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Not Reported in F.Supp.2d, 2003 WL 21443404 (N.D. Tex.)
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Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court, N.D. Texas, Dallas
Division.

LaSandra MADDEN and Levell Madden,
Individually and on Behalf of Labrea Williams, a
Minor Child Plaintiffs,

v.

WYETH D/B/A WYETH, INC f/k/a American
Home Products Corporation, et al Defendants
No. 3-03-CV-0167-R.

April 16, 2003.

MEMORANDUM ORDER

KAPLAN, Magistrate J.

*1 Plaintiffs LaSandra Madden and Levell Madden, Individually and on Behalf of Labrea Williams, a Minor Child, have filed a motion to preserve evidence in this drug products liability action. As grounds for their motion, plaintiffs allege that "there exists the possibility for defendants and their agents or employees to unintentionally or intentionally destroy or lose materials and documents relating to Children's Advil..." (Plf. Mot. at 2). Much of this evidence is potentially critical to plaintiffs' case. In order to avoid the spoliation of relevant documents and other discoverable information, plaintiffs seek an order requiring defendants to: (1) preserve all documents and information, whether in paper or electronic format, pertaining to Children's Advil regardless of the actual trade name used; and (2) suspend all routine destruction of documents, including but not limited to recycling back-up tapes, automated deletion of e-mail, and reformatting computer hard drives. The parties have briefed their respective arguments in a joint status report filed on April 15, 2003, and the motion is ripe for determination.

A motion to preserve evidence is an injunctive

remedy and should issue only upon an adequate showing that equitable relief is warranted. *Pepsi-Cola Bottling Co. of Olean v. Cargill, Inc.*, 1995 WL 783610 at *3 (D.Minn. Oct. 20, 1995), citing *Humble Oil & Refining Co. v. Harang*, 262 F.Supp. 39, 42 (E.D.La.1966) (concluding that preservation order is, in reality, a form of restraining order). In the Fifth Circuit, a party must establish a substantial threat of irreparable harm in order to obtain an injunction. See *Sierra Club v. City of San Antonio*, 112 F.3d 789, 793 (5th Cir.1997). Plaintiffs have made no such showing. Instead, they point to the mere "possibility" that defendants and their agents may intentionally or unintentionally destroy relevant documents. However, as plaintiffs recognize, *all litigants* are obligated to take appropriate measures to preserve documents and information which are reasonably calculated to lead to the discovery of admissible evidence and likely to be requested during discovery. ^{FN1} See *Hester v. Bayer Corp.*, 206 F.R.D. 683, 685 (M.D.Ala.2001); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443, 1455 (C.D.Cal.1984). Lawyers have an affirmative duty to advise their clients of pending litigation and the requirement to preserve potentially relevant evidence. *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y.1991). Plaintiffs do not allege, much less prove, that defendants will flaunt their obligation under the federal rules without a preservation order. "To supplement every complaint with an order requiring compliance with the Rules of Civil Procedure would be a superfluous and wasteful task, and would likely create no more incentive upon the parties than already exists." *Hester*, 206 F.R.D. at 685.

FN1 The court has been advised that plaintiffs sent a request for production of documents to defense counsel on March 25, 2003. (Jt. Stat. Rep. at 10). Presumably, the documents and

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information covered by plaintiffs' proposed preservation order are included in this discovery request.

The court is confident that defense counsel will advise their clients of the requirement to preserve relevant evidence and admonish them of the dire consequences of violating this duty ^{FN2} Without some proof that evidence may be lost or destroyed without a preservation order, the court is not inclined to enter such an order in this case. Accordingly, plaintiff's motion to preserve evidence is denied.

FN2 These consequences include sanctions under Rule 37 and giving a spoliation instruction to the jury.

***2 SO ORDERED.**

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Briefs and Other Related Documents (Back to top)

- 2005 WL 3137449 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Omnibus Motion for Sanctions and to Compel, With Supporting Brief (Oct. 24, 2005)
- 2004 WL 1596965 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Response to Wyeth's Objections to December 8, 2003 Order Signed by Magistrate Judge Kaplan, Motion for Stay of December 8, 2003 Order, and Motion for Extension of Time (Jan. 05, 2004)
- 2003 WL 23658718 (Trial Motion, Memorandum and Affidavit) Memorandum Order (Apr. 16, 2003)
- 3:03cv00167 (Docket) (Jan. 28, 2003)

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