

**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.

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL
PRODUCTION OF JAMES (JIM) MILLER'S ELECTRONIC EMAIL FILES**

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 file this Memorandum of Law in Support of their

Motion to Compel the production of the electronic email files of James (Jim) Miller. In further support of this Motion, Plaintiffs would show unto the Court as follows:

Background

This Motion to Compel is centered on the “missing” documents of James (Jim) Miller, the former President of the Auditory Division of Advanced Bionics. The Court should recall that in December 2009, a Motion to Compel was filed seeking production of Mr. Miller’s hard copy and electronic custodial files. During the hearing on that Motion to Compel (which is adopted and incorporated herein by reference found at D.E. 137) Advanced Bionics made representations to the Court that the following are true:

1. Mr. Miller’s hard copy files are missing, despite a diligent search for the document; and
2. Mr. Miller’s electronic computer files are unable to be produced because of a technical problem with the backup and storage of the files.

As such, it was discussed with the Court at the hearing on the December 2009 motion to compel that the only Jim Miller files that could be produced were Mr. Miller’s electronic email files. The record is full of statements of counsel, as well as questions from the Court and answers from counsel, concerning this production. The parties have also submitted and filed letters with the Court about Mr. Miller’s production of documents. Because the previous Motion to Compel may not be sufficiently clear that Plaintiffs would request production of Mr. Miller’s electronic email files without any cost to the Plaintiffs, this Motion is being filed with the Court.

It is undisputed that Plaintiffs have asked for specific categories of documents in this case via Requests for Production of Documents.¹ These requests for production included a request for Mr. Miller’s electronic custodial file and hardcopy custodial file, using the definition of

¹ Advanced Bionics will argue the requests were “broad” and “overlapping,” but it is undisputed that the requests have resulted in the production of hundreds of thousands of documents. Conveniently, none of Mr. Miller’s emails have been produced.

this term as utilized by Defendant in discovery responses. Mr. Miller's emails would be relevant toward numerous requests for production, if not all of the requests. This employee was the "President" of the "Auditory Division" (e.g. the division that made the defective, twice-recalled cochlear implant at issue in this case).

Advanced Bionics claims that these emails are available, but that it will be unreasonably burdensome in terms of time and cost for Advanced Bionics to produce the files. Advanced Bionics further argues that cost-shifting/sharing is appropriate. This Memorandum of Law will explain Plaintiffs' position as to why cost sharing is inappropriate and why the production of the files is warranted.

LAW AND ARGUMENT

I. Mr. Miller's email files are relevant and should be produced.

"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)). Under Rule 26 of the Federal Rules of Civil procedure, there is a broad policy which favors full disclosure of facts during discovery. Wei v. Bodner, 127 F.R.D. 91, 95-96 (D.N.J. 1989).

To argue that Mr. Miller's email files are not relevant is borderline ridiculous. Mr. Miller was a key executive in Advanced Bionics. He was a "President." No matter how Advanced Bionics attempts to spin the facts and argue Mr. Miller was involved with mostly "sales," that is not the point. If the President of the division that manufactured this device was emailing about warning signs, potential problems, causes of the moisture, risk vs. return, putting profits over patients or any number of conceivable possibilities, the evidence is not only relevant but likely admissible at trial.

Make no mistake: Plaintiffs seek relevant emails from Jim Miller's email backup. Plaintiffs have no desire to pry into Mr. Miller's personal life, grocery lists, Amazon.com order confirmation emails, hotel reservations or the like. Any such type of email should be excluded from production.

Advanced Bionics is likely to argue it is unduly burdensome for it to have to review so many emails to find the emails responsive to Plaintiffs' discovery requests. This argument fails to consider what transpired after Advanced Bionics was on notice of litigation involving the HiRes90k. In a perfect world, Advanced Bionics would have produced Mr. Miller's hardcopy documents and/or computer files, and this may have alleviated the need for emails. However, Advanced Bionics cannot produce either the hardcopy documents or electronic hard drive images. As such, the emails are the sole hope for Plaintiffs to explore the knowledge of Mr. Miller.

Advanced Bionics has conveniently not produced the litigation hold letter from its counsel advising the need to secure and keep files of Mr. Miller, including keeping computer backups safe and secure. See Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 2413631, at *2 (D.N.J. Aug. 4, 2009) (Ex. A). The attached Colorel case explains that while actual litigation hold letters are not normally discoverable, "plaintiffs are entitled to know which categories of electronic storage information employees were instructed to preserve and collect, and what specific actions they were instructed to undertake." Id. at *2. Further, if the Court finds

spoliation occurs, “the [hold] letters are discoverable.” Id. Saying that Mr. Miller left Advanced Bionics before these lawsuits were filed is irrelevant. There has been no proof of when the hardcopy files were “lost” or when the computer backup tapes were “damaged.” At the least, Defendant should be required to produce the litigation hold letter showing that it was taking an active role in safeguarding key custodial files, even if that production is in camera.

There is no good argument for not producing Mr. Miller’s files. While the period is closed for requesting documents, the trial is months away, and Plaintiffs could use the documents at trial. The discovery requests were asked in advance of the discovery cutoff, as well. Finally, this request comes only after the numerous efforts by Plaintiffs to obtain other Jim Miller documents. Simply stated, the email backups are all that is left. Without production of Mr. Miller’s email files, the jury will be unable to consider any document of the President of the division that was responsible for the Plaintiffs’ injuries.²

II. Cost-Shifting or Sharing is Improper.

The Federal Rules of Civil Procedure, and applicable case law, hold that under ordinary circumstances, a party should bear the expense of complying with discovery requests. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). The responding party may request the Court to enter a protective order related to undue burden or expense, including a request that discovery be conditioned upon “cost shifting.” Id. at 358. Nevertheless, “[a] court should consider cost shifting only when electronic data is relatively inaccessible, such as in back up tapes.” Zubulake v. U.B.S. Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

As noted by one District Court in the Sixth Circuit, “[s]hifting the costs of extraordinary electronically stored information discovery efforts should not be used as an alternative to sustaining a responding party’s objection to undertaking such efforts in the first place.”

² Plaintiffs are not filing this motion as to spoliation of the Miller hard copy documents or computer backup tapes.

Cason-Merenda v. Detroit Medical Center, No. 06-15601, 2008 WL 2714239, at *3-4 (E.D. Mich. July 7, 2008) (Ex. B) (quoting the Sadona Principles). As noted in Federal Rule of Civil Procedure 26(b)(2):

[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2).

Fed. R. Civ. P. 26(b)(2). It is anticipated that Advanced Bionics will seek, in response to this motion, cost-shifting under Zubalake and Rule 26(b)(2).

The request for Plaintiffs to “share” in any production costs or pay the entire production cost is improper and fundamentally unfair. While Plaintiffs concede that the email files of Mr. Miller are located on backup tapes, principles of equity and fairness warrant a sidestep from the traditional (and relatively new) rules for cost-shifting following the Zubalake case.

Plaintiffs should not be required to pay for the fault and (gross) negligence of Advanced Bionics. Advanced Bionics was not concerned enough with Mr. Miller’s hardcopy files to place them under lock and key to preclude their becoming “missing.” Advanced Bionics failed to safeguard copies of Mr. Miller’s hard drive. As such, now the only means of exploring Mr. Miller’s communications, thought processes, and admissions as to the allegations in these cases is to review his email (which is located on backup tapes). While Plaintiffs acknowledge there will be some cost to Defendant to produce these emails, Defendant has no one to blame but itself for the costs to be incurred. Had Defendant taken reasonable steps to secure this key executive’s files, it may not be necessary to produce the email files.

As a further showing on why it would be fundamentally unfair for Plaintiffs to share in costs, these cases are costly enough for the Plaintiffs, and Defendant is already spreading its defense costs across the voluminous cases that have been filed in at least California state court and federal courts in Mississippi, Texas, Tennessee, Illinois, New York, Massachusetts and

Washington.³ It would be far more burdensome on the Plaintiffs to incur the costs than the Defendant, which touts revenues of more than \$100 Million Dollars per year (and whose shareholders recently sold itself to a Swiss corporation for nearly \$500 Million Dollars).

Plaintiffs respectfully request the Court deny any request by Advanced Bionics to require Plaintiffs to “share” in the production costs.

CONCLUSION

For the reasons set forth above, good cause has been shown for the production of Mr. Miller’s electronic email files, which are available at Advanced Bionics. Further, based upon the above argument, it would be improper for the Plaintiffs to bear any of the costs incurred in the production of these files. As such, Advanced Bionics should be required to pay for the production of the responsive email documents.

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, would respectfully request that this Honorable Court order Advanced Bionics within thirty (30) days to produce the electronic email files of Mr. Miller that are responsive to discovery requests submitted in this cause and that Advanced Bionics should be required to incur the cost of said production.

Respectfully submitted,

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

/s/ Tim Edwards _____

/s/ Edwin E. Wallis III _____

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³ Counsel from Wheeler Trigg O’Donnell have entered an appearance in all cases, except the Mississippi federal court case.

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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 6th day of May, 2010.

/s/ Edwin E. Wallis III
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