

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

MISSOURI SOYBEAN)	
MERCHANDISING COUNCIL, et)	
al.,)	
Plaintiff,)	Case No.
)	
v.)	Division 13
)	
AGBORN GENETICS, LLC,)	
Defendants.)	

ORDER AND JUDGMENT

NOW, on this 8th day of June, 2016, the Court takes up for consideration Plaintiff's Motion for Sanctions, filed with the Court on October 23, 2015 and Plaintiff's Supplemental Suggestions in Support of their Motion for Sanctions, filed on March 28, 2016. The Court heard oral argument on January 11, 2016 and again at the Pre-Trial Conference on June 3, 2016. Further, the Court ordered that Plaintiffs' attorneys prepare and file information regarding the amount of time and expense that the attorneys had expended in pursuing the various discovery issues in the case. Counsel presented the affidavits on January 19, 2016 and May 27, 2016.

Analysis

Rule 61.01 permits the imposition of sanctions for discovery abuses including the striking of pleadings. *See, e.g.*, Rule 61.01(d)(1)-(4). "Under Rule 61.01, a trial court has broad discretion to sanction a party for failure to answer discovery requests or for providing incomplete or evasive responses to discovery requests." *Fairbanks v. Weitzman*, 13 S.W.3d 313, 326-27 (Mo. Ct. App. 2000) (internal quotations and citation omitted). Further, "[a] trial court has the inherent power to enforce compliance with its reasonable orders and may, at its discretion, impose sanctions when they are justified, considering the conduct of the parties and counsel." *Mitalovich*

v. Toomey, 217 S.W.3d 338, 340 (Mo. Ct. App. 2007) (citation omitted); *McLean v. First Horizon Home Loan, Corp.*, 369 S.W.3d 794, 801 (Mo. Ct. App. 2012) (court has inherent power to sanction bad faith conduct).

The Court is aware of innumerable issues that were the subject of discovery. On June 27, 2014 the Plaintiff served interrogatories and requests for production of documents on Defendant Agborn. Since that discovery was served, there were five motions to enforce discovery relating to Agborn's failure to produce responsive documents, provide adequate responses to the discovery and issues concerning a central witness in the case, AS. The Court has, until this juncture, only ordered the Defendant to comply with discovery requests, produce responsive documents and supplement interrogatory answers. In addition, the Court has Ordered that AS, the General Manager, Owner and Corporate Representative of Defendant Agborn, sit for a second deposition before a Special Master and answer certain questions he refused to answer at an earlier deposition. In its Order of June 23, 2015, the Court advised Defendant Agborn that it was not ruling on the Plaintiff's initial motion for sanctions at that time but would take up the issue if there was not substantial compliance with its Orders. Extensions were afforded and ultimately Defendant Agborn was required to produce all responsive documents on or before September 15, 2015.

The Plaintiff filed a Motion for Sanctions on October 23, 2015 and filed its Fifth Motion for Enforcement of Discovery on November 3, 2015. Based on extensions for the Defendant to respond granted by the Court, which were appropriate, and scheduling issues for the attorneys and the Court, the matter was heard on January 11, 2016. As a result of the hearing and the statements made by counsel, the Court in part stated: 1.) Based on Defendant's counsel's representation at the hearing that all requested royalty/wholesale reporting forms, all

subcontracts and all 2015 emails have been produced to Plaintiffs, the Court denies as moot that portion of Plaintiffs' motion seeking production of those items; provided, however, that Plaintiffs may renotice said motion if further relief is needed in light of subsequently discovered information. (See Order of January 13, 2016).

Plaintiffs filed its Supplemental Motion for Sanctions on March 28, 2016 regarding at least in part that element of the Court's Order.

Those issues which the Court addresses in this Order pertain to: Royalty reports, the method by which the Plaintiff could adduce at least in part what may be a method to calculate its damages; Agborn's third party contracts with entities that it would sell Plaintiffs' seed, to determine the entities Defendant Agborn contracted with to sell Plaintiff's seed; emails which would pertain to many issues in the case which include those issues previously described and others.

As it relates to the production of royalty reporting forms, on February 29, 2016, the Plaintiff took a second deposition of AS. AS testified that the Defendant should have had Royalty Reports in their records and if they were not produced he assumes they were discarded. Because of the failure of the Defendant to produce these Royalty Report Forms, the Plaintiff was required to seek discovery from numerous third-party entities and incur expenses that the Plaintiff states would not have been necessary but for the Defendant's failure to produce those documents. Royalty Reporting Forms were later produced to Plaintiff's by subpoena to third-party seed companies. Notably, some of the reporting forms were from dates **after** the case had been filed and **after** the discovery had been propounded to the Defendant, yet even for those royalty reporting forms, the Defendant failed to produce them or acknowledge they even existed. This is a violation of the Court's Order to produce all documents.

In addition, when Plaintiff sought in Interrogatory 6 (Ex. CC) to have all contracts and sublicenses that Agborn entered into regarding the MCA, the Defendant identified only three such contracts. The Court in its Order of January 13, 2016 denied Plaintiff's Fifth Motion to Compel as moot because the Court was advised that all such contracts had been identified. However, in his second deposition of February 29, 2016, AS testified that additional information should have been contained in Interrogatory No. 6. The Court finds that no rational explanation was afforded for the failure of Agborn to identify those contracts or produce those contracts. Again, Plaintiff was required to seek discovery regarding contracts from third-party entities. The third-party entities produced additional contracts that they had with Defendant Agborn, which should have been identified and produced by the Defendant. The Defendant did not answer the discovery completely even after the Court ordered it to do so. This is also a violation of the Court's Order.

In addition, the Plaintiffs sought the discovery of emails from AS's email account(s) and other email accounts for other employees of Defendant Agborn that would relate to the Plaintiffs or the subject matter of this litigation. As the Court reiterated in its Order, Defendant stated that it had no other emails other than those previously produced. Again, third-party entities have produced numerous emails from and to AS and others associated with Agborn that should have been produced but that Agborn never produced and that directly concern royalty payments and sales of seed that Plaintiffs claim are covered under the MCA. The Defendant violated the Court's Order on its requirement to produce the subject emails.

The Court is aware that on numerous occasions, it has addressed the discovery violations. The Court accepted as true the representations of Defendant's counsel. The Court does not, in

any way, question the integrity of counsel or that he was not truthful with the Court about what he stated to the Court based on the knowledge available to him..

The Court nonetheless finds that the Defendant has abused the discovery process and violated the Orders of the Court.

Plaintiffs have been prejudiced in their efforts to do discovery, appear before the Court, take depositions, and communicate with counsel. They have been required to file several motions that relates to Defendant's failures and incomplete responses, as well as conduct significant discovery with third-party entities. The Court is aware that in many cases, there are discovery issues that arise, where neither side is afforded sanctions or attorney's fees. In complex commercial litigation cases those issues are confronted fairly frequently. However, in this instance, the Court finds that the discovery violations were so substantial so as to afford that the Defendant should be sanctioned for its actions in this case. While the Plaintiff seeks the most severe of sanctions, including striking the Defendant's pleadings and/or granting a default judgment, the Court at this juncture will not grant such a request. The Court does find that a sanction of paying some of Plaintiff's counsel's attorneys' fees is warranted.

Attorneys' Fees

"The trial court is considered an expert on the necessity, reasonableness, and value of attorney's fees." *Lau v. Pugh*, 299 S.W.3d 740, 751 (Mo. Ct. App. S.D. 2009) (citing *Denney v. Winton*, 184 S.W.3d 110, 119 (Mo. Ct. App. 2006)). "It is entirely within the trial court's discretion whether to award attorney fees." *Id.* at 752 (quoting *Denney*, 184 S.W.3d at 1).

The Court has requested and has reviewed the Affidavits of Plaintiff's attorneys and the accompanying exhibits relating to the time spent in pursuing the various discovery issues in the

case thus far. The Court also reviewed Defendants Response to Plaintiffs Petition for Award of Attorneys' Fees and Supplement to Petition for Award of Attorneys' Fees.

The Plaintiffs seek fees and expenses that exceed \$120,000 dollars. The Court does not question that the Plaintiffs incurred such fees and expenses, but the Court will not grant fees for all of the services rendered in representing the Plaintiffs on the issues presented in the Motion for Attorney Fees and the accompanying affidavits. The Court does award fees from the point where Plaintiff was required to seek Sanctions, again seek discovery in its Fifth Motion to Enforce, and the time Plaintiffs were required to spend in obtaining the discovery it should have obtained from the Defendant.

The Court does find that the fees identified below are reasonable in light of the complex issues in the case, the extensive discovery necessary for the case, and the efforts required by Plaintiffs to try and secure discovery compliance by Agborn.

The Exhibits relating to the date, attorney, description, time expended, and cost associated with the Motion for Sanctions and Supplemental Motion were attached to the Motions when filed. In this Order, the Court will only provide the date and cost of those entries that the Court is finding shall be paid by the Defendant. It is as follows:

9/4/15	\$706.42
9/7/15	\$353.21
9/9/15	\$2,344.03
9/10/15	\$418.95
9/11/15	\$209.38
9/11/15	\$417.43
9/11/15	\$674.98
9/14/15	\$1,541.28
9/22/15	\$349.13
10/7/15	\$1,857.34
10/8/15	\$1,987.68
10/9/15	\$1,010.13
10/10/15	\$619.11
10/19/15	\$261.73

10/20/15	\$261.73
10/20/15	\$418.76
10/21/15	\$1,596.66
10/22/15	\$1,230.25
10/22/15	\$149.63
10/22/15	\$749.45
10/23/15	\$65.17
10/23/15	\$471.11
10/23/15	\$1,379.87
10/27/15	\$1,335.98
10/28/15	\$716.87
10/29/15	\$97.76
10/30/15	\$1,564.08
10/30/15	\$565.25
10/30/15	\$366.42
11/2/15	\$65.17
11/3/15	\$366.42
11/3/15	\$782.04
11/3/15	\$418.76
11/3/15	\$994.56
11/5/15	\$32.59
11/5/15	\$2,617.25
11/17/15	\$418.76
11/18/15	\$209.38
11/18/15	\$209.38
11/19/15	\$261.73
11/21/15	\$249.38
11/21/15	\$195.51
11/22/15	\$1,466.33
11/23/15	\$2,346.12
11/24/15	\$864.50
11/24/15	\$628.14
11/24/15	\$944.97
11/25/15	\$391.02
12/1/15	\$314.07
12/3/15	\$151.05
12/17/15	\$261.73
12/22/15	\$104.69
12/22/15	\$471.11
1/5/16	\$366.42
1/6/16	\$314.07
1/7/16	\$471.11
1/8/16	\$418.76
1/11/16	\$2,092.00
1/11/16	\$2,719.60
1/28/16	\$674.31

2/2/16	\$1,059.63
2/5/16	\$192.66
2/6/16	\$417.43
2/9/16	\$642.00
2/22/16	\$224.77
2/25/16	\$209.20
2/26/16	\$642.00
2/29/16	\$609.90
2/29/16	\$418.76
3/1/16	\$156.90
3/1/16	\$96.33
3/2/16	\$64.22
3/2/16	\$64.22
3/2/16	\$128.44
3/2/16	\$418.76
3/4/16	\$104.60
3/7/16	\$96.33
3/8/16	\$128.44
3/10/16	\$130.40
3/11/16	\$64.20
3/14/16	\$96.30
3/15/16	\$293.40
3/17/16	\$104.69
3/25/16	\$978.00
3/26/16	\$978.00
3/28/16	\$1,046.00
3/28/16	\$128.44
3/28/16	\$575.80
4/7/16	\$261.50
4/7/16	\$785.17
4/8/16	\$2,510.40

These amount to the sum of \$59,167.61. Defendant is ordered to pay Plaintiffs the amount of \$59,167.61 for attorneys fees as a sanction for its abuse of the discovery process and its violation of the Court's Orders. Said payment shall be made within thirty (30) days of this Order.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Sanctions should be, and is hereby, **SUSTAINED IN PART** and **DENIED IN PART**. As it relates to the reimbursement of

attorney's fees expended, Plaintiff's Motion is **SUSTAINED**. Plaintiff's Motion is **DENIED** as it relates to the entry of a Default Judgment or the striking of Defendant's Pleadings.

IT IS SO ORDERED.



CHARLES H MCKENZIE, Judge