

STATE OF WISCONSIN,

Plaintiff,

v.

ABBOTT LABORATORIES, *et. al.*,

Defendants.

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Case No.: 04 CV 1709

**DEFENDANTS' MOTION TO COMPEL SUPPLEMENTAL INTERROGATORY
RESPONSES AND VERIFICATION OF OTHER RESPONSES**

Defendants move for an order compelling Plaintiff to (1) formally memorialize supplemental interrogatory responses and serve on all Defendants; and (2) verify its interrogatory responses in accordance with the Wisconsin Rules of Civil Procedure ("Rules"). Defendants have repeatedly requested that Plaintiff perform these two straightforward procedural tasks but Plaintiff has repeatedly declined to do so, thereby necessitating the filing of this motion.

LEGAL STANDARD

Pursuant to Wis. Stat. § 804.12(1)(a), if a party fails to timely answer an interrogatory submitted under Wis. Stat. § 804.08, the discovering party may move for an order compelling such answers and/or productions.

ARGUMENT

I. PLAINTIFF MUST SUPPLEMENT ITS INTERROGATORY RESPONSES IN A FORMAL DOCUMENT AND SERVE ON ALL DEFENDANTS.

Under the Wisconsin Rules of Civil Procedure, Plaintiff is required to answer any interrogatory served upon it by Defendants.¹ Each interrogatory must “be answered separately and fully in writing under oath.”² A duty to supplement interrogatory responses may be imposed “by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.”³

On February 20, 2006, Defendants served their Second Set of Interrogatories on Plaintiff. Plaintiff served its initial responses on June 19, 2006. During the next eleven months, Plaintiff and Defendants engaged in a number of meet-and-confers concerning deficiencies in Plaintiff’s interrogatory responses. As a result of these meet-and-confers, Plaintiff agreed to supplement its interrogatory responses and, indeed, began providing Defendants with supplemental information. However, Plaintiff only provided the supplemental information piecemeal and informally to Defendants’ liaison counsel. Plaintiff never memorialized the information it provided into formal interrogatory responses as required by the Rules. Plaintiff, in its own words, admits that it “lapsed into an informal mode [of] supplementing and/or clarifying [its] [interrogatory] responses by e-mail.”⁴

In July 2007, Defendants requested that Plaintiff “please memorialize [the various supplemental responses you have provided to defendants’ interrogatories] in a formal

¹ Wis. Stat. § 804.08(1)(a).

² *Id.* at (1)(b).

³ *Id.* at (5)(c).

⁴ See Email from F. Remington to J. Walker (July 26, 2007 8:54 AM), attached as Exhibit 1.

document and serve it on all parties.”⁵ Plaintiff did not do so. Defendants asked Plaintiff again repeatedly over the next several months to do so to no avail.⁶

Instead, Plaintiff made excuses for why it could not formally memorialize and serve its supplemental interrogatory responses and tried to shift its burden for doing so onto Defendants. First, Plaintiff expressed reluctance in serving its supplemental responses because of the difficulty of identifying all the informal supplemental information it had sent to Defendants’ liaison counsel.⁷ Defendants’ liaison counsel responded by collecting and forwarding to Plaintiff⁸ the correspondence containing Plaintiff’s supplemental responses,⁹ again requesting that Plaintiff “[p]lease memorialize these responses into a formal response

⁵ See Email from J. Walker to F. Remington (July 26, 2007 6:25 AM), attached as Exhibit 2.

⁶ See, e.g., Email from J. Walker to F. Remington (Aug. 27, 2007 12:33 PM) (“When can defendants expect to receive a formal response memorializing the State’s supplemental interrogatory responses?”), attached as Exhibit 3; see also Email from J. Walker to F. Remington (Sept. 9, 2007 2:21 PM) (“Seven weeks ago, I asked you to memorialize the State’s interrogatory responses into a formal response...Please provide us with a date certain on when we will receive the formal response.”), attached as Exhibit 4; see also Email from J. Walker to F. Remington (Nov. 11, 2007 11:27 AM) (“We really need a date certain on when we can expect to receive...the State’s supplemental interrogatory responses memorialized in a formal response.”), attached as Exhibit 5.

⁷ See Affidavit of Jennifer A. Walker at ¶ 3, attached as Exhibit 6.

⁸ See, *id.* at ¶ 4, Ex. 6; see also, e.g., Email from J. Walker to F. Remington (Oct. 3, 2007 3:48 PM) (“For your convenience, I’m forwarding you the first of several emails you sent me where you appear to be supplementing the State’s earlier interrogatory responses.”), attached as Exhibit 7; see also Email from F. Remington to J. Walker (Oct. 4, 2007 9:09 AM) (email string containing email from J. Walker stating “[a]lso, here is your 5/7/07 letter which appears to provide supplemental responses to a number of interrogatories. Please memorialize these into a formal response.”), attached as Exhibit 8; see also Email from J. Walker to F. Remington (Oct. 4, 2007 8:43 AM) (“Here is additional information you sent us to supplement Interrogatory No. 7 to defendants’ second set of interrogatories.”), attached as Exhibit 9.

⁹ See, e.g., 10/04/07 Email from J. Walker to F. Remington, Ex. 9 (forwarding a March 16, 2007 email from F. Remington containing a recitation of Defendants’ Interrogatory No. 7 followed by several paragraphs titled “Answer to Interrogatory No. 7”); see also 10/03/07 Email from J. Walker to F. Remington, Ex. 7 (forwarding a July 11, 2007 email from F. Remington stating “[p]lease consider this message a supplemental answer to your earlier interrogatory on this question.”); see also Letter from F. Remington to S. Barley and J. Walker (May 7, 2007) (providing supplemental interrogatory responses prefaced by the statement: “Plaintiff provides this additional response to the Defendants’ Second Set of Interrogatories as follows...”), attached as Exhibit 10.

and serve it [on] all defendants.”¹⁰ Plaintiff, despite Defendants’ efforts to assist it by locating the supplemental responses, still did not do so.

Next, Plaintiff tried to shift Plaintiff’s burden of memorializing and serving its interrogatory responses onto Defendants by proposing that Defendants draft a Request for Admissions (“RFAs”) formally reflecting Plaintiff’s supplementation of its interrogatory responses to which Plaintiff could respond.¹¹ Defendants’ liaison counsel initially agreed to take on the task of drafting and serving RFAs but only if in return Plaintiff would agree to respond within one week.¹² Plaintiff responded that it could not promise to do so.¹³

Finally, and most recently, Plaintiff has again tried to avoid its responsibility to formalize its supplementation of interrogatory responses by arguing that not all of the information it has informally supplied to Defendants’ liaison counsel can be considered supplemental responses, and that it considers it an “open question” whether Plaintiff must supplement its earlier responses at all.¹⁴ However, Plaintiff has already agreed to supplement its responses as a result of meet-and-confers between the parties during which the parties discussed deficiencies in Plaintiff’s initial interrogatory responses. Moreover, Defendants are not asking Plaintiff to supplement its responses with the substance of every email correspondence. The only correspondence in question is that from Plaintiff to

¹⁰ See 10/3/07 Email from J. Walker to F. Remington, Ex. 7.

¹¹ See Email from J. Walker to F. Remington (Nov. 21, 2007 4:44 PM) (“Instead of putting your interrogatory responses into a formal pleading, you requested that I cut and paste your responses into RFAs.”), attached as Exhibit 11.

¹² *Id.* (“I had hoped that this was something the State could handle but in an effort to get these sooner rather than later, I will take on the task of doing this IF you will promise to respond to the RFAs within one week.”).

¹³ See Email from F. Remington to J. Walker (Nov. 21, 2007 5:39 PM) (“On the admissions, I really can’t promise to sign them within seven days after receipt...I know you’ll do your best to faithfully duplicate what I have said back at us in the form of an admission, but there is always the possibility that a turn of a phrase or a word inserted or missing might change things. Additionally, because of the profound impact of an admission, I can’t imagine that I would forego running the answers by knowledgeable people at DHFS.”), attached as Exhibit 12.

¹⁴ See Letter from F. Remington to L. Chen (Dec. 5, 2007) at 3, attached as Exhibit 13.

Defendants' liaison counsel in which it is clearly stated that the information provided therein are supplemental interrogatory responses.¹⁵ Defendants are merely requesting that Plaintiff memorialize in a single formal supplemental response the explanations and/or information it has agreed to supply, and has *already* supplied to Defendants' liaison counsel in response to specific questions regarding these interrogatories, and to serve such responses on all Defendants. Given that seven months have already passed since Defendants first requested that Plaintiff do this and Plaintiff still refuses to carry out this simple procedural task, Defendants request that this Court order Plaintiff to memorialize its supplemental interrogatory responses in a formal document to serve on all Defendants.

II. PLAINTIFF MUST VERIFY ITS INTERROGATORY RESPONSES.

Like any party responding to interrogatories, Plaintiff must verify its interrogatory responses under oath. Wis. Stat. § 804.08(1)(b) clearly provides that “[e]ach interrogatory shall be answered separately and fully in writing under oath....The answers are to be signed by the person making them, and the objections signed by the attorney making them.” As such, Plaintiff must verify its substantive responses to Defendants' interrogatories.

On October 18, 2007, Defendants served their Fourth Set of Interrogatories on Plaintiff. Plaintiff responded on November 26, 2007, but did not verify its interrogatory responses. Defendants asked Plaintiff to verify its responses¹⁶ but Plaintiff refused to do

¹⁵ See footnote 9 *supra*.

¹⁶ See 11/21/07 Email from J. Walker to F. Remington, Ex. 11 (“You expressed your concern with finding someone to sign interrogatories on behalf of the State. Because the State is a party to this litigation and the interrogatory responses are directed to the State, someone needs to sign the interrogatory responses on behalf of the State.”); see also Letter from J. Walker to F. Remington (Nov. 27, 2007), at 1 (“[T]he State’s Responses have not been signed under oath as required by Wis. Stat. § 804.08. Please serve verified Responses.”), attached as Exhibit 14.

so.¹⁷ Despite having verified all of its previous responses,¹⁸ Plaintiff said it could not verify these responses because of the difficulty of finding someone capable of verifying responses on behalf of the State.¹⁹

The difficulty of finding someone to verify its interrogatory responses does not excuse Plaintiff from its obligation under the Rules, any more than difficulty would excuse Defendants (who are responding to broad discovery requests covering many different business units) from verifying their responses. Wis. Stat. § 804.08(1)(b) clearly requires that the parties verify their responses. As a party to this litigation, it is up to Plaintiff to decide how best to do this.

This rule is not a mere procedural nicety that can be ignored. It is required in order to allow parties to reasonably and meaningfully rely on the statements made by opposing parties.²⁰ Defendants served these interrogatories on Plaintiff in order to receive answers they could rely upon. Defendants cannot so rely until Plaintiff verifies its responses. Accordingly, Defendants request that the Court order Plaintiff to verify its interrogatory responses in accordance with Wis. Stat. § 804.08(1)(b).

¹⁷ See Letter from F. Remington to S. Barley and J. Walker (Dec. 3, 2007) at 2 (“[Y]ou ask that someone sign the answers under oath as required by State law. As you know we have talked about this issue for many months...In the interest of moving forward, on behalf of the Plaintiff I will stipulate that the Plaintiff waives any right to object to the use of its answers to interrogatories on the ground they were not signed under oath.”), attached as Exhibit 15.

¹⁸ See Verification of F. Remington (Oct. 12, 2007), attached as Exhibit 16. Notably, other States involved in similar AWP litigation, such as Alaska, Kentucky and Alabama, have all verified their interrogatory responses. See, e.g. Verification of David Campana, Verification of Nici Gaines and Verification of Mary Hayes Finch, J.D., M.B.A., attached as Exhibit 17.

¹⁹ See 11/21/07 Email from J. Walker to F. Remington, Ex. 11 (memorializing a telephone conference meet and confer and noting: “[y]ou expressed your concern with finding someone to sign interrogatories on behalf of the State.”); see also Dec. 3, 2007 Remington Letter at 3, Ex. 15 (“Given the ongoing issue about signing answers to interrogatories, I have suggested that the defendants memorialize what they feel is necessary in a succinct request for admission.”).

²⁰ See, e.g., *Cohn v. Bryden Motors, Inc.*, 153 Wis.2d 773, 452 N.W.2d 585, *2 (Wis.App.,1989) (noting that “unless answers to interrogatories are sworn to and signed by the person providing the information, the adverse party cannot use them at trial for impeachment purposes.”)

CONCLUSION

For all of the foregoing reasons, Defendants move for an order compelling Plaintiff to memorialize its supplemental interrogatory responses in a formal document to be served on all Defendants and to verify all of its substantive interrogatory responses. Defendants further request that the Court award Defendants reasonable expenses incurred in obtaining this order, including attorneys' fees, as provided for in Wis. Stat. § 804.12(1)(c).

Date: February 12, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2008, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.


