court may either order compliance with the demand, excuse full compliance, or order partial compliance: *SCCR*, R. 7-1(14); *Edwards v. Ganzer*, 2012 BCSC 138 at para. 41. Rule 7-1(14) provides for wider disclosure on

application to the court, including documents "relating to any or all matters in question in the action": *Biehl* at para. 15.

[20] When a party demands additional documents or classes of documents from the listing party that are not material, but that relate to any or all matters in question in the action, the demanding party must satisfy the requirements of R. 7-1(11) and show the existence and possible relevance of the additional documents beyond a "mere possibility": *Jiang v. Peoples Trust Company*, 2021 BCSC 2193 at para. 17, citing *Przybysz v. Crowe*, 2011 BCSC 731 at para. 32, 45; *Kaladjian* at paras. 60, 62, 64.

[21] The Court of Appeal in *Jones* clarified the distinction between a material fact and a relevant fact at para. 18:

> […] a material fact is the ultimate fact, sometimes called the "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.

[22] The burden on a party seeking documents under R. 7-1(11) is not a high one, and as long as there is some "air of reality between the documents and the issues in the action", the court will order the documents produced: *Jiang* at para. 19, citing *Lonking (China) Machinery Sales Co. Ltd. v. Zhao*, 2017 BCSC 2154 at paras. 19–20, 30–33, 43, 45; *Biehl* at para. 29.

[23] Relevance is the animating principle when considering a request for additional document production in the context of a certified class action: *Jiang* at para. 22. The general approach is that the question of relevance is governed by the certified common issues, as informed by the pleadings, and subject to the principles that apply in class proceedings, including proportionality: *Jiang* at para. 22.

B. Proportionality

[24] The court may consider the objectives of the *SCCR,* including proportionality, when exercising its discretion under R. 7-1(14). The principle of proportionality in

SCCR, R. 1-3(2), requires the court to attempt to balance the burden of producing additional documents against their materiality and probative value: *Jiang* at para. 20. The proportionality rule can be applied either to expand or restrict production of documents: *Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141*, 2011 BCSC 1752 at para. 15, citing *Whitcombe v. Avec Insurance Managers Inc.,* 2011 BCSC 204 at para. 11. The obligation of a producing party to produce "only relevant documents" is subject to the principle of proportionality: *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District*, 2025 BCSC 1256 at para. 73 [*Acciona*], citing *Gowing Contractors Ltd. v. Walsh Construction Co. Canada*, 2023 ONSC 4407. An approach informed by proportionality requires a fact-specific assessment of the disclosure in the context of the particular proceeding: *Acciona* at para. 73. As noted by Justice Elwood in *Acciona* at para. 85, *SCCR*, R. 7-1 should not be applied rigidly, and modern complex litigation requires a functional and pragmatic approach to rules that were developed during a different era of documentary records. Mentor submits that *Acciona* supports the proposition that proportionality has a role in document production in even the most complex cases.

[25] The plaintiffs assert that Mentor's status as a large, multinational company favours fulsome document production. They argue that class actions are inherently more complex and "higher stakes" proceedings than other litigation, a factor they say militates in favour of broader document discovery.

C. Postponement

[26] *SCCR*, R. 7-1(22) addresses the determination of an issue or question in dispute before discovery. It provides that, if the party from whom discovery is sought objects to that discovery, the court, "if satisfied that for any reason it is desirable that an issue or question in dispute should be determined before deciding on the right to discovery", may "order that the issue or question be determined first and reserve the question of discovery".

[27] The plaintiffs assert that the additional documents they request from Mentor are relevant to the summary trial issues and overlap with the other certified common

issues. They submit that trial fairness requires production of all these documents now, before the summary trial in February 2027. Mentor argues that to the extent the additional requested documents are relevant to the certified common issues #5–12 (i.e., those not set to be tried summarily in February 2027), discovery ought to be deferred until after its summary trial application on threshold issues.

[28] In *Robinson v. Marich*, 1980 CanLII 704 (B.C.S.C.), 23 B.C.L.R. 381 at para. 16, Justice Fulton found that the records sought related to the issues of liability and damages and could not easily be segregated so that discovery could be postponed. The plaintiffs submit that *Robinson* mirrors their position on this application: namely, the discovery of documents cannot be postponed if issues are intertwined.

[29] In *Northcott v. Allaby et al*, 2001 BCSC 14, the Court was required to determine whether there was a discrete issue that could conveniently be postponed until a major or other issue was resolved. Justice Melvin observed at para. 19 that any order made should not prejudice the plaintiff's opportunity to prove their case. He concluded at para. 15 that postponing discovery of the defendant's financial records pending resolution of the plaintiff's entitlement on establishing the defendant's liability would neither delay nor prejudice the trial. He rejected the suggestion that orders postponing discovery are exceptional: para. 19, citing *AR Sixteen Holdings Ltd. v. Down* (1997), 28 B.C.L.R. (3d) 394 (S.C.) at para. 21.

[30] In *Kwantlen University College Student Association v. Canadian Federation of Students Association - British Columbia*, 2017 BCSC 163 [*Kwantlen University*], Master (now Associate Judge) Harper concluded that the plaintiffs' claims were broad and wide-ranging and that the pending summary trial was a trial of the whole action and not a preliminary issue only: paras. 26, 29. In her view, there was a risk that the summary trial judge would not have all the relevant evidence if she postponed the discovery of documents: paras. 26, 31.

[31] I have considered the plaintiffs' requests for additional document production with these principles in mind.

IV. ANALYSIS AND CONCLUSIONS

A. What documents has Mentor produced to date?

[32] I begin by reviewing Mentor's document production to date. Mentor advises that it has produced three lists of documents and 1,881 documents comprising over 82,000 pages.

[33] On September 8, 2025, Mentor served its first list of documents pursuant to R. 7-1(1). This list disclosed 1,508 documents, comprising over 43,000 pages, and included, among other things: instructions for use for the Implants, patient brochures used in Canada during the class period, and extensive regulatory submissions to Health Canada, including but not limited to annual reports to Health Canada pursuant to the conditions of approval for the Implants, communications with Health Canada regarding BII and CTDs, and information about the design, testing, safety, efficacy, and post-market data for the Implants.

[34] On November 21, 2025, defence counsel served Mentor's first amended list of documents and advised plaintiffs' counsel as follows:

> We have generally produced full document "families" (i.e., with all attachments) and endeavoured to produce submissions to Health Canada in full, even though individual documents or attachments within the submission may not relate to a material fact in issue. Accordingly, production of a document or listing of a document by the defendants is not an acknowledgement or admission that it is material or relevant, either to the common issues or the matters at issue in this action generally. Our clients also reserve the right to challenge the admissibility of listed documents at trial.

[35] On the same date, defence counsel emailed plaintiffs' counsel to advise that Mentor's document production was ongoing and being made "on a rolling basis", and that they anticipated making further production as additional documents were identified.

[36] On January 19, 2026, Mentor served its second amended list of documents, identifying an additional 257 documents comprising over 2,200 pages. Mentor notes

that the plaintiffs seek historical documents dating back to 2003, and that production has necessarily taken some time.

[37] I accept that Mentor has produced the following categories of documents, as summarized in its application response, and that it agrees to produce additional documents in these categories, if they exist and can be made available:

a) Submissions to Health Canada dating back to 2003 and correspondence to and from Health Canada regarding BII, CTDs, and the design, testing, safety, and efficacy of the Implants;

b) Annual reports to Health Canada pursuant to the conditions of approval for the Implants, including post-approval studies and post-market adverse events;

c) Regulatory submissions to the FDA, including evidence regarding pre-clinical and clinical testing, safety, and the efficacy of the Implants;

d) Information regarding worldwide adverse events reported for the Implants from 2006, also referred to as post-market reporting data or surveillance reports/data;

e) Product Information Data Sheets for the Implants;

f) Patient brochures used in Canada during the class period;

g) Available archived versions of Mentor's Canadian websites; and

h) Information, documents, and materials (e.g., videos) potentially shown or provided by sales representatives to doctors.

[38] Plaintiffs' counsel contends that, to date, Mentor has produced substantial documents with limited or no probative value. He asserts that four months have "evaporated" and resulted in "meaningless and irrelevant document production". He argues that Mentor has produced only those documents it has chosen to disclose

externally and not its internal documents, which, he suggests, are often the most probative in product liability cases like this one.

[39] Mentor disputes that characterization. Defence counsel replies that Mentor has produced thousands of pages of documents, including scientific information and internal Mentor documents which are neither "external" (although they might have been sent to Health Canada and regulators) nor irrelevant. Mentor submits that it has produced a substantial volume of documents which are relevant to *all* the certified common issues and not just those set to be tried summarily in February 2027. Mentor suggests the plaintiffs' real complaint is that none of these documents supports their claim.

[40] I accept that Mentor has listed and produced extensive documentation to date. At issue is whether the scope of its document production is adequate at this stage in these proceedings.

B. What additional documents have the plaintiffs requested?

[41] I next consider the plaintiffs' requests for production of additional documents from Mentor. I begin by reviewing counsel's exchange of correspondence about that matter.

[42] On October 3, 2025, the plaintiffs sent an email demand to Mentor pursuant to *SCCR*, R. 7-1(10), requesting an amended list of documents to include 12 additional broad categories of documents.

[43] On November 5, 2025, Mentor emailed its response to the plaintiffs' October 3, 2025 demand, stating, in part, as follows:

> We previously advised you that the defendants' List of Documents dated September 8, 2025 was their first list, and that the defendants would be providing further documents as they are identified and available for production. In particular, we advised that the defendants were still in the process of collecting regulatory affairs files from archived storage and that we anticipated providing further regulatory submissions for the products and annual reports as they were retrieved. We can (again) advise that further regulatory submissions have been located and will be produced, with an amended List of Documents, in the near future.

> We can advise that the defendants have produced numerous patient brochures that were used in Canada during the class period, and continue to search for archived marketing materials. To the extent that additional marketing materials are identified, they will be listed and produced.

[44] On November 10, 2025, plaintiffs' counsel replied to defence counsel's November 5, 2025 letter, and advised that they considered it to be unresponsive to their request for further document production. Plaintiffs' counsel stated, in part:

> That some lengthy regulatory submissions have been produced is no answer to the fact that the Defendants have produced essentially no documents relating to, *inter alia*, internal discussions about the subject medical conditions or of medical literature or studies considering same, the Defendants' discussions with external advisors about the medical conditions at issue, or any evidence of internal studies conducted or discussed related to the subject medical conditions.

[45] In response to Mentor's offer that counsel meet to discuss its discovery of documents, plaintiffs' counsel replied: "it appears that our positions on the appropriate scope of production are so divergent that they will not be resolved by a meeting". Plaintiffs' counsel suggested that a hearing date be set for this application.

[46] The plaintiffs' requests for the production of additional documents from Mentor evolved before and after they filed this application. Plaintiffs' counsel further narrowed the plaintiffs' requests for additional documents in his oral submissions. In broad terms, the plaintiffs now request all documents that are material and those that relate to the certified common issues set to be tried summarily in February 2027 and/or are intertwined with the other certified common issues. Specifically, they seek a further amended list of documents from Mentor, which includes the following categories of documents:

a) All internal Mentor presentations, memoranda, emails, meeting minutes, draft or final documents (including red-lined versions) that discuss, summarize, or analyze BII or CTDs;

b) All internal Mentor pre-clinical or laboratory testing, in-vitro, or in-vivo studies, epidemiological studies, health-hazard evaluations or assessments, regulatory correspondence, communications or reports

from external consultants or scientific advisors relating to BII or CTDs, not previously disclosed; and

c) All internal Mentor documents relating to the "Dow Corning moratoria" dating back to 2003.

[47] Mentor replies that it has produced a significant number of documents in many categories, including all material documents and documents that relate to both the summary trial and other certified common issues. Mentor argues it has provided reasonable discovery in advance of its pending summary trial.

C. Are the documents necessary to identify a Mentor representative?

[48] Plaintiffs' counsel suggested that the requested documents are necessary to allow them to identify an appropriate Mentor representative to examine for discovery. The plaintiffs address examinations for discovery in their September 2025 litigation plan:

> The parties will meet and confer on a discovery plan with respect to the identity and number of representatives (witnesses) to be examined, location of each examination, and anticipated duration (time estimate) for each examination for discovery. The Plaintiffs anticipate that examinations for discovery will be required of three to six representatives of the Defendants. If the parties cannot agree, any party may bring an application to the Court pursuant to Rule 7-2.

[49] Mentor denies this issue is properly engaged on this application. I agree. It is open to the parties to confer and to exchange information about who Mentor ought to produce for an examination for discovery. If counsel cannot reach an agreement on that matter, it is open to the plaintiffs to apply for the appropriate order, as necessary.

D. Are the documents material to the certified common issues?

[50] I next consider whether the "internal" Mentor documents that the plaintiffs have requested (as summarized in para. 48 above) could be used to prove or disprove a material fact in connection with the certified common issues. If the

answer to this question is yes, Mentor concedes that they must be listed and produced now.

[51] Plaintiffs' counsel asserts that the number of documents Mentor has produced suggests "significant underproduction". I do not agree that the number of documents produced is, on its own, a relevant factor in determining the adequacy of Mentor's document production.

[52] Plaintiffs' counsel submits that Mentor's internal communications and discussions with its advisors are "vitally important" because "the common issues engage questions of what [Mentor] knew about BII and *when*, and *whether* [Mentor] acted appropriately in the context of [its] post-market surveillance relating to BII, or if [it] suppressed information and manipulated the science to maintain [its] denial of the existence of BII (until September 2020, when a black box warning was recommended by the regulators)".

[53] The parties' essential dispute is whether Mentor must provide, at this stage in the litigation, comprehensive discovery of its internal documents and electronic communications dating back about 20 years to October 2006. The plaintiffs assert that these documents are material and/or relate to pleaded allegations in the third amended notice of civil claim (the "Third ANOCC") at paras. 73–74 and 80:

> 73. All of the studies that the Defendant Mentor was required to conduct were supposed to support long-term safety. The poor follow-up rates and inadequate data confirm the Defendant Mentor's intentional and systematic failure to follow FDA and Health Canada requirements. Halfway through the ten-year prospective post-marketing studies mandated by the FDA and Health Canada, well over 50% of the 80,000 women in the study groups were dropped or otherwise eliminated from the studies. Of the patients who were accounted for, significant numbers reported systemic ailments.
>
> 74. It has been reported to the FDA that the implants are more likely to break than the company reported. It has also been reported that the silicone is more likely to leak, even when the implants are intact. The Defendant Mentor knew of these risks associated with the implants, but failed to appropriately investigate and disclose those risks by terminating studies, sponsoring only self-serving research they could control, and by misrepresenting the risks to the users, physicians, and regulatory agencies.
>
> […]

> 80. The Defendant Mentor knew of multiple risks associated with implants, and responded by terminating studies, sponsoring only self-serving research they could control, and by misrepresenting (or alternatively, failing to appropriately represent) the risks to the users, physicians, and regulatory agencies.

[54] Plaintiffs' counsel submits that Mentor's internal documents regarding BII and CTDs are likely to be the most probative in this case, citing *Gionet v. Syngenta AG*, 2024 BCSC 1440. He asserts that Mentor has produced only the documents it wanted the regulators to see. He says that the plaintiffs want to determine if what Mentor has said about BII publicly is the same as what it knew and said about BII internally. He argues that this is, in essence, what the plaintiffs plead at para. 80 of the Third ANOCC. Plaintiffs' counsel suggests that Mentor's alleged non-disclosure, inappropriate disclosure, and/or suppression of information (as pleaded in the Third ANOCC) is comparable to what occurred in *Gionet*. He admits the plaintiffs do not actually know if Mentor suppressed information or manipulated the science. He contends that the Third ANOCC pleads this allegation and that the plaintiffs ought to be permitted to investigate it before Mentor's summary trial application.

[55] Plaintiffs' counsel further submits that Mentor's internal documents go to the heart of the certified common issues set to be tried summarily in February 2027. He argues that, if these documents are not produced, the summary trial will proceed on a "sanitized record" and be determined based only on documents that contain the information about its product that Mentor wants the public to know. He suggests that any experts the parties retain might offer different opinions if the plaintiffs' allegations about Mentor "suppressing evidence and manipulating science" were taken as true. He submits that the plaintiffs must be able to "put their best foot forward" in response to Mentor's summary trial and notes that the pleadings and the certified common issues must inform document production.

[56] Defence counsel, Ms. Reinertson, replies that alleging scientific or regulatory fraud is a very serious matter. She denies those allegations have been expressly pleaded or that a bald assertion can form the basis for the kind of wide-ranging document disclosure the plaintiffs seek. She disputes any suggestion by plaintiffs'

counsel that the requested documents are either material or relate to the summary trial issues.

[57] Defence counsel denies the Third ANOCC pleads the very serious allegation that Mentor suppressed information or manipulated science. They say the Third ANOCC expressly pleads that Mentor failed to conduct adequate studies, to undertake sufficient follow-up (including adequately tracking patients), and to collect data. They submit that those alleged failures would be consistent with an absence of documentation and that additional discovery will not produce documents that do not exist. They deny this is an allegation that Mentor conducted "secret studies" which it has not disclosed or that it has suppressed data. While Mentor denies the plaintiffs' allegations, defence counsel submits that Mentor has produced all relevant documentation.

[58] I have reviewed the allegations in paragraphs 73, 74, and 80 of the Third ANOCC. The plaintiffs do not expressly plead that Mentor suppressed information or manipulated science. Rather, they allege multiple failures by Mentor including:

a) A failure to follow-up (allegedly resulting in inadequate data) in the studies Mentor was required to conduct to support long-term safety (para. 73);

b) A failure to report the risks known to Mentor of the Implants breaking and leaking silicone (para. 74);

c) A failure to appropriately investigate and disclose those risks by terminating studies, sponsoring only self-serving research Mentor could control, and misrepresenting the risks to the users of the Implants, physicians, and regulatory agencies (para. 74); and

d) A failure to continue studies, sponsoring only self-serving research Mentor could control, and misrepresenting or failing to appropriately represent the risks to the users of the Implants, physicians, and regulatory agencies, despite knowledge of them (para. 80).

[59] Mentor has provided comprehensive discovery of its communications to users of the Implants, physicians, and regulatory agencies including submissions, correspondence, and its annual reports to Health Canada regarding BII, CTDs, the design, testing, safety, and efficacy of the Implants, post-approval studies, post-market adverse events, and its regulatory submissions to the FDA, including evidence regarding pre-clinical and clinical testing, safety, and the efficacy of the Implants, and information about worldwide adverse events reported for the Implants since 2006. Assuming the bare assertions pleaded in the Third ANOCC to be true, they would appear to be predominantly associated with an absence of documents.

[60] In my view, *Gionet* is distinguishable on its facts. It is a certification decision and not an application for the production of documents. In *Gionet*, the defendants' expert was instructed to ignore relevant information which the defendant knew existed: para. 96. Specific data that had been filed in US proceedings was not provided to the defendants' expert: para. 95. The defendants relied on an expert opinion, despite knowing of information that undercut his critiques: para. 96. Mentor denies *Gionet* supports the plaintiffs' request that it produce all of its internal communications dating back to 2006. Defence counsel denies *Gionet* supports the proposition that all internal communications are producible in any product liability case where general causation is at issue. I agree.

[61] The documentation found to be relevant in *Gionet* did not comprise all of the defendants' internal communications. Defence counsel advises that Mentor has produced all clinical and pre-clinical studies, the data they contend is relevant to the general causation issues. Mentor has not produced all its internal communications, including memoranda, regarding BII. Defence counsel say that some consideration must be given to the principle of proportionality in considering this request. They deny these communications are material to any certified common issue.

[62] Plaintiffs' counsel describes Mentor, the manufacturer of the Implants, as the party with knowledge that is superior to their own. He questions how Mentor can deny the Implants cause or contribute to BII or CTDs and then refuse to produce all

their internal communications, studies, and engagement with their own experts about those matters.

[63] Mentor denies it is proportional to require it to produce documents now that will not assist the court in answering the threshold questions set to be tried summarily. Mentor admits it has expertise regarding the design, safety, and efficacy of the Implants and adverse events, pre-clinical studies, and ongoing surveillance of the Implants. Mentor has produced all documents related to those matters. Mentor denies it is an expert in defining the characteristics of medical conditions; it submits that information on those matters will necessarily come from appropriately qualified scientific experts.

[64] Mentor denies the determination of summary trial issues #2 to #4 will turn on its knowledge but says that, to the extent it has information, it has been produced. It describes the additional documents the plaintiffs currently seek as hypothetical and speculative and says that a suggestion, based on a bare pleading, does not mean the requested records are probative to material facts.

[65] Defence counsel argue that the plaintiffs have "not been crisp" about what Mentor has produced or how the additional documents they request are material. I agree. I accept that Mentor has produced many internal documents (i.e., those not publicly available) related to testing, studies, and regulatory correspondence about the Implants. I conclude that the plaintiffs have not met their burden of establishing how Mentor's internal communications, to the extent they exist and remain available, could prove or disprove any material fact regarding the certified common issues. I accept that documentation related to internal Mentor testing, studies, and data regarding BII and CTDs could be material to the summary trial issues and/or to overlapping certified common issues. It follows that, if such documents exist and have not already been produced, Mentor must list and produce them now.

E. Are the documents related to the certified common issues?

[66] Where a party demands additional documents or classes of documents from the listing party that are not material, but that relate to any or all matters in question

in the action, the demanding party must satisfy the requirements of R. 7-1(11) and show the existence and possible relevance of the additional documents beyond a "mere possibility": *Jiang* at para. 17, citing *Przybysz* at paras. 32, 45; *Kaladjian* at paras. 60, 62, 64.

[67] Plaintiffs' counsel argues that Mentor ought to be required to produce documents that are related to all certified common issues at this stage in the litigation. They assert that, otherwise, the resulting delay will prejudice them and frustrate their ability to prove their case and to defend the pending summary trial.

[68] Defence counsel describes the plaintiffs' request for additional documents as imprecise and overly broad. They say it is unclear how the broad categories of additional requested documents are relevant to the certified common issues. They deny there is anything to support the plaintiffs' bald assertion that Mentor is in possession of "secret information" it has not produced that is relevant to the certified common issues. They describe the plaintiffs' wide-ranging requests for production of Mentor's internal communications dating back to 2006 as the quintessential "fishing expedition".

[69] Having regard to the Third ANOCC and the certified common issues, I conclude that Mentor's non-privileged internal communications with expert consultants regarding BII and CTDs could relate to the summary trial issues and/or overlapping certified common issues. I do not view Mentor's other internal electronic communications, meeting minutes, or unspecified "documents" regarding BII or CTDs the same way. I conclude, having regard to the plaintiffs' pleaded allegations and the certified common issues, that the plaintiffs have failed to show the existence and possible relevance of those internal communications beyond a mere possibility: *Jiang* at para. 17.

[70] I next consider whether production of the requested documents is proportional.

F. Is the plaintiffs' demand for discovery proportional?

[71] Mentor concedes that it has neither searched for nor collected "thousands" of internal Mentor emails related to all of the certified common issues. Defence counsel denies the production of those documents is proportional before the pending summary trial. Mentor argues that s. 12 of the *CPA* authorizes the court to make almost any order it considers appropriate regarding the conduct of a class proceeding to further a "fair and expeditious determination". They argue that proportionality must be a factor in this analysis. Based on the "no-costs" rule in s. 37 of *CPA* for certified class actions, they underscore that Mentor will not recover its costs, even if it prevails at the summary trial.

[72] By applying the proportionality principle in *SCCR*, R. 1-3(2), the court should attempt to balance the burden of producing additional documents against their materiality and probative value: *Jiang* at para. 20. As noted by Master Taylor in *Callahan Construction Co. Ltd. et al. v. National Bank Finance Ltd. et al.*, 2005 BCSC 1746:

> [29] I have been convinced that the material that the defendants seek to have discovered and disclosed at this time would involve a prolonged inquiry of voluminous documents which is best postponed until after the determination of a summary trial as to whether or not there is an issue to be tried concerning damages for breach of good faith. Accordingly, I have come to the conclusion that this is a case where it is appropriate to apply Rule 26(15) and to order the postponement of discovery of these documents until the issue is determined by summary trial.

[73] Those comments are analogous here. I accept that requiring Mentor to produce about 20 years of its internal electronic communications regarding BII and CTDs would be onerous and costly, assuming those documents exist and could be searched, accessed, and produced. Mentor denies that producing a large number of irrelevant documents in the form of a "document dump" (which imposes a burden on the receiving party, as well as the producing party) is appropriate. I agree.

[74] I have considered the burden that producing about 20 years of internal electronic communications would impose on Mentor. I conclude that the plaintiffs have not demonstrated the relevance of those documents to the threshold summary

trial issues, or to any overlapping certified common issues, beyond a mere possibility. The plaintiffs' request for production of those documents is based on a bald assertion in the Third ANOCC. Weighing the materiality and probity of these internal Mentor documents, I conclude it would not be proportional to order that Mentor produce them at this stage in these proceedings.

G. Is it appropriate to postpone discovery?

[75] Mentor argues that production of the extensive additional documents the plaintiffs request is ultimately contingent on their success on the threshold issues at the summary trial. Mentor submits that documents related to its knowledge and conduct can be postponed and addressed after the summary trial, as necessary.

[76] In *Speckling v. Local 76 of the C.E.P.U.*, 2004 BCSC 714, the plaintiff sought additional document production, which the defendant said ought to be postponed pending determination of threshold, procedural, and jurisdictional motions: paras. 1–2. Justice Gerow, citing *SCCR*, R. 26(15), the predecessor to R. 7-1(22), confirmed that postponement of discovery is available in circumstances where the determination of an issue may make the discovery of documents unnecessary or limit the document discovery required: para. 3. The court has a wide discretion to make such an order, especially where the determination of the issues may provide a final determination of the litigation: para. 4. An order to postpone discovery is more readily granted if the documents need not be seen in order to try the threshold, procedural, and jurisdictional questions: para. 5. Justice Gerow noted there is no authority for the proposition that such an order should be restricted to exceptional cases: para. 6.

[77] In *Kwantlen University*, Master (now Associate Judge) Harper concluded that the defendant's planned summary trial was not a trial of a preliminary issue but rather a trial of the entire action: para. 26. Accordingly, she declined the defendant's request to postpone the discovery of documents until after the summary trial: para. 26.

[78] In my view, *Kwantlen University* is distinguishable on its facts. I conclude there is not the same risk here that all of the relevant evidence will not be before the court if document discovery is limited to those documents that are material to the certified common issues and/or related to or intertwined with the summary trial and other certified common issues. Unlike *Kwantlen University*, all pleaded issues will not be before the court on Mentor's summary trial application. In *Yang v. Kong*, 2022 BCSC 1639, Master (now Associate Judge) Robertson postponed discoveries pursuant to *SCCR*, R. 7-1(22) pending the hearing of a summary trial: para. 19. It is possible that the summary trial here could resolve some or all issues in this action.

[79] The Court in *Thomson v. A.R. Thomson Group*, 2023 BCSC 431 considered at paras. 28–30, 36–37 and 40-41 the following factors in exercising its discretion to postpone discovery until after an application to strike had been determined:

a) The Court was satisfied there was no risk that the judge hearing the application to strike would not have all the relevant evidence if discovery was postponed as it was neither necessary nor relevant to the plaintiff's defence of the application;

b) If successful, the application to strike would determine the entire action and no further discovery would be required; and

c) Postponing discovery until after determination of the application to strike did not prejudice the plaintiff's ability to prepare for the trial (seven months later).

[80] I conclude that ensuring all documents potentially covered by the plaintiffs' Third ANOCC are produced now would be time-consuming and costly: *Speckling* at para. 12. I accept that determination of the threshold summary trial issues could narrow the scope of additional document discovery or render it unnecessary. No conventional trial date has been set in this action. I am not persuaded that postponing discovery of some of the documents the plaintiffs request would prejudice their ability to prepare for such a trial, if one proceeds. Mentor concedes

that it is open to the plaintiffs to argue at the summary trial, based on evidence then available, that its discovery has been inadequate, or that additional document production is necessary.

[81] I conclude that the following documents, if they exist and have not already been produced, could relate to the summary trial issues and be intertwined with the other certified common issues:

a) Internal Mentor testing, studies, and data related to BII or CTDs; and

b) Non-privileged internal Mentor communications with, and/or reports from, expert consultants and/or scientific advisors related to BII or CTDs.

[82] Accordingly, if the above-noted documents exist and have not already been produced, I conclude that it is appropriate for Mentor to list them in a further amended list of documents to be served on plaintiffs' counsel within 35 days. Thereafter, if production of those documents supports broader document discovery by Mentor, it is open to the plaintiffs to renew their application for further production, supported by evidence. I make no determination about whether these documents exist or remain in Mentor's possession or control. That matter can be addressed as necessary after Mentor has provided its updated list in accordance with these reasons.

[83] I conclude that production of the above-noted documents (as summarized in para. 81 above) will allow the parties to place a complete evidentiary record before the court at the summary trial, capable of addressing the summary trial issues and any overlapping certified common issues. In my view, it is appropriate to postpone Mentor's discovery of other documents related to the remaining certified common issues until after the summary trial in February 2027.

[84] I do not order Mentor to produce all of its internal electronic communications that relate to BII and CTDs dating back to 2006 (assuming they exist, remain available, and could be searched and produced) at this stage in these proceedings. In my view, doing so would not be proportional, having regard to the pleadings, the

materiality, probity, and relevance of those documents to the summary trial issues and any overlapping certified common issues, and the corresponding cost and burden of producing them.

[85] I am not persuaded that any documents in Mentor's possession related to the Dow Corning regulatory moratoria imposed on a different manufacturer, regarding a different product, before the start of the class period in this action, are relevant to the summary trial issues or any overlapping certified common issues.

H. Summary

[86] In summary, having regard to the pleadings, the certified common issues, and the principles governing class proceedings, including proportionality, I conclude:

a) The following internal Mentor documents, if they exist and have not already been produced, could relate to certified common issues #2 to #4 and overlap with the other certified common issues:

   i. Internal Mentor testing, studies, and data relating to BII and CTDs; and

   ii. Mentor's internal non-privileged communications with, and/or reports from, expert consultants or scientific advisors regarding BII and CTDs.

b) Mentor must provide a further amended list of documents which identifies the documents, if any, described in para. 86(a) above within 35 days.

[87] I conclude that limited additional production by Mentor in accordance with these reasons is proportional and adequate to permit the plaintiffs to prepare for the pending summary trial application in February 2027. If production of these additional documents supports more extensive document discovery, it is open to the plaintiffs to renew their application for document production, supported by affidavit evidence.

V. DISPOSITION

[88] I make the following orders:

a) Within 35 days of these reasons, Mentor will provide the plaintiffs with a further updated list of documents, including the following internal Mentor documents, if they exist and have not already been produced:

   i. Internal Mentor testing, studies, and/or data regarding BII and CTDs; and

   ii. Mentor's internal non-privileged communications with, and/or reports from, its expert consultants and/or scientific advisors regarding BII and CTDs;

b) Production of the remaining documents the plaintiffs have requested from Mentor is postponed until after the summary trial in February 2027; and

c) It is open to the plaintiffs to renew their application for further document discovery at a later stage in this action on appropriate evidence.

[89] If there are any issues arising from these reasons, it is open to the parties to schedule a judicial management conference to address them.

"Douglas J."

SCHEDULE "A"

Negligence and General Causation

1. Did the Defendants, or any of them, owe a duty of care to the Class Members?

2. Is Autoimmune Syndrome Induced by Adjuvants due to silicone breast implants or Breast Implant Illness (collectively, "BII") a real disease and, if so, what are its defining characteristics?

3. If the answer to #2 above is yes, do Mentor Silicone Breast Implants have the capacity to cause the development of BII?

4. Do Mentor Silicone Breast Implants have the capacity to cause the development of the following connective tissue disorders: rheumatoid arthritis, systemic lupus erythematosus, Sjogren's syndrome, and/or systemic sclerosis?

5. If the answer to #3 and/or #4 above is yes, did the Defendants, or any of them, breach their duty to the Class Members in their post-market surveillance and/or monitoring of the Mentor Silicone Breast Implants with respect to those conditions and if so, who, when and how?

6. If the answer to #3 and/or #4 above is yes, did the Defendants know or ought they to have known that Mentor Silicone Breast Implants have the capacity to cause the development of BII, rheumatoid arthritis, systemic lupus erythematosus, Sjogren's syndrome, and/or systemic sclerosis, and if so, when?

7. If the answer to #3 and/or #4 above is yes, did the Defendants, or any of them, breach a duty to warn, or to adequately warn, Class Members and/or surgeons with respect to the risks of BII, rheumatoid arthritis, systemic lupus erythematosus, Sjogren's syndrome, and/or systemic sclerosis associated with Mentor Silicone Breast Implants and if so, who, when and how?

BC Consumer Protection Claims

8. Did the Defendants' supply of Mentor Silicone Breast Implants to Class Members in British Columbia during the Class Period constitute a "consumer transaction" pursuant to the BPCPA?

9. With respect to the supply of Mentor Silicone Breast Implants to Class Members in British Columbia during the Class Period, are the Defendants or any of them "suppliers" pursuant to the BPCPA?

10. Are the Class Members "consumers" pursuant to the BPCPA?

11. If the answer to #3 and/or #4 above is yes, did the Defendants, or any of them, engage in conduct that constituted a "deceptive act or practice" contrary to the BPCPA with respect to the risks of BII, rheumatoid arthritis, systemic lupus erythematosus, Sjogren's syndrome, and/or systemic sclerosis associated with Mentor Silicone Breast Implants?

Competition Act

12. If the answer to #3 and/or #4 above is yes, did the Defendants, or any of them, engage in conduct which is contrary to section 52 of the Competition Act with respect to the risks of BII, rheumatoid arthritis, systemic lupus erythematosus, Sjogren's syndrome, and/or systemic sclerosis associated with Mentor Silicone Breast Implants?