

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

TERRA JOHNSON, Individually and
as next of friend and mother of TAMARIO
MILLER, a minor

Plaintiff,

v.

Case No. 2:08-cv-02376-JPM

ADVANCED BIONICS, LLC d/b/a
ADVANCED BIONICS CORPORATION
and ADVANCED BIONICS HOLDING
CORPORATION d/b/a
ADVANCED BIONICS CORPORATION and
ASTRO SEAL, Inc.

Defendants.

CHRISTINE PURCHASE, Individually and
as next of friend and mother of CLYCE
("CHASE") PURCHASE WEATHERLY,
a minor

Plaintiff,

v.

Case No. 2:08-cv-02442-JPM

ADVANCED BIONICS, LLC d/b/a
ADVANCED BIONICS CORPORATION
and ADVANCED BIONICS HOLDING
CORPORATION d/b/a
ADVANCED BIONICS CORPORATION and
ASTRO SEAL, Inc.

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL
DISCOVERY AND FOR SANCTIONS**

COME NOW the Plaintiffs, Terra Johnson, Individually and as next of friend and mother of Tamario Miller, a minor, and Christine Purchase, Individually and as next of friend and mother of Clyce ("Chase") Purchase Weatherly, a minor, by and through their counsel of record,

Glassman, Edwards, Wade & Wyatt, P.C., and submit this Memorandum of Law in support of their Motion to Compel Discovery and for Sanctions against the Defendant, Advanced Bionics. In support thereof, Plaintiffs would show as follows:

RELEVANT FACTS

This Motion to Compel centers around Advanced Bionics, LLC's responses to Plaintiffs' Jurisdictional Interrogatories Nos. 5 and 6. Advanced Bionics filed their discovery responses on or about October 16, 2008, and immediately upon receiving and reviewing those interrogatories responses, counsel for the Plaintiffs contacted counsel for Advanced Bionics to discuss deficiencies in Advanced Bionics' Interrogatory Responses. Despite counsel's diligent attempts to try and work out this discovery dispute, counsel have been unable to reach an agreement as to the sufficiency of the Interrogatory responses supplied by Advanced Bionics.

This Motion centers around responses for two Interrogatories supplied to Defendant Advanced Bionics for jurisdictional purposes:

Interrogatory No. 5:

Does Advanced Bionics contend that Defendant Astro Seal, Inc., in whole or in part, was responsible for the HiRes 90K cochlear implant failures which are the subject of this litigation?

Response to Interrogatory No. 5:

Advanced Bionics objects to this interrogatory on the ground that it exceeds the scope of the Court's order permitting limited jurisdictional discovery. Advanced Bionics further objects to this interrogatory as premature as there has not yet been any discovery in this action.

Subject to and without waiving the above objections, please see Advanced Bionics' answers to Plaintiffs' Complaint.

Interrogatory No. 6:

If your answer to the preceding Interrogatory is "yes," state the factual basis for your contention that Astro Seal, Inc. is responsible in whole or in part.

Response to Interrogatory No. 6:

Advanced Bionics herein incorporates its response to Interrogatory No. 5.

See Advanced Bionics, LLC's Responses to Plaintiff's Jurisdictional Interrogatories (Ex. A).

LAW AND ARGUMENT

I. Plaintiffs are entitled to complete responses to Interrogatories Nos. 5 and 6.

"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" Fed. R. Civ. P. 26(b)(1). Relevancy means that the evidence "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); see also Coleman v. Am. Red Cross, 23 F.3d 1091, 1097 (6th Cir. 1994). The Court should broadly interpret whether evidence is relevant. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.12 (1978) (quoting 4 J. Moore, Federal Practice § 26.96[1], at 26-131 n.34 (2d ed. 1976)). In this Circuit, the scope of discovery is extremely broad under the Federal Rules of Civil Procedure and "is . . . within the broad discretion of the trial court." Lewis v. ACB Business Servs. Inc., 135 F.3d 389, 402 (6th Cir. 1998). The United States Supreme Court has also noted that discovery should be both broad and liberal. See Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964) (citing Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

An interrogatory "may relate to any matter that may be inquired into under Rule 26(b)." Fed. R. Civ. P. 33(b). The Rules of Civil Procedure follow that "each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Fed. R. Civ. P. 33(b)(3). Moreover, in oral argument on Defendant Astro Seal's Motion to Dismiss, and Plaintiffs' Motion for Limited Discovery, United States District Judge Jon McCalla specifically and pointedly asked of counsel for Advanced Bionics this very question, i.e. whether Advanced Bionics was faulting Astro Seal. Unable to get a direct answer, Judge McCalla ordered this discovery to be taken.

As it relates to Interrogatories Nos. 5 and 6, Defendant Advanced Bionics has failed to adequately answer these Interrogatories. Advanced Bionics' only response is to direct Plaintiffs

to the “Answer to Plaintiffs’ Complaint.” See Response to Interrogatory No. 5. A review of the Answer of Defendant Advanced Bionics to the Complaint filed by Terra Johnson, Individually and as Next Mother and Friend of Tamario Miller, a Minor, reveals a 35-page pleading with 38 affirmative defenses. Advanced Bionics is, in a sense, hiding a needle in a haystack for the Plaintiffs to try and guess the answer to a straightforward question, namely whether or not Advanced Bionics contends that Defendant Astro Seal, Inc. is either in whole or in part responsible for the HiRes 90K cochlear implant failures which are the subject of this litigation. The same is true for the Purchase case, where a voluminous pleading awaits the Defendants’ “incorporation.” See Answer to Johnson case (Ex. B); Answer to Purchase case (Ex. C).

This lawsuit is not the first opportunity for Defendant Advanced Bionics to review allegations concerning the failure of the HiRes 90K cochlear implant device. Advanced Bionics has been sued by the United States Food and Drug Administration, a case which was settled for \$1.1 million dollars, and Advanced Bionics has been sued in other state and federal courts across the nation concerning the same or similar allegations of wrongdoing. It is unlikely that an interrogatory asking if Advanced Bionics contends that Astro Seal is either in whole or in part responsible for the HiRes 90K cochlear implant failures is somehow “premature” as alleged by Advanced Bionics in their responses to the Plaintiffs’ Interrogatories.

Further, it is believed that Advanced Bionics will produce in discovery responses a transcript from a web chat session where the company’s own CEO discussed allegations of fault as to Astro Seal. Advanced Bionics set forth no good cause reason for its current responses. The Answers to the two Complaints are vague as to whether Astro Seal is at fault for these allegations. Plaintiffs are entitled to full and complete answers as to the “fault” of Astro Seal.

The Plaintiffs are not asking for pages upon pages of explanation in response to Interrogatory Nos. 5 and 6. Plaintiffs are merely asking that this Court order the Defendant, Advanced Bionics, to answer the question asked, specifically “Does Advanced Bionics contend that Defendant Astro Seal, Inc., in whole or in part, was responsible for the HiRes 90K cochlear

implant failures which are the subject of this litigation?” If Advanced Bionics contends that it is alleging, either in whole or in part, that Astro Seal is responsible, Advanced Bionics is asked to state the factual basis for that contention. Incorporating a 35-page Answer response to a simply asked interrogatory is inappropriate and insufficient under the Federal Rules of Civil Procedure. Plaintiffs should be allowed to prosecute this case using the broad range of discovery afforded under the Sixth Circuit and across the Federal Judiciary. For these reasons, the Defendant Advanced Bionics, should be compelled to fully and completely respond to Interrogatories Nos. 5 and 6, answering those interrogatories outright and not referring the parties to over 60 pages of pleadings previously filed in this action. Good cause has been established by Plaintiffs.

II. Sanctions should be imposed against Advanced Bionics.

Under Federal Rule of Civil Procedure 37(a)(2)(A), if a “party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.” Fed. R. Civ. P. 37(a)(2). When a party files a motion under Rule 37 for failure to cooperate in discovery, that party may be entitled to reasonable expenses, including attorney’s fees, incurred in bringing the motion as Rule 37 states:

If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney’s fees, unless the court finds that the motion was filed without the movant’s first making a good faith effort to obtain the disclosure or discovery without court action.

Fed. R. Civ. P. 37(a)(4). The decision to impose sanctions under Rule 37 is left to the district court's discretion. Forro Precision, Inc. v. Int’l Bus. Machs. Corp., 673 F.2d 1045, 1053 (9th Cir.1982).

Pursuant to Rule 37, Plaintiffs also request this Court require Defendant Advanced Bionics to pay Plaintiffs’ reasonable expenses, including attorney’s fees, incurred in preparing

and filing the instant Motion to Compel and for Sanctions. Counsel attempted to request on numerous occasions that Advanced Bionics supplement its discovery responses to answer the questions asked and not vaguely and indirectly refer the parties to voluminous pleadings already filed in this action. For their failure to answer a simple question asked, sanctions are appropriate.

CONCLUSION

For the reasons set forth above, it is appropriate that the Court order Defendant Advanced Bionics to fully and completely respond to Interrogatories Nos. 5 and 6 as propounded by Plaintiffs in their First Set of Jurisdictional Interrogatories submitted to Advanced Bionics. The Answer provided by Defendant Advanced Bionics should not be a mere referral to prior Answers and/or pleadings filed in this action but should contain an answer to the Interrogatory, namely whether the Defendant Advanced Bionics contends that Defendant Astro Seal, Inc. was, in whole or in part, responsible for the HiRes 90K cochlear implant failures which are the subject of this, and numerous other, litigations.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Terra Johnson, Individually and as next of friend and mother of Tamario Miller, a minor, and Christine Purchase, Individually and as next of friend and mother of Clyce ("Chase") Purchase Weatherly, a minor, respectfully request that this Court enter an Order compelling the Defendant, Advanced Bionics, to provide full and complete responses to Interrogatories Numbered 5 and 6, and to pay the reasonable fees and expenses incurred by the Plaintiffs in preparing this Motion to Compel.

Respectfully submitted,

**GLASSMAN, EDWARDS, WADE
& WYATT, P.C.**

/s/ Tim Edwards _____
/s/ Edwin E. Wallis III _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was forwarded by electronic means via U.S. Mail, postage prepaid, or via e-mail to:

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this 17th day of November, 2008.

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