

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

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BRIAN and MICHELLE SADLER,  
Individually and on behalf of their Minor  
Child, BREANNA SADLER

Plaintiffs,

v.

ADVANCED BIONICS, LLC,

Defendant.

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Civil Action No. 3:11-cv-450-R

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**DEFENDANT'S MOTION PURSUANT TO FED. R. CIV. P. 50 AND 59 FOR NEW  
TRIAL OR TO REDUCE, ALTER, OR AMEND THE JUDGMENT**

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Defendant Advanced Bionics, LLC ("Advanced Bionics"), hereby moves for a new trial under Rule 59 of the Federal Rules of Civil Procedure and Local Rule 7.1. Should the Court decline to grant a new trial of the case as a whole, Advanced Bionics moves in the alternative for a new trial on liability for and, if necessary, amount of punitive damages. Failing that, Advanced Bionics moves pursuant to Rules 50 and/or 59 for an order substantially reducing the punitive damages amount or conditionally granting a new trial unless Plaintiffs accept a substantial remittitur of the punitive damages award. In accordance with this Court's Order of May 10, docket number 283, Advanced Bionics will submit its memorandum of law in support of this motion on or before May 30, 2013.

As grounds for the requested relief, Advanced Bionics states the following:

1. Before trial, the Court correctly ruled that federal law preempted claims based on Plaintiffs' allegations that Advanced Bionics had violated FDA regulations or committed fraud

on the FDA. Advanced Bionics is entitled to a new trial because the jury verdict was likely influenced by evidence that related to the preempted claims, was used exclusively in a manner prohibited by preemption principles, was irrelevant to the only two claims that had not been dismissed on preemption grounds, and was inflammatory and unduly prejudicial.

2. Advanced Bionics is entitled to a new trial because the court erroneously admitted other irrelevant and unduly prejudicial evidence, including (a) evidence that 1000 other individuals also experienced a device failure, even though most of the individuals resided outside Kentucky and most of the failures occurred well after Breanna Sandler received her implant; (b) photos of an infant undergoing implantation surgery; and (c) repeated improper comments by Plaintiffs' regulatory expert.

3. Advanced Bionics is entitled to a new trial on all issues—or at a minimum on punitive damages—because Plaintiffs' counsel repeatedly engaged in improper jury argument, including (a) urging the jury to calculate punishment based on the alleged effect of Advanced Bionics' conduct in other states and on harms to nonparties, in violation of settled Supreme Court precedent, *see, e.g., Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 352-55 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003); (b) improperly and misleadingly predicated Plaintiffs' punitive damages calculus on Advanced Bionics' gross revenues from sales of 1000 other implants, although Kentucky Revised Statutes (KRS) 411.186 allows consideration only of evidence of profits, and Advanced Bionics' cochlear implant business had no such profits but instead incurred substantial losses (*see* Declaration of James Robinson, attached as Ex. A)<sup>1</sup>; (c) arguing for liability and punishment based on improperly

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<sup>1</sup> The existence of these losses is clearly reflected in the documents produced to counsel for Plaintiffs in discovery. (*See* Declaration of Craig May, attached as Ex. B.)

admitted evidence and allegations relating to the preempted claims; and (d) making other impermissible appeals to juror passion and prejudice (including referring to other lawsuits and invoking the parents' emotional distress, for which the parents could not recover).

4. The punitive damages awarded by the jury are unconstitutionally excessive under the principles and guideposts established by the Supreme Court in *State Farm, Philip Morris USA, BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and under precedents of the Sixth Circuit, including *Morgan v. New York Life Insurance Co.*, 559 F.3d 425 (6th Cir. 2009), *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470 (6th Cir. 2007), *Bach v. First Union National Bank*, 486 F.3d 150 (6th Cir. 2007), and *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006). Accordingly, the Court should either reduce the punitive damages outright to a nominal amount or, at most, an amount equal to the ample award of compensatory damages, or order a new trial unless Plaintiffs agree to a remittitur to that amount.

### **CONCLUSION**

For the foregoing reasons, this Court should order a new trial on all issues, or at least a new trial on liability for and, if necessary, amount of punitive damages. In the alternative, the Court should order a reduction or a remittitur of the punitive damages to a nominal sum or, at most, to no more than the amount of the compensatory damages.

Dated: May 16, 2013

Respectfully submitted,

*s/ Craig May*

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**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on May 16, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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*s/ Nicole Ramirez*

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