

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

LAUREY BLANKENSHIP, Individually and as
Special Administrator of the Estate of
DOUGLAS BLANKENSHIP, Deceased,

No. 02-L-630

and All Other cases On the Simmons Firm
November 18, 2002 Trial Docket,

Plaintiffs,

vs.

PNEUMO ABEX CORP., et al.

Defendants.

PLAINTIFFS' RULE 219(c) MOTION FOR SANCTIONS
AGAINST DEFENDANT PNEUMO ABEX CORP.

nothing
showing
Abex
supplied
NAPA
+
who did.

Plaintiffs, pursuant to *Ill.S.Ct. Rule 219(c)*, hereby move this Court to impose sanctions against defendant Pneumo Abex Corp. ("Abex"), on the grounds: that it has deliberately and contemptuously filed false, incomplete, misleading and improper answers to interrogatories; and, that it has failed and refused to supplement its deficient responses. Specifically, plaintiffs ask this Court to: strike all pleadings and defenses of Abex; enter default judgments against Abex; and order that trial shall proceed only as to the issue of damages, punitive as well as compensatory. Alternatively, plaintiffs ask this Court to impose such sanctions as are just under the circumstances. In support thereof, plaintiffs state:

1. On April 12, 2000, this Court held a consolidated hearing on all defendants' objections to plaintiffs' standard written discovery. Abex received notice and had an opportunity to participate in those proceedings and, therefore, is bound by the results. By Ordered dated April

13, 2000 (copy attached as Exhibit A), this Court issued its rulings as to those objections. Some interrogatories with withdrawn or modified. Some of defendants' objections were sustained. Most objections were overruled. The Court's April 13, 2000 Order further directed defendants to provide supplemental answers, consistent with the Court's rulings, within 14 days.

2. Abex filed its answers to plaintiffs' standard interrogatories on or about April 27, 2000. Those answers were not verified at the time that they were filed. Abex has not provided a verification. Both the Standing Order and 735 ILCS 5/1-109 require a proper verification. Additionally, Abex continues to assert objects that the Court overruled.

3. In response to Interrogatory No. 8, Abex states that it has "in excess of ten (10) million" documents and about "three (3) million sales records," all of which are preserved "in the order in which they were found." According to Abex, this means that the "burden of deriving or ascertaining the response is substantially the same for plaintiffs as Abex." Accordingly, in response to this and numerous subsequent Interrogatories, Abex' 'response' is to invite plaintiffs to come and inspect its thirteen million documents. See Response to Interrogatories Nos. 9, 14, 15, 18, 28, 35, 36, 40, 47, 48, 52, 54-60, 74, 83, 89, 91-93, 95-100, 104-109, and 120-123.

4. Rule 213(e) provides that "when the answer to *an* interrogatory may be obtained from documents...it shall be a sufficient answer to *the* interrogatory to produce those documents *responsive to the Interrogatory*." This means that a party need not write out an answer, when it can point to specific documents responsive to a particular interrogatory. It does not permit a party to answers an entire set of interrogatories with a general reference to a huge, undifferentiated collection of records.

5. Rule 213(e) further provides that any production in lieu of an interrogatory answer "shall comply with the requirements of Rule 214." Rule 214 requires that documents be produced

as they are kept in the ordinary course of business or organized by request. The Committee

Comments to Rule 214 further provide:

This [rule] requires the party producing the documents and that party's attorney to make a good-faith review of documents produced to ensure full compliance with the request, but not to burden the requesting party with nonresponsive documents. The failure to organize the requested documents as required by this rule, or the production of nonresponsive documents intermingled among the requested documents, constitutes a discovery abuse subject to sanctions under Rule 219.

6. Abex's manner of responding is in violation of Rule 214. As 'they were found' is not the same as 'as they are kept in the ordinary course of business.' Moreover, even then, the responding party is not permitted to bury relevant documents in a mountain of irrelevant trash. This is nothing but a tactic designed to discourage document review and prevent plaintiffs from obtaining full and complete information. It far exceeds what is customary even in asbestos litigation (where defendants are sometimes permitted some latitude to make a collection available for review).¹ Essentially, offering to produce thirteen million unsorted documents is an abuse for which sanctions should be imposed.

7. There are other problems with specific interrogatory responses (including outright misrepresentations. Several answers are contrary to those given in other litigation filed years ago in St. Louis. See *Exhibit A-1*. Specifically:

Interrogatory No. 9:

(a) This interrogatory seeks information regarding Abex officers and directors who also held positions with other asbestos companies

(b) Abex simply references its already inadequate response to Interrogatory No. 8.

¹ In these situation, even if what is produced is not organized, there must have been some reasonable effort made to eliminate completely unrelated materials and produce only what is fairly responsive.

(c) This information is critical to plaintiffs' ability to fully and accurately attribute knowledge and notice to Abex.

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Interrogatory No. 10

(a) This interrogatory seeks information as to asbestos businesses acquired by Abex.

(b) Abex identifies S. K. Wellman Co., which manufactured friction materials, as a company that it acquired in 1963.

(c) Throughout the rest of its answers, Abex provides no further responses relating to Wellman.

Interrogatories Nos. 19 & 20:

(a) These interrogatories ask Abex to identify and provide information as to any and all asbestos-containing products that it (and/or related companies/predecessors) designed, manufactured, processed, sold, distributed, applied, installed, patented, specified and/or re-labeled.

(b) Abex answers, in very general terms, that it "manufactured and sold [] asbestos-containing automotive friction products." Abex also provides a general list of trade names.

(c) This is wholly inadequate. Plaintiffs are entitled to a reasonably specific answer, which identifies particular types of friction products and their applications. Plaintiffs are entitled to information as to the years during which each particular product was manufactured and sold.

Interrogatory No. 25:

(a) This interrogatory seeks the identities of companies from which defendant purchased raw asbestos and/or asbestos-containing components.

(b) Abex identifies a number of companies but fails to list North American Asbestos Corporation ("NAAC"). It also falsely states that it purchased only chrysotile.

(c) Plaintiffs have found evidence that NAAC was as a supplier of raw asbestos to Abex. See Exhibit B. Moreover, Abex purchased crocidolite, which is an undisputed carcinogen. Additionally, Abex does not list its suppliers of the phenolic resins, which were used to bind asbestos fibers (and, perhaps, other materials) to make friction products. Plaintiffs have learned that such resins, themselves, typically contained asbestos (sometimes crocidolite or amosite) *C. ap. 8*

Interrogatory No. 27

(a) This interrogatory asks Abex to describe the packages in which its products were sold.

(b) Abex objects that this shifts the burden of proof on product identification from plaintiffs to Abex. It also states that its products were sold in "cardboard boxes according to size."

(c) Abex's objection is frivolous and contrary to the Court's April 13, 2000 Order. This Court has repeatedly made clear that product identification by a plaintiff is not a prerequisite to a defendant's compliance with discovery. Product identification is a relevant issue and a proper subject of discovery. Abex is simply treating discovery as a tactical game instead of disclosing the truth. Additionally, its limited answer is next to useless (unless Abex will admit responsibility for any friction product that came from a cardboard box of some size).

Interrogatory No. 33

(a) This interrogatory asks if Abex's products could be used without liberating asbestos fibers.

(b) Abex says, in essence, 'yes...they could be applied without liberating fibers.'

(c) Such an unequivocal response is contrary to Abex's experience as a member of the FMSI, which was well aware of problems with dust associated with the application of friction materials. See *Exhibit C*.

Interrogatory No. 35:

(a) This interrogatory asks Abex to identify individuals involved in designing its asbestos products.

(b) Abex claims that it would be impossible to identify all such persons and, then, does not identify anyone, but simply refers to its mountain of documents.

(c) Assuming *arguendo* that identifying each and every such person might be impossible (or at least burdensome), Abex should be able to identify at least some of these people. The difficulty in providing a complete and exhaustive list is no excuse for failing to answer at all. Indeed, this is simply a tactic to deny plaintiffs the opportunity to depose people who might have information adverse to Abex.

Interrogatory No. 37:

(a) Subpart (a) specifically asks for the type(s) of asbestos contained in defendant's products.

(b) The only type of asbestos identified by Abex is chrysotile.

(c) Abex purchased crocidolite (see Exhibit B), which is acknowledged to be a more hazardous and an undisputed carcinogen. It has not accounted for the type of asbestos contained in its binder resins.

Interrogatory No. 38:

(a) This interrogatory asks for information concerning the specific locations at which defendant manufactured asbestos products, including identifying plant managers.

(b) Abex provides some very generally, incomplete information concerning facilities, but fails to give names of plant managers.

(c) Plaintiffs are entitled to this information.

Interrogatory No. 40:

(a) This interrogatory asks Abex to identify individuals with knowledge as to the sale and distribution of its asbestos products.

(b) Abex claims that it would be impossible to identify all such persons and, then, does not identify anyone, but simply refers to its mountain of documents.

(c) Assuming *arguendo* that identifying each and every such person might be impossible (or at least burdensome), Abex should be able to identify at least some of these people. The difficulty in providing a complete and exhaustive list is no excuse for failing to answer at all. Indeed, this is simply a continuation of Abex's tactic to deny plaintiffs the opportunity to depose people who might have information adverse to Abex.

Interrogatories Nos. 47 & 48:

(a) These interrogatories ask for information concerning industrial hygienists.

(b) Abex does identify five former medical directors, but refuses to identify any industrial hygienists.

(c) This is part of its continuing pattern of not providing names of potential witnesses.

Interrogatory No. 54 & 56:

(a) These interrogatories seek information regarding industrial hygiene surveys and dust counts.

(b) Abex asserts frivolous objections that the Court has overruled. It references its

mountain of documents. In general, it evades answering.

(c) Abex did, in fact, conduct industrial hygiene surveys and dust counts. *See Exhibit D.* Plaintiffs are entitled to the results.

Interrogatory No. 58:

(a) This interrogatory asks if Abex, or anyone acting on its behalf, has conducted any studies concerning the health effects of asbestos.

(b) Abex objects and references its document collection, but fails to identify any such studies.

(c) Abex not only sponsored a study by Gardner of Saranac Lake in the 1930's and 1940's, but also participated in falsifying the results. *See Exhibit E.*

Interrogatory No. 68:

(a) This interrogatory asks if defendant ever received any advice, suggestion, recommendation or the like concerning the need to warn about asbestos, prior to the first time it issued any such warning.

(b) Abex states that it cannot determine the exact circumstances surrounding its decision to eventually issue a warning..

(c) As a member of FMSI, Abex participated in numerous discussions concerning warnings (mostly on not doing so), prior to the time it began to do so. *See Exhibit F.*

Interrogatory No. 75:

(a) This interrogatory asks when defendant first had knowledge or notice of of TLVs.

(b) Abex answers is that it cannot clearly identify a specific date.

(c) This is simply evasive. Abex is obligated to state the earliest date it can identify. Indeed, as a member of the American Industrial Hygiene Association in 1937, a member of FMSI and other organizations, Abex would have had access to, and notice of, TLVs.

Interrogatories Nos. 79 & 80:

(a) These interrogatories seek information as to when defendant first had notice or knowledge that asbestos could cause certain diseases, including mesothelioma.

(b) Abex states that it cannot pin-point a precise time.

(c) Abex knew of the association between asbestos and cancer at least as early as 1948-49, when it helped to falsify the Gardner study by eliminating references to cancer. See *Exhibit G*. It had notice and information concerning mesothelioma no later than 1961, when it hired Blackwell to serve as its medical director. See *Exhibit H*.

Interrogatory No. 86:

(a) This interrogatory asks if defendant ever sponsored, performed or received the results of any study(ies) concerning the relationship between asbestos and certain diseases, including mesothelioma.

(b) Abex discloses no such studies. It does "acknowledge" the Gardner study in a very vague way, but seeks to disavow the authenticity and accuracy of the documents showing its participation.

(c) This is game-playing at its most extreme. Abex has evaded producing documents by making the task too onerous. Then, when plaintiffs are required to obtain the information from other sources, it tries to deny authenticity.³

Interrogatory No. 89:

(a) This interrogatory asks defendant to identify asbestos related claims against it.

(b) Abex does not do so.

(c) Its objections are frivolous and have been overruled by the Court.

Interrogatories Nos. 98-100:

(a) These interrogatories ask defendant to identify documents sent to, or received from, various sources, including trade organizations, which make some reference to asbestos.

(b) Abex' discloses no responsive documents.

(c) Plaintiffs have been compelled to find such documents from other sources. Abex will, presumably, try to take advantage of its noncompliance by objecting to authenticity.

IMPOSITION OF SANCTIONS

8. Rule 219(c) provides that, if a party fails to comply with discovery or with any court order relating to discovery, the court may impose any sanction, provided it is "just." Sanctions

³ It is for this reason that one of the "lesser sanctions" which this Court has been willing to allow is the automatic authentication of documents.

are clearly warranted here, given Abex's incomplete and false interrogatory answers, and its repeated refusal to obey the Court's Order that it provide complete answers. According to Rules 213 and 214, Abex's manner of responding is abusive and warrants sanctions.

9. In determining what sanction is appropriate, a court should consider the seriousness of the violation, the willfulness of the violation and the importance of the evidence involved.

10. Here, the violation is very serious and the evidence involved is important. Abex falsely omitted that some of its products contained crocidolite. It has repeatedly refused to provide any meaningful (even minimally) information as to its knowledge and notice of the potential hazards of asbestos. It has expressly refused to provide specific information about products. It has attempted to disavow its early knowledge and participation in a fraud on the public.

11. Abex' evasive assertion that it has no current knowledge, information or evidence is inadequate. The flaw with Abex's excuse is that its discovery deficiencies are so great and pervasive, that they can only be the product of: (a) deliberately concealing information; (b) deliberately destroying information; and/or (c) deliberately refusing to search the corporate memory for information. *See Campen v. Executive House Hotel, Inc.*, 105 Ill.App.3d 576, 434 N.E.2d 511, 518 (1st Dist. 1982)("an officer or agent who answers interrogatories on behalf of a corporation must take reasonable steps to search the 'corporate memory'"). This is only exacerbated by the fact that Abex's answers are unverified. *See Ill.S.Ct.* Rule 213(d)(corporate answers to interrogatories must be verified by an officer, partner or agent).

12. A deliberate refusal to make an effort to look is as egregious as wilfully concealing known information. *See Baldini v. Owens Corning*, 318 Ill.App.3d 1167, 744 N.E.2d 370, 375 (4th Dist. 2001)("all reasonable presumptions will be indulged against a party who deliberately

destroys evidence”).

13. “[A] court [should] neither condone nor tolerate false, incomplete or inaccurate discovery.” *Boettcher v. Fournie Farms, Inc.*, 243 Ill.App.3d 940, 612 N.E.2d 969, 974 (5th Dist. 1993) (“[d]iscovery is not a tactical game to be used to obstruct or harass the opposing litigant” / “half-truths are equivalent to outright lies and ‘fractional disclosure’ is not the disclosure contemplated by our discovery rules”). See also *Ostendorf v. International Harvester Co.*, 89 Ill.2d 273, 433 N.E.2d 253, 257 (1982) (“half-truths...have the effect of an affirmative concealment”).

14. Rule 219(c)(v) provides for striking all defenses and entering a default judgment. Rule 219(c)(vi) provides that the court may order “that any portion of the offending party’s pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.” Abex’s misconduct warrants such severe sanctions. Its actions were deliberate and contemptuous. Abex has provided false information and/or failed to disclose information as to all of the issues as to which sanctions are sought. Because their cases are set for immediate trial, these plaintiffs have been severely and irreparably prejudiced by Abex’s discovery fraud and deliberate disregard for the discovery process. This Court should strike its pleadings and enter a default judgment. See *Buehler v. Whalen*, 70 Ill.2d 51, 374 N.E.2d 460, 467 (1978) (“discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation” / where party “gave false answers to interrogatories under oath... the trial court would have been justified in striking the answer of this defendant and submitting to the jury only the issue of damages”). See also *Hutcheson v. Shell Wood River Refining Co.*, No. 99-L-450.

15. In these circumstances, the Court should strike the pleading and defenses of Abex.

Abex should also be directed to bear all costs, including copying costs, to forthwith provide full and accurate discovery. This Court should also enter default judgments against Abex and proceed to trial solely on the issue of damages. It should instruct the jury that Abex has been found to have acted negligently and in willful disregard of the rights and well being of Plaintiffs. It should instruct the jury that Plaintiffs were exposed to asbestos products attributable to Abex and, that such products caused or contributed to any asbestos-related disease proved by Plaintiffs. Plaintiffs should present medical and other evidence, relating to damages, which should be determined by the jury.

WHEREFORE, plaintiffs pray this Court to enter its Order imposing the sanctions described herein and for such other and further relief as this Court deems appropriate.

By: 
John Simmons # 0623129
Randall A. Bono #0252298
THE SIMMONS FIRM, L.L.C.
Attorneys for Plaintiff-Respondent
301 Evans Avenue, PO Box 559
Wood River, IL 62095
618-259-2222