

Correction: Attys Sanctioned \$655K After \$645M Medical Device Row Loss

By **Dave Simpson**

Law360 (September 20, 2018, 10:11 PM EDT) -- An Ohio federal judge ordered Cavitch Familo & Durkin Co. and three of its attorneys to pay more than \$655,000 in sanctions Wednesday for its discovery abuses while representing Healthcare Essentials Inc., which was ordered to pay medical device maker KCI USA Inc. \$645 million in trebled damages earlier this month for stealing and rebranding KCI's product.

U.S. District Judge Benita Y. Pearson declined to reconsider or revise her July order imposing sanctions. She ordered the firm and two of its attorneys to pay \$365,200.67 and ordered a third Cavitch attorney to pay \$290,488.30 for running up expenses through discovery abuses and failures.

"The most obvious tranche of unnecessary expenses are those that occurred between January 25, 2016, when the Cavitch attorneys falsely confirmed to Magistrate Judge [William] Baughman that they had fully complied with all discovery obligations, and October 6, 2016, when KCI, by its own efforts, came into possession of the discovery it had expected long before," Judge Pearson said.

Judge Pearson also ordered the defendants to pay nearly \$2.5 million for KCI's attorneys' fees and costs.

Earlier this month, Judge Pearson awarded KCI \$645 million, citing Healthcare Essentials' discovery abuse, which limited estimates of how much damage it and several related entities caused KCI to just a conservative estimate. Those abuses included filing false affidavits, refusing to produce relevant communications and documents, fabricating invoices and inventory spreadsheets, destroying digital and physical evidence, and intimidating at least two witnesses.

Regardless, certain defendants' failure to respond at all to the allegations coupled with misrepresentations of those who did appear in court indicate that Healthcare Essentials and its owners intentionally tried to disrupt the case, the judge said.

Moreover, the record that's available shows Healthcare Essentials, after stealing and rebranding KCI's products, spread false rumors about KCI and drove its customers away, Judge Pearson said.

The court also issued Healthcare Essentials a permanent injunction against selling, branding or misrepresenting the products and the company's connection to KCI.

KCI, which sells hospitals and nursing homes devices that use negative pressure to help heal wounds, had alleged that brothers Ryan and Colin Tennebar started Healthcare Essentials with former KCI employees and built an entire enterprise solely through the theft of KCI's devices.

In addition to failing to produce documents and other discovery abuses, the court said the defendants failed to abide by an injunction against their activity.

KCI filed the complaint in March 2014, alleging it had spent millions developing its devices and paid company representatives to provide constant technical service around the clock. In October 2012, it discovered Healthcare Essentials, which isn't a distributor, was using its products without properly training its employees.

In June, the court entered a default judgment against the brothers, several businesses they controlled and three former KCI employees. Before entering the judgment, Ryan Tennebar and the corporate entities entered a proposed stipulation order as to damages under which they agreed to pay at least \$215 million in exchange for KCI not seeking punitive damages.

Colin Tennebar did not join the settlement and instead had argued that KCI had failed to state a claim against him. But the court said that Colin Tennebar was mentioned numerous times, by name and in passing reference, in KCI's complaint. After piercing the company's corporate veil, it became obvious that Tennebar directly controlled the companies and used them to commit fraud, the court said.

A spokesperson for Cavitch told Law360 in an email that in the firm's century-long history, it has never been sanctioned for any discovery issues or unethical conduct in litigation.

"While this case presented challenging issues, we are confident that our lawyers acted properly and ethically at all times, with respect for the Court, the client, and the opposing party," the firm said. "While an opinion was recently issued by the Court, and damages were awarded, there has never been a hearing on the claims made against the Firm. We look forward to the opportunity to present the facts through the legal process, whether by way of appeal or otherwise."

KCI is represented by Thomas O. Crist, David A. Landman and Anthony C. Sallah of Benesch Friedlander Coplan & Aronoff LLP.

Healthcare Essentials and the Tennebars are represented by Rhys B. Cartwright-Jones and Christopher Sammarone, and Eric J. Weiss, Komlavi Atsou and Michael R. Rasor of Cavitch Familo & Durkin Co. LPA. Colin Tennebar is also represented by John B. Gibbons and Orville E. Stifel.

The case is KCI USA Inc. v. Healthcare Essentials Inc. et al., case number 1:14-cv-00549, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Christopher Crosby. Editing by Bruce Goldman.

Update: This story has been updated to add comment from Cavitch.

Correction: A previous version of this story misstated the total amount owed by the Cavitch attorneys. This error has been corrected.