

NOV 17 2003

JAMES W McCORMACK, CLERK
By: _____
DEP. CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In re: : MDL Docket No. 4:03CV1507-WRW
: :
PREMPRO PRODUCTS LIABILITY : ALL CASES
LITIGATION :
:

ORDER CONCERNING ELECTRONIC DISCOVERY HEARING

Purpose and Areas of Discussion

My responsibilities as the discovery Judge in this case are to insure that all significantly relevant and discoverable materials are preserved and produced, to expedite the discovery process, to minimize costs, and to achieve a reasonable balance between the legitimate discovery needs of the parties and the corresponding burden on the producing party. Because of the nature of the litigation, it is probable that the most significant discovery problems will arise in connection with Plaintiffs' discovery of Defendant's materials.

To carry out these responsibilities, a hearing on electronic discovery has been scheduled for December 16, 2003. The parties and I can make every attempt to tie down issues now, in an effort to head off problems and to facilitate discovery.

To do this it is necessary to obtain information evaluate the proposed Practice and Procedure Order No. #3, and make sure that I can discharge my duty to monitor the discovery process.

Defendant acknowledges the existence of a significant amount of discoverable electronic data. As the parties know, preservation, discovery, and production of electronic materials presents special problems.

I am interested in learning about the following:

1. Defendant's electronic document depository. A presentation and demonstration will be welcome.
2. Defendant's corporate structure and operations, including which departments or divisions would be involved in research and development, government approval, marketing, and monitoring the involved product.
3. The identities of the key individuals within each of the above areas of responsibility that would have been involved with the product.
4. The time frame during which relevant electronic or other discoverable information may have been created.
5. Basic information about the process of obtaining government approval for the product in question, including citations to regulations covering retention of research and other materials involved in the approval process.
6. Basic information about necessary record-keeping and reporting to the government during the time the product is marketed.
7. Defendant's computer systems, including servers, networks, e-mail systems, voice mail systems, data bases, desktop or laptop computers, PDAs, and backup or archival tapes or other similar storage media.

8. Changes made in Defendant's systems during the relevant period and any information as to the existence of any relevant and discoverable electronic data which is not located on currently used electronic devices (legacy data).
9. Whether relevant and discoverable electronic data may exist in third party storage or processing entities, such as internet storage or servicing facilities.
10. Any steps taken to insure preservation of relevant and discoverable materials—in addition to in-house counsel's memorandum to employees dated July 17, 2002, directing the preservation of hard copy and electronic documents. Whether any individuals have been given the responsibility of monitoring the process, and, if so, their names and positions.
11. Whether the parties anticipate special problems with discovery by Defendant of the various Plaintiffs' medical and other relevant and discoverable information.

No later than Wednesday, December 10, 2003, Defendant must submit information about its basic corporate structure, as listed in items 2 and 3 above,¹ and information about the government approval and monitoring process as mentioned in paragraph 5 above.

Defendant must also have present for the hearing the individual or individuals most knowledgeable about its computer system. Any additional information bearing on the above categories which the parties could submit prior to the hearing would be welcome.

¹ The Court needs somewhat more detailed information than that listing "management, medical affairs, regulatory affairs and labeling, and marketing," which appeared in Wyeth's Statement Regarding Document Preservation, Collection and Production filed June 2, 2003. Perhaps the organizational charts listed in the proposed order, if not too extensive, would be helpful.

Steering Committee Concerns

Proposed Practice and Procedure Order No. 3 was presented before the appointment of the Steering Committee. That was one of the reasons that the Order has not been entered. I believe it is in the interest of the Parties for the Steering Committee to have an opportunity to participate in this critical step of the litigation. The Steering Committee should review the proposed Order and express any concerns they might have. If such concerns exist, **the committee must specifically state those concerns in a motion or other appropriate pleading, which must be filed no later than Monday, December 8, 2003, with copies to opposing counsel.**

Preservation of Data

One concern I have with the proposed document depository is that the documents are being produced in Tagged Image File Format (.tif). Thus, although the documents would be in electronic form, it appears the production is the functional equivalent of a "hard copy" production and no "metadata" such as document history, earlier or deleted versions, electronic marginal comments, etc., would be available. Of further concern is Defendant's statement that after a document is scanned and the ".tif" image created, Wyeth is "returning the original documents needed for ongoing business to the files."² As to electronic documents, this may result in destruction or alteration of relevant data. Therefore, all parties and their counsel are reminded of their duty to preserve evidence that may be relevant to this action. The duty extends to documents, data, and tangible things in the possession, custody, and control of the parties to

² See Wyeth's Statement Regarding Document Preservation, Collection and Production filed June 2, 2003, pages 5-6.

this action, and any employees, agents, contractors, carriers, bailees, or other non-parties who possess materials reasonably anticipated to be subject to discovery in this action. Counsel is under an obligation to exercise reasonable efforts to identify and notify such non-parties, including employees of corporate or institutional parties.

“Documents, data, and tangible things” is to be interpreted broadly to include writings; records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemail; E-mail; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video, phonographic, tape, or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.

“Preservation” is to be interpreted broadly to accomplish the goal of maintaining the integrity of all documents, data, and tangible things reasonably anticipated to be subject to discovery under Fed. R. Civ. P. 26, 45, and 56(e) in this action. Preservation includes taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible.

If Defendant's business practices involve the routine destruction, recycling, relocation, or mutation of such materials, Defendant must, to the extent practicable for the pendency of this order, either (1) halt such business processes; (2) sequester or remove such material from the business process; or (3) arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery if requested.

Before or after the hearing, Defendant may apply to the court for further instructions regarding the duty to preserve specific categories of documents, data, or tangible things. Defendant may seek permission to resume routine business processes relating to the storage or destruction of specific categories of documents, data, or tangible things, upon a showing of undue cost, burden, or overbreadth.

IT IS SO ORDERED this 17th day of NOVEMBER 2003.


UNITED STATES DISTRICT JUDGE
WM. R. WILSON, JR.