

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

BEVERLY LONG, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 PRIME TANNING CORP., et al.,)
)
 Defendants.)

Case No. 09CN-CV00422

FILED
SEP 14 2010

MOLLY LIVINGSTON
Clerk of Clinton Co. Circuit Court

DEFENDANT ELEMENTIS LTP L.P.'S
MOTION TO COMPEL DISCOVERY FROM
PLAINTIFFS BEVERLY LONG AND CYNTHIA MCQUEEN
AND SUGGESTIONS IN SUPPORT

Defendant Elementis LTP L.P. ("Elementis"), by and through counsel and pursuant to Missouri Supreme Court Rule 61.01, respectfully requests that this Court enter an Order compelling complete discovery responses from plaintiffs as set forth more specifically below. Suggestions in Support are included and incorporated herein.

SUGGESTIONS IN SUPPORT

I. INTRODUCTION AND STATEMENT OF FACTS

In their petition, plaintiffs allege illnesses as a result of exposure to "unacceptable" levels of hexavalent chromium. Plaintiffs have attempted to advance their lawsuit in the media while side-stepping defendants' attempts to gain basic information regarding these claims. Plaintiffs' counsel hired Erin Brockovich and held a "Town Meeting" in Cameron, Missouri, thus creating a frenzy about the existence of a brain cancer cluster in Northwest Missouri and an unsupported perception that farm fields contained unsafe concentrations of hexavalent chromium.

Despite these claims, there appears to be no objective evidence to support plaintiffs' allegations. In 2008, the Missouri Department of Health and Senior Services

("MDHSS") determined that it has no basis for a conclusion that there is a cancer cluster in any area that shares the Cameron, Missouri zip code.¹ See Community Update on Cancer Inquiry, Cameron, Missouri (October 9, 2008), a copy of which is attached as Exhibit A. Although this determination had been made prior to the Cameron Town Meeting in April 2009, Ms. Brockovich and her partner Bob Bowcock (both hired by plaintiffs' counsel) communicated a contrary message to both the media and the large crowd that was present at the meeting.²

Moreover, there is no demonstrated evidence of unsafe levels of hexavalent chromium on any field where Prime Tanning spread the fertilizer. Rather, the testing performed by the Environmental Protection Agency ("EPA") and the Missouri Department of Natural Resources ("MDNR") validate the MDNR's permitting of Prime Tanning's practice of distributing the material as a fertilizer. The MDNR testing contradicts plaintiffs' allegations.

Further, the evidence accumulated to date does not support causation. The plaintiffs in this case have brought suit for widely varying diseases. Beverly Long has lung cancer and, according to the petition, Norma Bingham had amyloidosis (the petition may mean to attribute this to Cynthia McQueen). Each of the plaintiffs has a widely divergent medical and social history, and their medical problems do not suggest that the Prime Tanning fertilizer product is the source of their problem. Also, Beverly Long claims exposure between 1977 and 2009, while Norma Bingham claims her mother was

¹ The Cameron zip code includes areas of Caldwell, Clinton, Daviess and DeKalb counties.

² A video of Ms. Brockovich's presentation at the Cameron Town Meeting can be viewed at <http://www.kmbc.com/video/19255889/index.html?taf=kc1>.

exposed from “the late 1990s through June 2006.” Further discovery will help reveal the significance of these histories and the presence of potential alternative causes.

The refusal or delay in responding to basic discovery regarding these claims and other issues have, in turn, delayed the discovery process in this case. Defendants seek only to find out the factual basis behind the claims that plaintiffs and their counsel have made in the lawsuit and communicated to the media. If plaintiffs possess factual information that supports their claims, it should be provided.

II. PRIOR DISCOVERY DISPUTES

There is no prior discovery dispute.

III. DISCOVERY SOUGHT

The following sets of discovery are the subject of this motion:

- Plaintiff Beverly Long’s Answers and Objections to Defendant Elementis LTP L.P.’s First Interrogatories to Plaintiff Beverly Long (Exhibit B);
- Plaintiff Beverly Long’s Answers and Objections to Defendant Elementis LTP L.P.’s Second Set of Interrogatories to Plaintiff Beverly Long (Exhibit C);
- Plaintiff Beverly Long’s Responses and Objections to Defendant Elementis LTP L.P.’s First Request for Production of Documents to Plaintiff Beverly Long (Exhibit D);
- Plaintiff Norma Bingham’s Answers and Objections to Defendant Elementis LTP L.P.’s First Set of Interrogatories to Plaintiff Norma Bingham (Exhibit E);
- Plaintiff Norma Bingham’s Answers and Objections to Defendant Elementis LTP L.P.’s Second Set of Interrogatories to Plaintiff Norma Bingham (Exhibit F);
- Plaintiff Norma Bingham’s Responses and Objections to Defendant Elementis LTP L.P.’s First Request for Production of Documents to Plaintiff Norma Bingham (Exhibit G).

Each set of discovery is attached hereto and identified by the exhibit designation indicated in the bullet-list above.

After plaintiffs provided their first response to discovery, Defendant Elementis provided a golden rule letter dated September 2, 2010 to each plaintiff identifying the areas where responses were deficient. Copies of these letters are attached hereto as Exhibits H and I.

The discovery sought in this motion relates to specific interrogatories and requests contained in the First and Second Sets of Interrogatories to each plaintiff, as well as the First Request for Production of Documents to each plaintiff.

IV. ISSUES RAISED BY DISCOVERY DISPUTE

The majority of the deficiencies in plaintiffs' discovery responses relate to (1) a failure to provide basic facts to support claims; (2) the use of objections without providing a privilege log or a representation that nothing is being withheld pursuant to the objections; and (3) the failure to timely supplement responses.

Because the discovery sent to each plaintiff was identical and because most of the deficiencies are the same (with only a few exceptions), plaintiffs' responses to each *set* of discovery will be collectively addressed. In other words and as an example, the First Set of Interrogatories propounded to Beverly Long and Norma Bingham will be addressed as a group in the same section of these Suggestions. To the extent that a specific deficiency in an individual plaintiff's response is identified and is not common to both plaintiffs, it will be addressed at the end of each section pertaining to that set of discovery.

A. First Set of Interrogatories to Plaintiffs

Plaintiffs Beverly Long and Norma Bingham each interposed objections and failed to fully respond to Interrogatory Nos. 1, 2, 3, 4 and 5. See Exhibits B and E.

These interrogatories seek basic factual information that is at the core of each plaintiff's claim against defendants. Plaintiffs claim exposure to "hexavalent chromium." Information regarding each plaintiff's knowledge regarding the specific time periods, number of times, locations, methods, route and duration of the alleged exposure should be provided. This is all factual information and does not require an expert opinion. Also, it is factual information that each plaintiff should reasonably know before filing suit and that defendants have a right to know as soon as possible. Elementis requests that plaintiffs specifically respond to the questions or indicate that they have no more specific knowledge.

In response to Interrogatory Nos. 13, 14, 15 and 16, **Plaintiffs Beverly Long and Norma Bingham** have provided some responses subject to objections. See Exhibits B and E. In its Golden Rule letter to each Plaintiff, this defendant indicated that it would not dispute the responses *if* each Plaintiff was fully responsive and was not withholding information. To date, no confirmation has been provided that information has not been withheld. In addition, both plaintiffs make vague references to medical records without having provided either the records or an authorization. Defendant requests that the Court order that each plaintiff (1) provide a full and complete response to each interrogatory, including but not limited to a more complete description of the medical conditions and complications and symptoms that each plaintiff indicates have resulted from the diagnoses; and (2) affirm that no additional information is being withheld.

B. Second Set of Interrogatories to Plaintiffs

Plaintiff Beverly Long has indicated that she has information to supplement Interrogatory Nos. 9, 10, 17, 25 and 28. See Exhibit C. **Plaintiff Norma Bingham** has indicated that she has information to supplement Interrogatory Nos. 5, 6, 7, 9, 10, 17, 22,

23, 26 and 28. See Exhibit F. To date, the requested, basic information has not been supplemented in response to the written discovery. This defendant requests that these answers be supplemented.

Both Plaintiffs have also objected to Interrogatory Nos. 13, 15, 16, 20, 22, 24 and 29. See Exhibits C and F. From plaintiffs' responses, it is unclear if part of a response is being withheld based on the objections. Defendant requests that the Court order that each plaintiff respond to each interrogatory or, alternatively, confirm that she has already provided a complete answer. **Plaintiff Norma Bingham** objects to Interrogatory No. 25 and this defendant requests the same order as to the objections to this interrogatory.

Plaintiff Beverly Long has not fully answered Interrogatory Nos. 2, 5, 6, 8, 14, 15, 16, 20 and 22. See Exhibit C. Defendant seeks an order of this Court compelling a full response to these interrogatories. Similarly, **Plaintiff Norma Bingham** has not provided a full and complete answer to Interrogatory Nos. 4, 5, 8, 14, 15 and 16. See Exhibit F. Again, this defendant seeks an order of the Court requiring full responses to these interrogatories.

C. First Request for Production of Documents to Plaintiffs

Both Plaintiffs Beverly Long and Norma Bingham have objected to Request Nos. 1, 3, 5, 6, 7, 12 and 13. See Exhibits D and G. Each plaintiff has asserted privilege objections, without producing a privilege log, and no separate confirmation has been provided that the plaintiffs are not withholding documents based on the privilege. Defendant concedes that there may be no documents to produce or privilege log to be created. In the interest of clarity and based on the ambiguity of the current responses, however, this Defendant requests an order of the Court directing Plaintiffs to either provide a privilege log or indicate that there are no privileged/confidential documents

being withheld. Also, this defendant requests that plaintiffs indicate whether they are withholding any other documents or materials based upon the other objections that each has interposed.

Additionally, **Plaintiffs Beverly Long and Norma Bingham** have both indicated that they will supplement Request No. 4. This Defendant requests that they do so at this time.

D. Authorizations for Records

Records authorizations for medical records, tax records, employment records, insurance records, social security and disability records, education records and workers compensation records were sent to both **Plaintiffs Beverly Long and Norma Bingham** with the First Request for Production of Documents. To date, no authorization has been returned by either plaintiff to this defendant. This Defendant seeks an order of this Court compelling plaintiffs to provide these authorizations.

V. ARGUMENT

A. Defendants Have Been Denied Reasonable Discovery Regarding the Basic Facts of Plaintiffs' Claims

The general rule of discovery is that the “[p]arties may obtain [information] regarding any matter . . . relevant to the subject matter involved in the pending action” so long as the matter is not privileged. Mo. R. Civ. P. 56.01(b)(1). Plaintiffs have not fully answered basic questions regarding their alleged exposures and resulting injuries. This is the type of factual information that defendants have a right to discover as soon as possible, and certainly prior to depositions. Yet, in response to defendant’s First Set of Interrogatories addressing the specific time periods, locations, methods, route and duration of alleged exposures, plaintiffs uniformly assert objections that the questions

seek a premature expert opinion. Quite to the contrary, however, the information sought is the type that plaintiffs' counsel would have had a duty to investigate prior to filing suit.

In addition, all of the materials that plaintiffs agreed to supplement are basic to the claims in the case. Yet, supplementation has not occurred.

B. Plaintiffs Interpose Objections on the Basis of Privilege and Fail to Provide a Privilege Log.

Plaintiffs have made their physical, mental and emotional conditions an issue in this case. Accordingly, Defendants are entitled to discovery relevant to each plaintiff's overall physical, mental, and emotional well-being, and the amount of pain and suffering caused by the alleged exposure, as well as potential alternate causes for Plaintiffs' various illnesses. Defendants are simply interested in an assurance that the identity of certain selected health care providers is not being withheld based upon an objection.

Missouri courts have held that the physician-patient privilege is waived once the matter of plaintiff's physical condition is in issue under the pleadings. *Brandt v. Medical Defense Assocs.*, 856 S.W.2d 667, 671 (Mo. banc 1993). Missouri courts have prohibited plaintiffs from using the physician-patient "privilege both as a shield and a dagger at one and the same time." *Id.* at 672 citing *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. banc 1968). In essence, this prevents a plaintiff from strategically excluding unfavorable evidence while at the same time admitting favorable evidence. *Id.* at 672. Further, the "plaintiff should not be entitled to maintain the privilege through the discovery" stage and prevent the defendant from having knowledge of the medical facts. *Id.* at 673.

In addition to the assertions of physician-patient privilege, Plaintiffs' objections on the basis of attorney-client privilege and/or work product are mistakenly interposed

because plaintiffs have failed to produce a privilege log or affirm that they have no additional information. Under Rule 58.01(c)(3), discovery withheld upon a claim of protection on the basis of privilege or under the work product doctrine must be itemized on a privilege log, and described with sufficient particularity for opposing counsel to make a determination of whether the items are, in fact, properly withheld. Alternatively, defendants seek an affirmative representation, to each interrogatory and request to which an objection is lodged, that plaintiffs have not withheld any document or information based on the objection(s).

C. Defendants Have Been Prejudiced by Plaintiffs' Failure to Respond in Proper Time to Allow for Proper Preparation for Depositions.

Plaintiffs have promised to supplement numerous interrogatories. To date, that supplementation has not occurred. These materials should be supplemented immediately as depositions must begin soon.

VI. CONCLUSION

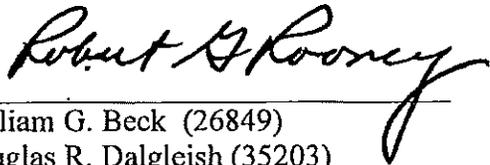
There is no legal basis for plaintiffs to withhold complete discovery responses to interrogatories and requests seeking information at the core of the lawsuit. Failure to answer even basic questions regarding the plaintiffs' claims, alleged exposures and damages only serves to cause undue delay, hardship and expense. Failure to supplement responses in a timely manner regarding basic, foundational information causes protracted litigation and additional unnecessary expense. Accordingly, defendant respectfully moves the Court to order plaintiffs to provide complete responses to interrogatories, to produce requested documents, to withdraw their objections or, alternatively, to provide a detailed privilege log for all documents and responses withheld on the basis of a claim of

privilege and/or work product. Defendant further requests any other relief that the Court deems fair and equitable.

Respectfully submitted,

Dated: September 13, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, First Class United States Mail, Postage Prepaid, to the following counsel of record this 13th day of September, 2010:

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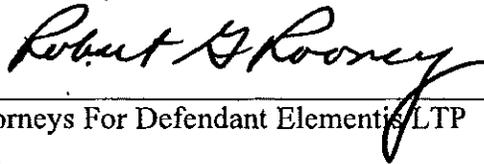
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