

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

C.R. BARD, INC. and BARD PERIPHERAL
VASCULAR, INC.,

Plaintiffs,

v.

ANGIODYNAMICS, INC.,

Defendant.

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C.A. No. 15-218-SLR-SRF

MEMORANDUM ORDER

At Wilmington this 18th day of **August, 2017**, the court having considered the parties' discovery dispute submissions and the arguments presented during the May 25, 2017 discovery dispute hearing (D.I. 158; D.I. 160; 5/25/17 Tr.), IT IS HEREBY ORDERED THAT defendant AngioDynamics, Inc.'s ("AngioDynamics") motion to compel responses to Amended 30(b)(6) Topics 5, 18, and 65 directed to plaintiffs C.R. Bard, Inc. and Bard Peripheral Vascular, Inc. ("Bard") is GRANTED for the reasons set forth below.

1. Background. Bard brought this civil action for patent infringement against AngioDynamics on March 10, 2015, asserting causes of action for infringement of U.S. Patent Nos. 8,475,417 ("the '417 patent"), 8,545,460 ("the '460 patent"), and 8,805,478 ("the '478 patent") (collectively, the "patents-in-suit"). (D.I. 1 at ¶¶ 18-45) Bard's PowerPort® ClearVUE® implantable power-injectable port products are covered by the patents-in-suit. (*Id.* at ¶ 7) According to Bard, AngioDynamics' implantable power-injectable port products, including its Smart Port® products, infringe the patents-in-suit. (*Id.* at ¶¶ 19, 27, 35)

2. At issue in this case is the date when AngioDynamics first became aware of the patents-in-suit or their respective patent applications. On April 4, 2017, AngioDynamics served

its 30(b)(6) deposition notice on Bard. (D.I. 132) On May 25, 2017, the court held a hearing to address the parties' discovery disputes. (D.I. 143) The Rule 30(b)(6) deposition of AngioDynamics' witness, Tina King, was held on May 31, 2017. (D.I. 174, Ex. E)

3. Analysis. Having considered the parties' briefing, as well as the arguments presented to the court during the May 25, 2017 hearing, the court grants AngioDynamics' motion to compel 30(b)(6) deposition testimony in response to Amended Topics 5, 18, and 65.¹ The parties agree that contention topics are disfavored. (D.I. 158 at 2; 5/25/17 Tr. at 37:22-38:1) However, AngioDynamics' amended topics seek specific factual information regarding when AngioDynamics first became aware of the patents-in-suit or their respective patent applications. Deposition testimony regarding the date and time of notice and marking, and who made the decision to identify the products as covered by the patents-in-suit, is too narrow to reveal Bard's legal position on willful infringement.

4. The circumstances before the court in *Pharmacia & Upjohn Co. v. Sicor Inc.* are distinguishable from the present case. There, Judge Jordan noted that "there is some good force to the argument . . . that the inserting of the word 'facts' doesn't make this less of an effort to get at what is essentially the legal position of the party." (D.I. 160, Ex. D at 36) However, the deposition topic in question broadly sought "[a]ll facts regarding Pharmacia's allegations regarding copying, commercial success" (*Id.*) In contrast, AngioDynamics' amended topics are more narrowly tailored to obtain purely factual information regarding who identified

¹ Amended Topics 5 and 65 seek information regarding "[t]he circumstances of how Bard informed AngioDynamics about the existence of the Asserted Patents" and "[w]hether Bard identified any of its power-injectable access port products . . . as being covered by the Asserted Patents." (D.I. 158, Ex. F at Sched. A at 1, 4) Amended Topic 18 requests information regarding "[t]he products Bard publicly lists as having 'patent coverage' relating to the Asserted Patents." (D.I. 158, Ex. F at Sched. A at 2)


the accused products and when notice was given to AngioDynamics. (D.I. 158, Ex. F, Sched. A at 1-4) Such facts are necessary to establish the basis of Bard's willful infringement contentions.

5. Conclusion. In view of the foregoing analysis, AngioDynamics' request for relief is granted.

6. Given that the court has relied upon material that technically remains under seal, the court is releasing this Memorandum Order under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Memorandum Order should be redacted, the parties should jointly submit a proposed redacted version by no later than **August 25, 2017**. The court will subsequently issue a publicly available version of its Memorandum Order.

7. This Memorandum Order is filed pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and D. Del. LR 72.1(a)(2). The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Memorandum Order. Fed. R. Civ. P. 72(a). The objections and responses to the objections are limited to ten (10) pages each.

8. The parties are directed to the court's Standing Order For Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the court's website, www.ded.uscourts.gov.


Sherry R. Fallon
United States Magistrate Judge