



**Zundel, CA No. 22-0285. Boston Medical Product's Motion to Compel Plaintiffs to Produce Mr. Zundel's Tissue Blocks and to Compel the Production of All Reports and Testing Results from Plaintiffs' Destructive Testing of Mr. Zundel's Tissue Blocks.**

After hearing, the Special Master recommends that the Plaintiffs be **ORDERED** to produce to the defendant Boston Medical Products one third of Bryce Zundel's tissue blocks within the plaintiffs' possession or control within ten (10) days of the date of this Order. This pathology is clearly discoverable, and the parties acknowledge that any concerns concerning potential prejudice flowing from this belated production will be alleviated by the condition that production will not delay the trial of this case, even should the case be assigned to the July trial session.

With regard to the request for all reports and testing results related to the destructive testing of Mr. Zundel's tissue blocks by Material Analytical Services, Inc. (MAS), it is necessary that the Special Master conduct an *in camera* review of these documents. Plaintiffs' counsel claimed in its opposition that no such "reports" exist, but during oral argument were careful to state that no "final reports" exists. Nor do they claim that other documents requested do not exist. In any event, plaintiffs maintain that such documents are not discoverable because, *inter alia*, they are not offering any expert testimony or opinion relating to MAS's destructive testing, because their designated expert William Longo, Ph.D., an employee of MAS (with a purported significant ownership interest in the lab) was not involved in the testing and has not received any results therefrom, and because in any event such discovery is protected under Mass.R.Civ.P. 26 (b)(4)(B) because it involves a consulting expert and no "exceptional circumstances" have been shown to warrant disclosure.

The claim of consultant expert work-product privilege depends, in part, on whether the testing was completed, and whether Dr. Longo reviewed and/or considered the testing. Although he testified during his deposition in the Fall of 2023 that he was aware that tissue analysis was being done by MAS, he stated that it had not yet been completed and that he "wait[s] to see it till it's done and it's gone through QC before [he] gets a hold of it." The record does not reveal that the tissue testing process at MAS was walled off from Dr. Longo to isolate him from the purported expert consulting services MAS was providing in this case. Review of records relating to the testing may well provide evidence of the state of the testing and whether Dr. Longo reviewed same or was otherwise involved in the process.

*In camera* review will also aid the Special Master in determining the relevance of any records.

Accordingly, it is hereby further **ORDERED** that within two weeks of the date of this Order that MAS provide the Special Master with all reports, testing results, notes, communications, and other documents, relating to MAS's fiber burden analysis and/or tissue digestion of Mr. Zundel's pathology tissue.

The parties have the right to seek review of the Special Master's Ruling per PTO-9.

Hon. Kenneth J. Fishman (Ret.)

Special Master, SMAL



COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
DEPARTMENT OF THE TRIAL COURT  
CIVIL ACTION NO. 2281-CV-02145

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BRYCE ZUNDEL and DIANE ZUNDEL,

Plaintiffs,

v.

AMERILURE, INC., et al.,

Defendants.

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**DEFENDANT BOSTON MEDICAL PRODUCTS, INC.'S LIST OF  
DOCUMENTS FILED PURSUANT TO SUPERIOR COURT RULE 9A**

Pursuant to Superior Court Rule 9A, Boston Medical Products, Inc. (“Boston Medical”),  
by its counsel, gives notice of filing herewith the following documents:

1. List of Documents Filed;
2. Defendant Boston Medical’s Notice of Filing;
3. Affidavit of Compliance with Superior Court Rule 9A (With Opposition);
4. Defendant Boston Medical’s Motion to Compel Plaintiffs to Produce Mr. Zundel’s Tissue Blocks and to Compel the Production of All Reports and Testing Results from Plaintiffs’ Destructive Testing of Mr. Zundel’s Tissue Blocks;
5. Plaintiffs’ Opposition to Boston Medical’s Motion to Compel Plaintiffs to Produce Mr. Zundel’s Tissue Blocks and to Compel the Production of All Reports and Testing Results from Plaintiffs’ Destructive Testing of Mr. Zundel’s Tissue Blocks;
6. Defendant Boston Medical’s Reply to Plaintiffs’ Opposition to Boston Medical’s Motion to Compel Plaintiffs to Produce Mr. Zundel’s Tissue Blocks and to Compel the Production of All Reports and Testing Results from Plaintiffs’ Destructive Testing of Mr. Zundel’s Tissue Blocks;
7. Defendant Boston Medical’s Request for a Hearing.

Respectfully submitted,  
Boston Medical Products, Inc.  
By its attorneys,

/s/ Daniel P. McCarthy

Daniel P. McCarthy, BBO #651559  
Michael F. McVinney, BBO #693970  
Christopher O. Massenburg, *Pro Hac Vice*  
MANNING GROSS + MASSENBURG LLP  
125 High Street, 6<sup>th</sup> Floor  
Oliver Street Tower  
Boston, MA 02110-3536  
Telephone: (617) 670-8800  
Facsimile: (617) 670-8801

**CERTIFICATE OF SERVICE**

I, Daniel P. McCarthy, attorney for Defendant, Boston Medical Products, Inc., hereby certify that I electronically served a copy of the above document on all counsel of record via File & Serve Xpress on February 12, 2024.

/s/ Daniel P. McCarthy

Daniel P. McCarthy

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
DEPARTMENT OF THE TRIAL COURT  
CIVIL ACTION NO. 2281-CV-02145

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BRYCE ZUNDEL and DIANE ZUNDEL,

Plaintiffs,

v.

AMERILURE, INC., et al.,

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**DEFENDANT BOSTON MEDICAL PRODUCTS, INC.'S  
NOTICE OF FILING**

Pursuant to Superior Court Rule 9A, Defendant Boston Medical Products, Inc. hereby gives notice that on February 12, 2024, it filed the documents listed on the accompanying List of Documents.

Respectfully submitted,  
Boston Medical Products, Inc.  
By its attorneys,

/s/ Daniel P. McCarthy

Daniel P. McCarthy, BBO #651559  
Michael F. McVinney, BBO #693970  
Christopher O. Massenburg, *Pro Hac Vice*  
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/s/ Daniel P. McCarthy  
Daniel P. McCarthy

COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT  
DEPARTMENT OF THE TRIAL COURT  
CIVIL ACTION NO. 2281-CV-02145

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BRYCE ZUNDEL and DIANE ZUNDEL,

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**DEFENDANT BOSTON MEDICAL PRODUCTS, INC.’S  
AFFIDAVIT OF COMPLIANCE WITH SUPERIOR COURT RULE 9A**

I, Daniel P. McCarthy, attorney for Defendant Boston Medical Products, Inc. (“Boston Medical”), under oath do depose and state as follows:

1. I am an attorney admitted to practice law in the Commonwealth of Massachusetts.
2. I represent Defendant Boston Medical in the above-captioned matter.
3. On January 23, 2024, my office served Boston Medical Products, Inc.’s Motion to Compel Plaintiffs to Produce Mr. Zundel’s Tissue Blocks and to Compel the Production of All Reports and Testing Results From Plaintiffs’ Destructive Testing of Mr. Zundel’s Tissue Blocks.
4. On February 2, 2024, I received Plaintiffs’ Opposition to Boston Medical Products, Inc.’s Motion to Compel Plaintiffs to Produce Mr. Zundel’s Tissue Blocks and to Compel the Production of All Reports and Testing Results from Plaintiffs’ Destructive Testing of Mr. Zundel’s Tissue Blocks.
5. To date, I have received no other opposition.

Respectfully submitted,  
Boston Medical Products, Inc.  
By its attorneys,

/s/ Daniel P. McCarthy

Daniel P. McCarthy, BBO #651559  
Michael F. McVinney, BBO #693970  
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/s/ Daniel P. McCarthy

Daniel P. McCarthy

COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT  
DEPARTMENT OF THE TRIAL COURT  
CIVIL ACTION NO. 2281-CV-02145

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BRYCE ZUNDEL and DIANE ZUNDEL,

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**DEFENDANT BOSTON MEDICAL PRODUCTS, INC.'S**  
**REQUEST FOR HEARING**

Pursuant to Superior Court Rule 9A(c)(2), Defendant Boston Medical Products, Inc. hereby requests a hearing at which it may present oral arguments on the issues raised by its Motion to Compel Plaintiffs to Produce Mr. Zundel's Tissue Blocks and to Compel the Production of All Reports and Testing Results from Plaintiffs' Destructive Testing of Mr. Zundel's Tissue Blocks.

Respectfully submitted,  
Boston Medical Products, Inc.  
By its attorneys,

*/s/ Daniel P. McCarthy*

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I, Daniel P. McCarthy, attorney for Defendant, Boston Medical Products, Inc., hereby certify that I electronically served a copy of the above document on all counsel of record via File & Serve Xpress on February 12, 2024.

*/s/ Daniel P. McCarthy* \_\_\_\_\_

Daniel P. McCarthy