

requests for documents, which deponents are instructed to bring with them to the deposition. The deposition is noticed for 11 a.m. on May 1, 2006 at the offices of Attorney General located at 17 West Main Street, Madison, Wisconsin.

4. On April 17, 2006, during a telephone conference call with Plaintiff's counsel, Jeffrey Archibald, to discuss discovery issues, Robert Funkhouser and I on behalf of Merck objected to the noticed location. We proposed that Merck produce a witness or witnesses on the Notice topics at a location in Philadelphia, Pennsylvania, closer to Merck's offices in North Wales, Pennsylvania, where the Merck employees knowledgeable concerning those topics work and reside. Plaintiff refused this offer, and insisted that the deposition of Merck must proceed in Madison, Wisconsin. Mr. Archibald further stated Plaintiff's position that Merck must seek a protective order regarding the location of the deposition prior to May 1.

5. Merck reiterated its offer and its objection to the noticed location in a letter to Mr. Archibald dated April 18, 2006 (attached hereto as Ex. B). Mr. Archibald thereafter confirmed Plaintiff's refusal to compromise on the location of Merck's deposition.

6. By letter of April 19, Merck proposed that the Special Discovery Master appointed by the Court, the Honorable William Eich, at least preliminarily hear the dispute by teleconference. (attached hereto as Ex. C.)

7. Plaintiff, by letter to Judge Eich dated April 20, 2006 (attached hereto as Ex. D), agreed to Merck's proposal to have the Discovery Master consider the dispute by teleconference, and stated its position that the dispute hinged on the provisions of Wis. Stat. 804.05(3)(b) and could be mooted by service of a subpoena on Merck's registered agent for service of process. The parties and Judge Eich agreed to a teleconference on April 25 at 1 pm.

8. Merck submitted a responsive letter brief on April 24, 2006 (attached hereto as Ex. E.) The letter responded to Plaintiff's legal arguments (at 2-4), and noted that the underlying facts relating to convenience of the witnesses were not in dispute (i.e., that the employees knowledgeable concerning the Notice topics work and reside in or near North Wales, Pennsylvania, not Wisconsin, and that requiring the Merck deposition to proceed in Madison, Wisconsin would be inconvenient to the witnesses) (at 4-5).

9. Shortly before the hearing, Plaintiff submitted a letter brief responding to Merck's April 24, 2006 letter and several exhibits, including a deposition subpoena and document request that had been served on Merck's registered agent, CT Corporation. (The letter and exhibits are attached hereto as Ex. F.)

10. The hearing proceeded by teleconference on April 25, 2006. (A transcript of the hearing is attached hereto as Ex. G). On April 27, 2006, Judge Eich issued his Report and Decision denying Merck's request for a protective order regarding the location of the deposition. (Ex. H.)

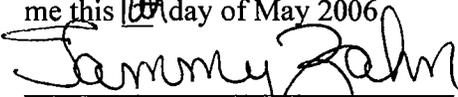
11. Plaintiff agreed to adjourn the date of Merck's deposition to June 20, 2006.

Dated this 14th of May, 2006



Michael P. Crooks (State Bar # 01008919)

Sworn and subscribed to before
me this 14th day of May 2006



State of Wisconsin, Notary Public
My Commission expires: 2/10/08

PETERSON, JOHNSON & MURRAY, S.C.
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Madison, Wisconsin 53703
Tel: (608) 256-5220
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Exhibit A



Mar 23 2006
4:05PM

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
AMGEN INC., et al.,)	
)	
Defendants.)	
)	

NOTICE OF DEPOSITION OF DEFENDANT MERCK & COMPANY, INC.

To:

Robert B. Funkhouser
Hughes, Hubbard & Reed, LLP
1775 I Street N.W.
Washington, DC 20006-2401

Michael P. Crooks
Peterson Johnson & Murray S.C.
131 West Wilson, Suite 200
Madison, WI 53703-3271

Attorneys for Merck & Company, Inc.

Pursuant to Wis. Stats. §§ 804.05(2)(e), 885.44 and 885.46 plaintiff will take the videotaped deposition of defendant **Merck & Company, Inc.** at **11:00 a.m.** on **May 1, 2006** at the offices of the Attorney General of the State of Wisconsin located at 17 West Main Street, Madison, WI 53703. The deposition is to be visually recorded and preserved pursuant to the provisions of Wis. Stats. §§ 885.44 and 885.46. **Merck & Company, Inc.** shall designate a person or persons to testify under oath about the following topics:

1. Any information possessed by the defendant showing, or tending to show, that the published AWP of any of defendant's targeted drugs was generally higher than the actual, net wholesale price regularly charged retail pharmacies for any of these drugs in any year from 1993 to the present.

2. Any information showing that any of defendant's targeted drugs were regularly purchased by retail pharmacies at a price equal to or greater than the published AWP at any time from 1993 to the present.

3. The reasons why defendant reported AWPs to medical compendiums that were higher than the price retail pharmacies were regularly paying for defendant's drugs, if it did so.

4. What contacts **Merck & Company, Inc.**, or its subsidiaries, have had with First Data Bank or the Red Book about any of the targeted drugs.

5. Whether **Merck & Company, Inc.**, or any of its subsidiaries, ever communicated to either First Data Bank or the Red Book that the published Average Wholesale Prices of their drugs did not accurately reflect the prices being paid by the retail classes of trade and, if so, when such communications took place and of what they consisted.

6. What actions, if any, defendants took to keep any AWP from being published in a medical compendium including but not limited to refusing to confirm any AWP for any medical compendium, and the reasons it took such actions.

The designated deponents shall bring with them: 1) all documents in defendant's possession tending to show that the published AWP of any of defendant's drugs was generally higher than the actual, net wholesale price regularly paid by retail pharmacies of those drugs at any time from 1993 to the present; 2) for the same period of time, all documents showing that any of the targeted drugs were generally sold to retail pharmacies at a price equal to or greater

than the published AWP; 3) for the same period of time, any documents evidencing communications between defendant and First Data Bank or The Red Book about or concerning the targeted drugs; 4) for the same period any documents which defendant believes tend to show: a) why defendant reported AWP to medical compendiums that were higher than the price retail pharmacies were regularly paying for defendant's drugs, if it did so, and b) any actions defendant took to keep any AWP from being published in a medical compendium.

Dated this _____ day of March, 2006.

/s/ P. Jeffrey Archibald
One of Plaintiff's Attorneys

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April 18, 2006

By Email and Fax

P. Jeffrey Archibald, Esq.
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Re: State of Wisconsin v. Amgen Inc., et al.
(No. 04-CV-1709)

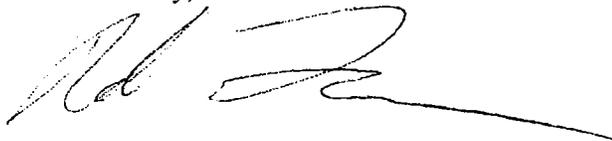
Dear Jeffrey:

On behalf of Merck & Co., Inc. ("Merck"), this letter will reiterate Merck's objection to the location specified in Plaintiff's March 23, 2006 Notice of Deposition that we discussed in our telephone conference meet and confer yesterday.

As discussed, Merck is prepared to make its witness available on the noticed date of May 1, 2006. The notice designates the place of the deposition as the Attorney General's offices in Madison, Wisconsin. The person or persons Merck will designate for the noticed topics work and reside in Pennsylvania, not Wisconsin. Under Wis. Stat. § 804.05, the depositions therefore must proceed in Pennsylvania. For your convenience, we offered to make Merck witnesses available in Philadelphia, rather than in North Wales, Pennsylvania.

During our call, you took the position that the location of the deposition was not negotiable and that Merck must file a protective order motion on this issue prior to May 1 even though Plaintiff would agree to a different (later) deposition date if the deposition proceeded in Wisconsin. In the event Plaintiff reconsiders its unreasonable position, please advise me no later than close of business today so we do not unnecessarily burden the Court.

Sincerely,



cc: Michael Crooks, Esq.

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Exhibit C

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† ALSO ADMITTED IN ILLINOIS

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MICHAEL J. WIRTH
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DANIEL P. DUFFY of Counsel †

*ALSO ADMITTED IN OHIO
**ALSO ADMITTED IN MICHIGAN
***ALSO ADMITTED IN FLORIDA
****ALSO ADMITTED IN MASSACHUSETTS

April 19, 2006

Honorable William Eich
840 Farwell Drive
Madison, WI 53704

RE: State of Wisconsin v. Amgen, Inc./Merck & Co., et al.
Dane Co. Case No. 04-CV-1709
Our File No. 1098-0277

Dear Judge Eich:

On behalf of Defendant Merck & Co., Inc. ("Merck"), we respectfully request guidance on how the Court would prefer to resolve a discovery dispute over the location of a deposition. Plaintiff has noticed the deposition of Merck on several topics for May 1, 2006, pursuant to the attached Notice of Deposition. (Ex. A). Merck is prepared to produce its designee or designees on that date in Philadelphia, Pennsylvania, which is near the North Wales, Pennsylvania offices where the employees of Merck most knowledgeable on the noticed topics work and reside. During a telephone conference on Monday April 17, 2006 to discuss several discovery disputes, Plaintiff insisted that Merck produce its witness or witnesses for deposition in Madison, Wisconsin, and stated its view that Merck must seek a protective order prior to the deposition to challenge the noticed location. See Ex. B.

Before multiplying the costs to the parties and burdening the Court, Merck requests the Court's guidance whether it would prefer, at least initially, to hear the issue by teleconference. The parties agree that Wisconsin Stat. § 804.05 provides the relevant authority on this issue. Merck also believes the Federal court decisions, such as *Zuckert v. Berkdiff Corp.*, 96 F.R.D. 161, 162 (D.C. Ill.1982), (Ex. C), provide guidance on the appropriate location of the deposition.



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PETERSON, JOHNSON & MURRAY, S.C.

April 19, 2006
Page 2

In the event your Honor prefers that Merck submit briefing and a motion for protective order, I will ensure that this occurs promptly.

Very truly yours,

PETERSON, JOHNSON & MURRAY, S.C.

Michael P. Crooks
MPC:taz

cc: ALL COUNSEL OF RECORD (see attached)

1. Any information possessed by the defendant showing, or tending to show, that the published AWP of any of defendant's targeted drugs was generally higher than the actual, net wholesale price regularly charged retail pharmacies for any of these drugs in any year from 1993 to the present.

2. Any information showing that any of defendant's targeted drugs were regularly purchased by retail pharmacies at a price equal to or greater than the published AWP at any time from 1993 to the present.

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than the published AWP; 3) for the same period of time, any documents evidencing communications between defendant and First Data Bank or The Red Book about or concerning the targeted drugs; 4) for the same period any documents which defendant believes tend to show: a) why defendant reported AWP's to medical compendiums that were higher than the price retail pharmacies were regularly paying for defendant's drugs, if it did so, and b) any actions defendant took to keep any AWP from being published in a medical compendium.

Dated this 23 day of March, 2006.


One of Plaintiff's Attorneys

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MICHAEL R. BAUER
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P. JEFFREY ARCHIBALD
State Bar # 1006299

Attorneys for Plaintiff,
State of Wisconsin

STATE OF WISCONSIN	CIRCUIT COURT	DANE COUNTY
	Branch 7	
STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified - Civil: 30703
AMGEN INC., et al.,)	
)	
Defendants.)	
)	

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Plaintiff State of Wisconsin's Notice of Deposition of Defendant Merck & Company, Inc. to be served by U.S. Mail upon:

Robert B. Funkhouser
 Hughes, Hubbard & Reed, LLP
 1775 I Street N.W.
 Washington, DC 20006-2401

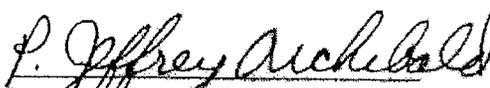
and

Michael P. Crooks
 Peterson Johnson & Murray S.C.
 131 West Wilson, Suite 200
 Madison, WI 53703-3271

this 24th day of March, 2006.

I hereby further certify that I caused a true and correct copies of the these documents to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20th, 2005.

Dated this 24th day of March, 2006.


 P. Jeffrey Archibald

Hughes Hubbard & Reed LLP

1775 J Street, N.W.
Washington, D.C. 20006-2404
Telephone: 202-771-4600
Facsimile: 202-771-4646

Robert B. Funkhouser
Litigation Counsel
Direct Dial: 202-771-4780
E-mail: funkhou@hugheshubbard.com

April 18, 2006

By Email and Fax

P. Jeffrey Archibald, Esq.
Archibald Consumer Law Office
1914 Monroe Street
Madison, WI 53711
Fax: 608.661.0067
Email: archibaldlaw@tds.net

Re: State of Wisconsin v. Amgen Inc., et al.
(No. 04-CV-1709)

Dear Jeffrey:

On behalf of Merck & Co., Inc. ("Merck"), this letter will reiterate Merck's objection to the location specified in Plaintiff's March 23, 2006 Notice of Deposition that we discussed in our telephone conference meet and confer yesterday.

As discussed, Merck is prepared to make its witness available on the noticed date of May 1, 2006. The notice designates the place of the deposition as the Attorney General's offices in Madison, Wisconsin. The person or persons Merck will designate for the noticed topics work and reside in Pennsylvania, not Wisconsin. Under Wis. Stat. § 804.05, the depositions therefore must proceed in Pennsylvania. For your convenience, we offered to make Merck witnesses available in Philadelphia, rather than in North Wales, Pennsylvania.

During our call, you took the position that the location of the deposition was not negotiable and that Merck must file a protective order motion on this issue prior to May 1 even though Plaintiff would agree to a different (later) deposition date if the deposition proceeded in Wisconsin. In the event Plaintiff reconsiders its unreasonable position, please advise me no later than close of business today so we do not unnecessarily burden the Court.

Sincerely,



cc: Michael Crooks, Esq.

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Westlaw

96 F.R.D. 161

Page 1

96 F.R.D. 161, 36 Fed.R.Serv.2d 60

(Cite as: 96 F.R.D. 161)

C

United States District Court, N.D. Illinois, Eastern
Division.

Sol ZUCKERT, Plaintiff.

v.

BERKLIFF CORPORATION, Berkley Industries,
Inc., Beauty Mail Mills, Inc., and
Lady Fair Mills, Defendants.

and

BERKLIFF CORPORATION and Berkley
Industries, Incorporated, Counterplaintiffs.

v.

Sol ZUCKERT, Counterdefendant.

No. 81 C 7284.

Nov. 22, 1982.

Defendants-counterplaintiffs objected to magistrate's order granting plaintiff-counterdefendant's motion to compel defendants' agents to travel to Chicago for depositions. The District Court, Aspen, I., held that in suit in which plaintiff alleged that defendants breached an oral agreement to pay commissions and incentive bonuses, counterclaim by defendants for breach of contract and breach of fiduciary duty, alleging that plaintiff solicited customers to purchase products from defendants' competitors and violated defendants' instructions on customer solicitation, was compulsory and not permissive; therefore, defendants were entitled to be deposed at location of their business.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure ⇌1383

170Ak1383 Most Cited Cases

As a general rule, deposition of a corporation by its agents and officers should be taken at its principal place of business, particularly so when corporation is defendant.

[2] Federal Civil Procedure ⇌1383

170Ak1383 Most Cited Cases

If a corporation objects to depositions at location other than its principal place of business, objection should be sustained unless there are unusual circumstances which justify such an inconvenience to the corporation.

[3] Federal Civil Procedure ⇌1383

170Ak1383 Most Cited Cases

If a counterclaim is compulsory, a defendant remains entitled to protection from deposition anywhere but his or her residence or business location; on the other hand, if a counterclaim is permissive, a defendant-counterplaintiff may be deposed at place of trial, so that filing permissive counterclaim results in defendant-counterplaintiff being treated as party plaintiff for purposes of any depositions. Fed.Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

[4] Federal Civil Procedure ⇌1383

170Ak1383 Most Cited Cases

In suit in which plaintiff alleged that defendants breached an oral agreement to pay commissions and incentive bonuses, counterclaim by defendants for breach of contract and breach of fiduciary duty, alleging that plaintiff solicited customers to purchase products from defendants' competitors and violated defendants' instructions on customer solicitation, was compulsory and not permissive; therefore, defendants were entitled to be deposed at location of their business. Fed.Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

*161 Ditekowsky & Contorer, Chicago, Ill., for plaintiff.

Lionel G. Gross, Altheimer & Gray, Chicago, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

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96 F.R.D. 161

Page 2

96 F.R.D. 161, 36 Fed.R.Serv.2d 60

(Cite as: 96 F.R.D. 161)

On November 4, 1982, Magistrate Carl B. Sussman entered an order granting plaintiff-counterdefendant Sol Zuckert's ("Zuckert") motion to compel defendants-counterplaintiffs' agents, Herbert Berkley, Allen Berkley and Kemal Sidak, to travel to Chicago for depositions. This order is now before the Court on defendant-counterplaintiffs' objections. After careful consideration *162 of this matter, Magistrate Sussman's November 4 order is vacated and it is ordered that the subject matter depositions be taken at the location of defendants-counterplaintiffs' business.

In his amended complaint, Zuckert alleges that defendants breached an oral agreement to pay commissions and incentive bonuses. [FN1] Defendants Berkley Corporation and Berkley Industries filed a counterclaim against Zuckert for breach of contract and breach of fiduciary duty, alleging that Zuckert solicited customers to purchase products from defendants' competitors and violated defendants' instructions on customer solicitation.

FN1. On March 17, 1982, this Court dismissed Zuckert's original complaint, which sought an accounting, pursuant to defendants' motion for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

The Magistrates Act, 28 U.S.C. §§ 631-639, sets forth the standard of review which courts are to observe when considering motions to reconsider magistrate's orders. Section 636(b)(1)(A) declares that

a judge may designate a magistrate to hear and determine any pretrial matter pending before the court.... A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

Thus, to reconsider and vacate Magistrate Sussman's order, we must find that his November 4 order was "clearly erroneous or contrary to law."

[1][2] As a general rule, the deposition of a

corporation by its agents and officers should be taken at its principal place of business. *Dunn v. Standard Fire Insurance Co.*, 92 F.R.D. 31, 32 (E.D.Tenn.1981). This is particularly so when the corporation is a defendant. *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir.1979). If a corporation objects to depositions at a location other than its principal place of business, the objection should be sustained unless there are unusual circumstances which justify such an inconvenience to the corporation. *Geay v. Continental Marketing Associates*, 315 F.Supp. 826, 832 (N.D.Ga.1970). One reason for this principle may be a desire to avoid forcing defendant corporations to transport business records. *Clark v. General Motors Corp.*, 20 Fed.R.Serv. 679, 688 (Callaghan) (D.Mass.1975).

[3][4] Two defendants in the instant case, however, have filed a counterclaim; they are thus counterplaintiffs. Therefore, this raises a question concerning whether defendants-counterplaintiffs are entitled to be deposed at their place of business pursuant to the general principle discussed above. If a counterclaim is compulsory, a defendant remains entitled to protection from deposition anywhere but his or her residence or business location; on the other hand, if a counterclaim is permissive, a defendant-counterplaintiff may be deposed at the place of trial. *Wisconsin Real Estate Investment Trust v. Weinstein*, 530 F.Supp. 1249, 1253 (E.D.Wis.1982); *Pinkham v. Paul*, 91 F.R.D. 613, 615 (D.Me.1981). Filing a permissive counterclaim thus results in a defendant-counterplaintiff being treated as a party plaintiff for purposes of any depositions. *Continental Federal Savings & Loan Association v. Delta Corp.*, 71 F.R.D. 697, 700 (W.D.Okla.1976). We must therefore decide whether the counterclaim in this case is compulsory or permissive.

Rule 13(a) of the Federal Rules of Civil Procedure provides:

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject

96 F.R.D. 161

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96 F.R.D. 161, 36 Fed.R.Serv.2d 60

(Cite as: 96 F.R.D. 161)

matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction...

In construing the requirement that a compulsory counterclaim arose out of the same transaction or occurrence as the claim of an opposing party, the Court of Appeals for the Seventh Circuit has declared that "163 " 'transaction' may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Warshawsky & Co. v. Arcata National Corp.*, 552 F.2d 1257, 1261 (7th Cir.1977). Applying this test to the instant case, it is clear that the counterclaim is compulsory and not permissive. Zuckert has sued for commissions and incentive bonuses allegedly due him pursuant to his full performance of an oral contract with defendants-counterplaintiffs; in their counterclaim, defendant-counterplaintiffs have put in issue Zuckert's performance of contracts with them. The complaint and counterclaim are thus inextricably related, and defendants-counterplaintiffs are entitled to be deposed at the location of their business. Zuckert has not persuaded this Court that there are any unusual circumstances justifying taking the deposition in question in Chicago.

Therefore, the November 4, 1982, order of Magistrate Sussman, granting Zuckert's motion to compel defendants' agents to travel to Chicago for depositions is vacated and the depositions in question are to be taken at the location of defendants-counterplaintiffs' business. It is so ordered.

96 F.R.D. 161, 36 Fed.R.Serv.2d 60

END OF DOCUMENT

Exhibit D

MINER, BARNHILL & GALLAND, P.C.

ATTORNEYS AND COUNSELORS

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JEFFREY I. CUMMINGS
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OF COUNSEL:

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SHARON K. LEGENZA
BRADLEY SCOTT WEISS

April 20, 2006

Honorable William F. Eich
840 Farwell Drive
Madison WI 53704

Via E-Mail and U.S. Mail

Re: *State of Wisconsin v. Amgen Inc., et al.*
Dane County Case Number: 04-CV-1709

Dear Judge Eich:

Wisconsin has no objection to a telephone resolution of Merck's informal motion for a protective order. Although this is an important issue for Wisconsin—if the State had to travel to each defendant for corporate designee depositions the cost to Wisconsin in money and inconvenience would be great—there is really very little to debate for several reasons.

First, this is a tempest in a teapot since all Wisconsin need do is serve a subpoena on Merck's registered agent to moot this issue. A provision of the Wisconsin statute that governs the location of depositions states: "A defendant who is not a resident of this state may be compelled by subpoena served within this state to give a deposition at any place within 100 miles from the place where that defendant is served." Wis. Stat. § 804.05 (3)(b)(3). Merck has a registered agent in Madison—C. T. Corporation System, 8025 Excelsior Drive, Madison, Wisconsin. Thus it can be compelled by subpoena to give a deposition here.

Second, even if Wisconsin were to rely on the notice of deposition already served, Merck still loses its motion. Another provision of the Wisconsin deposition statute states: "Any party may be compelled by notice ... to give a deposition at any place within 100 miles from the place where that party resides, is employed or *transacts business in person*." Wis. Stat. § 804.05 (3)(b)(1)(emphasis added). The statute even has a provision governing the specific type of

Honorable William F. Eich
Page Two
April 20, 2006

deposition at issue here—that of a corporate designee: “If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2)(e) [provision covering corporate designees], the place of examination shall be determined as if the deponent's place of residence, employment or transacting business in person were that of the party.” Wis. Stat. § 804.05 (3)(b)(6). Merck does business in person in Madison through its agents, including its sales people; a fact we do not expect Merck to deny.

Finally, the weakness of Merck's position is exposed by its need to rely on a 1982 federal case interpreting a different statutory scheme, which contains no provisions similar to those of Wisconsin's statutes. This case is of no use here given the specific Wisconsin statutes governing the location of the deposition at issue.

Sincerely yours,



Betty Eberle

BE:jlz

Cc: Michael P. Crooks via U.S. Mail
Counsel of Record via LNFS

Exhibit E

April 24, 2006

By Email and Fax

Honorable William Eich
840 Farwell Drive
Madison, WI 53704

Re: State of Wisconsin v. Amgen, Inc., et al.
(Case No. 04-CV-1709)

Dear Judge Eich:

On behalf of Defendant Merck & Co., Inc. ("Merck"), this letter will respond to Plaintiff's April 20 letter regarding the parties' dispute over Plaintiff's demand that Merck produce for deposition in Madison, Wisconsin witnesses who reside and work in North Wales, Pennsylvania. In its March 23, 2006 "Notice of Deposition of Defendant Merck & Co., Inc." (the "Notice"), Plaintiff demanded that Merck produce corporate witnesses and documents on six different topics related to the communications between Merck and two companies (First Data Bank and Red Book) that provide pharmaceutical pricing information, including "Average Wholesale Price"; and Merck's knowledge of wholesalers' pricing to retail pharmacies for specific Merck pharmaceuticals. The Notice specified the place of deposition as Madison, Wisconsin, and May 1, 2006 as the date. Plaintiff's counsel refused to consider any location other than Madison, Wisconsin, and insisted that Merck move for a protective order prior to the Notice date if it did not agree to the location in the Notice.

Plaintiff's demand that Merck produce its deponents in Madison, Wisconsin is contrary to established law, will impose considerable inconvenience on the witnesses whose interests should be of paramount importance in determining deposition location, and will substantially complicate efforts to schedule and complete pretrial discovery promptly. Plaintiff's counsel does not dispute that Merck's employees will be inconvenienced but merely asserts that taking the deposition at a location more convenient to the witnesses will impose costs on Plaintiff and inconvenience on Plaintiff's counsel.

We address below the arguments raised by Plaintiff in the April 20 letter and set forth some additional considerations that warrant a protective order that the deposition proceed in Pennsylvania. We are aware that Defendant Mylan has moved for a protective order that its corporate deposition should be adjourned until after the Plaintiff complies with the Court's order requiring further specificity to the Complaint. Defendant Merck fully agrees with the rationale of that motion but is prepared to proceed on the May 1, 2006 Notice date in Pennsylvania to accommodate the business and personal commitments of its designee.

Honorable William Eich
April 24, 2006
Page 2

1. Plaintiff's Subpoena Argument.

Plaintiff begins by asserting that the deposition of Merck's witnesses should proceed in Wisconsin because Plaintiff *could have* served a deposition subpoena on Merck by its registered agent CT Corporation.

First, Plaintiff concededly *did not* serve a deposition subpoena of any kind and this theoretical argument cannot possibly support requiring Merck witnesses to appear in Wisconsin for this deposition.

Second, Plaintiff's interpretation of the applicable statutes to require an out-of-state corporation to respond to a subpoena served on its registered agent for service of process is wrong. Wis. Stat. § 805.07(5) plainly states that the *only* exception to personal service of a subpoena on a corporation is provided in § 801.11(5)(a). That subsection of the general statutory provision for serving summons provides for service on a domestic or foreign corporation by personal service "upon an officer, director, or managing agent of the corporation." Service of a summons by service "upon an agent authorized by appointment or law to accept service of the summons for the defendant" is governed by the separate provision of § 801.11(5)(c). Section 801.11(5)(c) is not incorporated into the subpoena provision and thus cannot provide the backdoor route Plaintiff seeks to authorize depositions in Wisconsin.

2. The "Transacts Business In Person" Provision of § 804.05(3)(b).

Section 804.05(3)(b)(1) provides for the place of examination of a party for deposition as follows:

Any party may be compelled by notice under sub. (2) to give a deposition at any place within 100 miles from the place where the party **resides, is employed or transacts business in person, or at such other convenient place** as is fixed by an order of court.

Wis. Stat. § 804.05(3)(b)(1) (emphasis added). Where, as here, the party is a corporation and the notice requires the designation of witnesses on particular topics, Wis. Stat. § 804.05(3)(b)(6) provides as follows:

If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2)(e), the place of examination shall be determined as if the deponent's **place of residence, employment or transacting business in person were that of the party.**

Plaintiff interprets these provisions as allowing it to force Merck and presumably the other three dozen out-of-state corporate defendants named in the First Amended Complaint to

Honorable William Eich
April 24, 2006
Page 3

produce officers, employees and designees for deposition in Wisconsin. Neither Wisconsin law, nor the cases decided under the analogous Federal Rules of Civil Procedure, supports Plaintiff's position.

Wisconsin's civil procedure code is patterned after the Federal Rules of Civil Procedure. *See Korkow v. Gen. Cas. Co. of Wisconsin*, 117 Wis.2d 187, 193, 344 N.W.2d 108, 111 (1984). Accordingly, "[w]here a Wisconsin rule of Civil Procedure is based on a Federal Rule of Civil Procedure, decisions of the federal courts, to the extent they show a pattern of construction, are considered persuasive authority." *Neylan v. Vorwald*, 124 Wis.2d 85, 99, 368 N.W.2d 648, 656 (1985). The annotations to Wis. Stat. §804.05(3)(b)(6), Judicial Council Notes (1986), indicate that the Wisconsin deposition provisions are intended to follow Federal Rules: "Sub. (3)(b) is amended to conform to the territorial scope of deposition notices and subpoenas to the 100-mile provision of Rule 45(d), F.R.C.P. as amended in 1985." The "transacts business in person" provision thus derives from the territorial limitations on subpoena of non-party witnesses set forth in FRCP 45(c)(3)(A) providing that the court shall quash a subpoena that "requires a person who is not a party or an officer of a party to travel more than 100 miles from the place where that person resides, is employed or *regularly transacts business in person . . .*" Federal courts interpreting this provision have rejected Plaintiff's position that this provision is equivalent to the determination of whether there is general jurisdiction over a corporate party. *See, e.g., Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623-624 (5th Cir. 1973) ("a person designated by an organization pursuant to Rule 30(b)(6) could not be required to travel outside the limits imposed by Rule 45(d)(2)"); *Price Waterhouse LLP v. First American Corp.*, 182 F.R.D. 56, 62 n.3 (S.D.N.Y. 1998) (finding of personal jurisdiction over foreign accounting firm did not support subpoena for Rule 30(b)(6) deposition where no partner/employee with knowledge of topics resided or was employed in New York); *Regents of Univ. of California v. Khone*, 166 F.R.D. 463, 464 (S.D. Cal. 1991). Thus, the presence in Wisconsin of Merck sales personnel, which may be sufficient to support general jurisdiction over Merck, cannot support Plaintiff's effort to force employees performing other functions in other offices to be deposed in Wisconsin.

Although our research has disclosed no reported decision in which a Wisconsin court has addressed this deposition location issue, there is an abundance of federal authority that a corporate defendant's deposition should be taken at its place of business, and that the convenience of **the witness** should be the overriding factor in determining where the deposition takes place. Plaintiff's suggestion that Merck's reference to a 1982 federal case indicates "weakness" in Merck's position overlooks well-established law. The current versions of both leading federal treatises take precisely the same position as *Zuckert* and refer to dozens of decisions taking the same approach. *See 7 Moore's Federal Practice* § 3020[1][b] (2006) ("The deposition of a corporation through its officers or directors must normally be taken at the principal place of business . . ."); 8A *Wright & Miller, Federal Practice & Procedure*, § 2112, at 81 (same) (1994 and 2005 Supp.). *Accord Work v. Bier*, 107 F.R.D. 789, 793 n.4 (D.D.C. 1985) ("universally accepted rule in federal litigation is that, in the absence of special circumstances (such as an impoverished plaintiff and a very affluent defendant), a party seeking discovery must go where the desired witnesses are normally located").

Honorable William Eich
April 24, 2006
Page 4

Federal courts thus routinely grant protective orders when the plaintiff attempts to notice corporate depositions at a place away from the corporation's place of business. "If a corporation objects to depositions at a location other than its principal place of business, the objection should be sustained unless there are unusual circumstances which justify such an inconvenience to the corporation." *Zuckert v. Berkliff Corp.*, 96 F.R.D. 161, 162 (D.C.Ill.1982). See also *Chris-Craft Indus. Products, Inc. v. Kuraray Co., Ltd.*, 184 F.R.D. 605, 607-608 (N.D.Ill. 1999) ("[t]he purposes underlying the general rule that the depositions should proceed at the corporation's principal place of business create a presumption that the corporation has good cause for a protective order."). These considerations particularly apply where, as here, the notice is accompanied by a demand that deponents bring documents to the deposition. *Zuckert*, 96 F.R.D. at 162.

Wis. Stat. § 804.05(5) follows the wording of FRCP 30(d)(4), under which these and many other Federal courts have issued protective orders under the federal analog to Wis. Stat. § 804.01(3)(1) to require corporate depositions to take place where the defendant's witnesses work and reside. Although discovery issues seldom result in published state court decisions, at least one other state court, applying a provision similar to Wisconsin's, has determined that, in a State's civil action against out-of-state corporate defendants, depositions of defendants' designees should take place at the defendants' principal place of business. *State of Montana v. Hartford Fire Ins. Co.*, 2001 ML 1547, 2001 Mont. Dist. LEXIS 1982 (Mont. Dist. Ct. May 4, 2001). There, the court rejected the State's position that notices to the defendant insurance companies for corporate depositions in Montana required that designees who did not work or reside in Montana be deposed there. While recognizing that the text of the Federal Rules differed, the court found persuasive the "general principles" on which federal courts rely, including that: "A defendant . . . does not choose the forum and, therefore, the Court is more likely to protect it from a deposition set in the forum district." 2001 ML 1547 at *6. Accordingly, the court ruled the depositions should proceed at the defendants' principal places of business. This Court likewise should reject Plaintiff's efforts to upset this established rule on deposition location for corporate designees.

3. Convenience To The Witnesses Requires That The Deposition Proceed
Near Where They Work And Reside.

Section 804.05(b)(1) gives the Court the power to fix a "convenient place" for the deposition. In the case of Merck's designee, the location noticed by Plaintiff would require the witness to travel more than 700 miles from his residence and place of employment in North Wales, Pennsylvania. There are no direct flights between Philadelphia (the nearest major airport, which is approximately an hour away) and Madison, Wisconsin. The witness would have to travel more than eight hours roundtrip and be absent from work for two days to attend a deposition in Wisconsin.

Honorable William Eich
April 24, 2006
Page 5

Courts and attorneys (as officers of the court) generally recognize the public interest in minimizing, rather than maximizing, the disruption of witnesses' personal lives and livelihood due to litigation. As one treatise recently summarized it, these public considerations strongly favor that depositions should take place at the location most convenient for the witness:

[T]he customary practice of conducting depositions within commuting distance of the residence of the witness is consistent with genuine business and personal needs.

Witnesses often need to attend to other business even while a deposition is being conducted, and being at or near their regular place of work will minimize the burden on them, their co-workers and their employers. Second, travel imposes on the family life of witnesses. Even (and perhaps especially) employees who travel extensively on business are entitled to have their family and personal convenience considered. Third, proximity to the workplace of the witness may facilitate completion of the deposition; it is not uncommon that the witness will agree to check materials at her office that would not be accessible if the deposition were taken elsewhere. Finally, giving a deposition is an emotional strain on many witnesses, and being in a familiar environment may reduce that strain. On the whole, the customary practice of respecting the residence of the witness in all cases seems to work best. The requirement of producing witnesses in the forum is often invoked as an economic weapon, and adherence to a rule that requires witnesses to travel seems to promote litigation.

2 R. Haig, *Business and Commercial Litigation in Federal Courts* § 19.6 at 305-306 (ABA Lit. Section 1998). Adding to the inconvenience, Plaintiff's Notice includes multiple document requests.

The State does not dispute that deposing defendants' witnesses in Madison, Wisconsin will substantially inconvenience the witnesses, and will impose significant costs on defendants both directly in terms of travel costs and indirectly in terms of disruption of defendants' day to day business. Plaintiff argues that requiring the State's attorneys to travel to where the witnesses are located will impose costs and inconvenience on it. Judge Krueger previously has rejected Plaintiff's argument that its choice to sue multiple defendants in one action in this jurisdiction and to select these particular counsel warrants shifting the burdens of litigation to defendants. In the November 29, 2005 Decision and Order denying Plaintiff's motion to modify the protective order to allow sharing of confidential documents with other State litigants represented by the same counsel, the Court stated:

Combining three dozen major pharmaceutical companies in this one lawsuit is plaintiff's prerogative, but this crowded caption inures to only plaintiff's benefit.

Honorable William Eich
April 24, 2006
Page 6

Being part of such a big group can increase delay, add to attorneys' fees, and afford less individual attention for the defendants. (Decision and Order at 3.)

The Court concluded: "Clearly the rights of so many defendants to a protective Order should not hinge on the identity of the lawyers the plaintiff selected to help it prosecute this case. (Decision and Order at 4-5.)

Simply put, principles of equity, fairness, and common sense support a protective order holding that the deposition of Merck take place in Pennsylvania.

For the foregoing reasons, the Court should enter a protective order directing that Plaintiff's deposition of Merck take place in Pennsylvania, and such other relief, including costs of this motion, as the Court deems appropriate.

Respectfully,



cc: Michael Crooks, Esq. (by email and fax)
Betty Eberle, Esq. (by email and fax)
P. Jeffrey Archibald, Esq. (by email and fax)
All Counsel (by Lexis File & Serve)

Exhibit F



Apr 25 2006
11:35AM

MINER, BARNHILL & GALLAND, P.C.

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April 25, 2006

Honorable William F. Eich
840 Farwell Drive
Madison WI 53704

Via E-Mail and U.S. Mail

Re: *State of Wisconsin v. Amgen Inc., et al.*
Dane County Case Number: 04-CV-1709

Dear Judge Eich:

We address the three points Merck raises in its most recent letter. Despite their arguments to the contrary, it is clear that: (1) the Wisconsin statute regarding location of depositions is unambiguous, there is no federal equivalent, and thus federal caselaw cannot be applied to construe the statute; (2) the Wisconsin statute explicitly discounts convenience with regard to a corporate designee; and (3) regardless, Wisconsin can (and has) personally served Merck with a subpoena in Madison and thus can compel its deposition in Madison

Wisconsin statute regarding location of depositions is unambiguous—there is no federal equivalent; thus federal caselaw cannot be applied to construe the statute

Wisconsin's statute governing the location of depositions is plain and clear and precisely on point: A party may be compelled by notice to give a deposition in one of three places: where the party resides, is employed, or transacts business in person. Wis. Stat. § 804.05(3)(b)(1). Any ambiguity regarding the special situation of the deposition of a corporate designee is cleared up by another provision of the statute: If the deponent is a corporate designee, "the place of examination shall be determined as if the deponent's place of residence, employment or transacting business in person were that of the party." Wis. Stat. § 804.05(3)(b)(6). Merck is the party, it does not dispute that it transacts business in person in Wisconsin, and thus its corporate designee may be compelled to give a deposition in Wisconsin. It is that simple.

Merck expends considerable effort attempting to convince the Court that in federal litigation under the federal common law, a corporate defendant's deposition should be taken at its place of business. Regardless of how well established the federal law is on this point, it is irrelevant to interpreting a Wisconsin statute. As Merck pointed out, "[w]here a Wisconsin rule of Civil Procedure is based on a Federal Rule of Civil Procedure, decisions of the federal courts, to the extent they show a pattern of construction, are considered persuasive authority." *Neylan v. Vorwald*, 124 Wis.2d 85, 99, 368 N.W.2d 648, 656 (1985). However, *the Federal Rules of Civil Procedure contain no rule governing the location of depositions* (Merck does not contend otherwise),¹ and thus decisions of the federal court cannot aid in construing the Wisconsin rule.

Merck apparently pins its entire argument regarding the applicability of federal law on a 1986 Judicial Council Note that simply states: "Sub. (3)(b) [governing the location of all depositions]² is amended to conform the territorial scope of deposition notices and subpoenas to the 100-mile provision of Rule 45(d), F.R.C.P as amended in 1985." An examination of the 1983-84 statute shows that the amendment changed the rule (in both the provision governing parties and the provision governing corporate designees) from a 30-mile scope to a 100-mile scope, and expanded the number of places a party could be compelled to give a deposition, adding the places of employment and transacting business in person. Wis. Stat. § 804.05 (3)(b)(1) & (6)(1983-84 Version). The fact that the Wisconsin deposition location provision borrowed language from the Federal Rule governing subpoenas for non-party witnesses does not support Merck's nonsensical conclusion that therefore this Court should disregard the clear language of the statute, and instead apply federal common law.

Wisconsin's statute explicitly disregards "convenience to the witness" in determining the location of a corporate designee deposition.

The Wisconsin statute states that a party may be compelled to give a deposition "at any place within 100 miles from the place where the party resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of court." Wis. Stat. § 804.05 (3)(b)(1). Merck's argument that the option of a "convenient place" mandates that the Court order the deposition to proceed in Philadelphia fails for several reasons.

First, Merck's argument that consideration must be taken of where Merck's corporate designee resides and is employed (Merck letter at 4-6) when determining the location of the deposition is specifically negated by the provisions in the statute that states that a corporate designee's "place of residence, employment or transacting business in person" is irrelevant and what must be considered is the place of residence, employment or transacting business in person

¹ Merck simply contends that Wisconsin's *entire* civil procedure code is patterned after the Federal Rules of Civil Procedure. (Merck, April 24 letter, at 3) The Montana Rules of Civil Procedure does not have statutes similar to Wisconsin's, making Montana caselaw similarly inapposite.

² Merck incorrectly characterizes the Judicial Note as "annotations to Wis. Stat. §804.05(3)(b)(6)," which governs corporate designee depositions (Merck, April 24 letter, at 3), when in fact the Judicial Note references the entire provision governing all deposition locations.

of the "corporate party." Wis. Stat. § 804.05(3)(b)(6). The Wisconsin legislature has already weighed the factors affecting the "public interest" that Merck is asking the Court to weigh, and it came down with a clear mandate that corporate designees should be compelled to travel to places where their employers transact business in person.

Second, the statute allows the Court to fix a "convenient place" for the deposition—not a place, like Philadelphia, that is convenient for the corporate designee but inconvenient for the plaintiff. Merck's statement that "the convenience of the witness should be the overriding factor" is, as stated above, contradicted by the statute.

Third, Merck is asking for a protective order but has not provided an affidavit specifying the special circumstances why it, as opposed to every other foreign corporation, is entitled to protection from the clear mandate of the statute and why the burden should be shifted to the Wisconsin taxpayers. A protective order may be granted for "good cause shown" to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense" Wis. Stat. § 804.01(3). Merck cannot argue that producing a corporate designee *pursuant to statute* is an "undue burden." Merck transacts business in person in Wisconsin, and thus falls within the statute. In fact, Merck amply avails itself of the benefits of transacting business in Wisconsin, making many millions off its drug sales to Wisconsin annually. Its corporate designees, who work for a world-wide enterprise, cannot fault the Wisconsin legislature for expecting them to leave their home state on occasion in connection with the business it transacts in Wisconsin. Merck is asking this Court to go against the established intention of the legislature and in this case, force the taxpayers of Wisconsin to foot the bill for travel Merck employees do not wish to make. This is wholly unwarranted.³

Merck Can Be Compelled by Subpoena to Give a Deposition in Madison

Merck takes issue with the Wisconsin statute that specifically provides for the subpoenaing of a "defendant who is not a resident of this state," such as an out-of-state corporation like Merck. Wis. Stat. § 804.05(3)(b)(3). Under this provision, an out-of-state corporation "may be compelled by subpoena served within this state to give a deposition at any place within 100 miles from the place where that defendant is served." *Id.* Wisconsin can (and did) personally serve a subpoena for a deposition on Merck on its Madison registered agent.

³ Merck tacks on, as other defendants have done, Judge Krueger's observation that combining three dozen major pharmaceutical companies in this one lawsuit was plaintiff's prerogative, and that the "crowded caption" inures to only Wisconsin's (and presumably its citizen's) benefit. Plaintiffs believe that the method least burdensome to the court system was to bring defendants together in one case, rather than to bring three dozen separate lawsuits on the same subject matter, which would have been a nightmare. Merck continues on to quote the Court: "Clearly the right of so many defendants to a protective Order should not hinge on the identity of the lawyers the plaintiff selected to help it prosecute this case." This remark was made in reference to the fact that defendants wanted to restrict Wisconsin's sharing of discovery with other states despite the fact that some of the State's attorneys were pursuing the same litigation with other states. This comment has no application here.

Merck's faulty position regarding the statutorily prescribed location of its deposition is based on the false premise that Wisconsin noticed a deposition for an officer, director, or other managing agent of Merck. It has not. Wisconsin noticed a deposition for "Defendant Merck & Company, Inc." It did so explicitly pursuant to Wisconsin Statute Section 804.05(2)(e), which specifically authorizes a deposition of a "private corporation" and requires the corporation to "designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf...." Wis. Stat. § 804.05(2)(e).

Based on this false premise, Merck incorrectly argues that the "Substituted service" provision of the subpoena statute—Wis. Stat. § 805.07 (5)—governs this matter, and that because this provision does not include service on a registered agent, Wisconsin's service is invalid. However, service on a registered agent is the statutorily-prescribed method of personal service on a foreign (or domestic) corporation, and is not "substituted service." Wis. Stat. §§ 180.0504 (1) & 180.1510 (1).⁴ See also *Kenosha Hosp. & Medical Center v. Garcia*, 274 Wis.2d 338, 354, 683 N.W.2d 425, 432 (Wis. 2004) (listing "three methods of personal service" on a corporation including service "upon an agent authorized by appointment or by law to accept service," pursuant to Wis. Stat. § 801.11(5)(c)). Since service on a registered agent is "personal service," and a statute governing "substituted service" is irrelevant.

The "Substituted service" provision of the subpoena statute on which Merck relies, applies to (1) substituted service pursuant to 801.11(1)(b) pertaining to "natural persons," and providing that if the person cannot be personally served, a copy of the summons may be left at the defendant's usual place of abode; and (2) to substituted service on "officers, directors, and managing agents of public or private corporations or limited liability companies subpoenaed in their official capacity" pursuant to Section s. 801.11(5)(a), which provides: "In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office." Wis. Stat. § 801.11(5)(a) (emphasis added).

As stated above, Wisconsin has *not* noticed a deposition for an officer, director, or managing agent of Merck, but for the corporation, and Wisconsin has personally served the corporation. Thus a statute governing "substitute service" of a "specified officer" is inapplicable. Indeed, since Wisconsin does not know who the designated officer is, it could not possibly "substitute" service on someone else.⁵

⁴ Wisconsin law requires that "[e]ach foreign corporation authorized to transact business in this state shall continuously maintain in this state a registered office and registered agent." Wis. Stat. § 180.1507. The first provision of Wisconsin Statute Section 180.0504, which is entitled "Service on foreign corporation," states: "A corporation's registered agent is the corporation's agent for service of process, notice or demand required or permitted by law to be served on the corporation." Wis. Stat. § 180.1510 (1). Wis. Stat. § 180.0504 (1) states substantively the same rule for domestic corporations.

⁵ Moreover, it is unclear what "substituted service" on a corporation, as opposed to a person, would be. The closest analogy to "substituted service" on a corporation is found in Wisconsin Statute Section 179.88, entitled "Substituted service" under the subchapter for "Foreign Limited Partnerships," which provides that a foreign limited partnership can be served

Conclusion

The Wisconsin statutes are clear that a corporate designee can be compelled by notice to give a deposition where the corporation transacts business in person. Merck has not denied that it transacts business in Wisconsin. Merck had no basis to bring this motion. Given this, Wisconsin asks the Court to grant it its fees in responding to the motion and to hold Merck responsible for the magistrate's expenses.

Sincerely yours,



Betty Eberle

BE:jlz

Cc: Michael P. Crooks via e-mail and fax
Counsel of Record via LNFS

by serving duplicate copies on the Department of Financial Services, who in turn mails the notice to the partnership.



Apr 25 2006
11:35AM

STATE OF WISCONSIN, CIRCUIT COURT, DANE COUNTY

For Official Use

Case Caption: **Subpoena and Certificate of Appearance**
 State of Wisconsin,
 v.
 Amgen Inc., et al.

Case No. 04-CV-1709

The State of Wisconsin to (Witness Name and Address):
 Merck & Company, Inc.
 c/o CT Corporation
 8025 Excelsior Drive; Suite 200
 Madison WI 53717

Service Information		
Date Served 4-25-06	Time Served 10:45 pm	Fee Charged \$ <u> </u>
Manner of Service <input checked="" type="checkbox"/> Personal <input type="checkbox"/> Substitute: _____		Witness Fee Enclosed \$ <u> </u>
Serving Agency Archibald Consumer Law Office		
Served By (Signature) P. Jeffrey Archibald		

You are required to appear and give evidence:

APPEARANCE INFORMATION		
Date May 15, 2006	Time 11:00 a.m.	Location (Include Room Number) Offices of the Attorney General, State of Wisconsin 17 West Main Street; Madison WI 53703
Presiding Official P. Jeffrey Archibald, Attorney for State of Wisconsin		
On Behalf Of State of Wisconsin		Type of Proceeding Deposition

You are further required to bring with you the following:
See attached Exhibit A.

This is a third-party subpoena. Unless all parties agree otherwise, do not provide any requested items before the date and time of the above proceeding.

Failure to appear may result in punishment for contempt, which may include monetary penalties, imprisonment and other sanctions.

If you have any questions about this subpoena, please contact:		Issuing Official	
Name (Type or Print) Elizabeth J. Eberle		By: [Signature] Signature	
Title Attorney	Telephone Number (608) 255-5200	Date Apr. 25, 2006 Date	
Address Miner, Barnhill & Galland, PC 44 East Mifflin Street; Suite 803 Madison WI 53703			
If you need help in this matter because of a disability, please call:			

For Court Use Only

Witness Information	Witness Certificate of Appearance	
Telephone Number	Date Witness Appeared	Mileage

Address Correction	Signature of Witness
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EXHIBIT A

The designated deponents shall bring with them: 1) all documents in defendant's possession tending to show that the published AWP of any of defendant's drugs was generally higher than the actual, net wholesale price regularly paid by retail pharmacies of those drugs at any time from 1993 to the present; 2) for the same period of time, all documents showing that any of the targeted drugs were generally sold to retail pharmacies at a price equal to or greater than the published AWPs; 3) for the same period of time, any documents evidencing communications between defendant and First Data Bank or The Red Book about or concerning the targeted drugs; 4) for the same period any documents which defendant believes tend to show: a) why defendant reported AWPs to medical compendiums that were higher than the price retail pharmacies were regularly paying for defendant's drugs, if it did so, and b) any actions defendant took to keep any AWP from being published in a medical compendium.



Apr 25 2006
11:35AM

CHAPTER 804

CIVIL PROCEDURE — DEPOSITIONS AND DISCOVERY

804.01	General provisions governing discovery.	804.08	Interrogatories to parties
804.02	Perpetuation of testimony by deposition	804.09	Production of documents and things and entry upon land for inspection and other purposes.
804.03	Persons before whom depositions may be taken	804.10	Physical and mental examination of parties; inspection of medical documents
804.04	Stipulations regarding discovery procedure	804.11	Requests for admission
804.05	Depositions upon oral examination	804.12	Failure to make discovery; sanctions
804.06	Depositions upon written questions.		
804.07	Use of depositions in court proceedings		

NOTE: Chapter 804 was created by Sup. Ct. Order, 67 W (2d) 654, which contains Judicial Council Committee notes explaining each section. Statutes prior to the 1983-84 edition also contain these notes.

804.01 General provisions governing discovery. (1) **DISCOVERY METHODS.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under sub. (3), the frequency of use of these methods is not limited.

(2) **SCOPE OF DISCOVERY.** Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insur-

ance agreement is not by reason of disclosure admissible in evidence at trial.

(c) *Trial preparation: materials.* 1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

2. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under par. (a) and ac-

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quired or developed in anticipation of litigation or for trial, may be obtained only as follows:

1. A party may through written interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subd. 3 concerning fees and expenses as the court may deem appropriate.

2. A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

3. Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery under the last sentence of subds. 1 and 2; and with respect to discovery obtained under the last sentence of subd. 1, the court may require, and with respect to discovery obtained under subd. 2, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(3) **PROTECTIVE ORDERS.** (a) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:

1. That the discovery not be had;
2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
5. That discovery be conducted with no one present except persons designated by the court;
6. That a deposition after being sealed be opened only by order of the court;
7. That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

8. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(b) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion.

(4) **SEQUENCE AND TIMING OF DISCOVERY.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(5) **SUPPLEMENTATION OF RESPONSES.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to 1. the identity and location of persons having knowledge of discoverable matters, and 2. the identity of each person expected to be called as an expert witness at trial.

(b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made, or 2. the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

History: Sup. Ct. Order, 67 W (2d) 654, 1975 c. 218. Footnote cites (2) (c) 1 and (d) 2. State ex rel. Shelby Mut. Ins. Co. v. Circuit Court, 67 W (2d) 469, 227 NW (2d) 161.

Trial court has no authority to order the production of documents relevant to a claim upon which it could grant no relief. State ex rel. Rilla v. Dodge County Cir. Ct. 76 W (2d) 429, 251 NW (2d) 476.

Hospital fire drill rules and committee report on fire in plaintiff's decedent's hospital room held discoverable. Shibilski v. St. Joseph's Hospital, 83 W (2d) 459, 266 NW (2d) 264 (1978).

Where cost of discovery was several times greater than claim for damages, trial court abused discretion in denying defendant's motion for protective order. Vincent & Vincent, Inc. v. Spacek, 102 W (2d) 266, 306 NW (2d) 85 (Cl. App. 1981).

See note to 804.05, citing State v. Beloit Concrete Stone Co. 103 W (2d) 506, 309 NW (2d) 28 (Cl. App. 1981).

See note to 804.12, citing Jenzake v. City of Brookfield, 108 W (2d) 537, 322 NW (2d) 516 (Cl. App. 1982).

The new Wisconsin rules of civil procedure: Chapter 804
Graczyk, 59 MLR 463

804.02 Perpetuation of testimony by deposition. (1) **BEFORE ACTION.** (a) *Petition.* A person who desires to perpetuate personal testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in any such court in this state. The petition shall be entitled in the name of the petitioner and shall show: 1. that the petitioner expects to be a party to an action; 2. the subject matter of the expected action and the petitioner's interest therein; 3. the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it; 4. the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known; and 5. the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(b) *Notice and service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will move the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the state in the manner provided in s. 801.11 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in s. 801.11, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, s. 803.01 (3) applies.

(c) *Order and examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this chapter; and the court may make orders of the character provided for by ss. 804.09 and 804.10. For the purpose of applying

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this chapter to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(d) *Use of deposition.* If a deposition to perpetuate testimony is taken under this section, or if, although not so taken, it would be otherwise admissible in the courts of this state, it may be used in any action involving the same subject matter subsequently brought in this state in accordance with s. 804.07.

(2) **PENDING APPEAL.** If an appeal has been taken from a judgment of a court of this state or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show (a) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; and (b) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by ss. 804.09 and 804.10 and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in this chapter for depositions taken in actions pending in the court.

History: Sup. Ct. Order, 67 W (2d) 660, 1975 c. 218.

804.03 Persons before whom depositions may be taken. (1) **WITHIN THE UNITED STATES.** Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of this state or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(2) **IN FOREIGN COUNTRIES.** In a foreign country, depositions may be taken (a) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (b) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the

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commission to administer any necessary oath and take testimony, or (c) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on motion and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)". Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under this chapter.

(3) **DISQUALIFICATION FOR INTEREST.** No deposition shall be taken before a person who is a relative or employe or attorney or counsel of any of the parties, or is a relative or employe of such attorney or counsel, or is financially interested in the action.

History: Sup. Ct. Order, 67 W (2d) 663; 1975 c 218

804.04 Stipulations regarding discovery procedure. Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by this chapter for other methods of discovery.

History: Sup. Ct. Order, 67 W (2d) 664.

804.05 Depositions upon oral examination.

(1) **WHEN DEPOSITIONS MAY BE TAKEN.** After commencement of the action, any party may take the testimony of any person including a party by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena as provided in s. 805.07. The attendance of a party deponent or of an officer, director or managing agent of a party may be compelled by notice to the named person or attorney meeting the requirements of sub. (2) (a). Such notice shall have the force of a subpoena addressed to the deponent. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes, except when the party seeking to take the deposition is the state agency or officer to whose custody the prisoner has been committed.

(2) **NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; NON-STENOGRAPHIC RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION.** (a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena requiring the production of materials is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) The court may for cause shown enlarge or shorten the time for taking the deposition.

(c) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means or videotape means as provided in ss. 885.40 to 885.47, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at the party's own expense.

(d) The notice to a party deponent may be accompanied by a request made in compliance with s. 804.09 for the production of documents and tangible things at the taking of the deposition. The procedure of s. 804.09 shall apply to the request.

(e) A party may in the notice name as the deponent a public or private corporation or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized by statute or rule.

(3) **DEPOSITIONS; PLACE OF EXAMINATION.** (a) A subpoena issued for the taking of a deposition may command the person to whom it is

directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by s. 804.01 (2), but in that event the subpoena will be subject to sub. (2) and s. 804.01 (3).

(b) 1. Any party who is a resident of this state may be compelled by notice as provided in sub. (2) to give a deposition at any place within the county of residence, or within 30 miles of the party's residence, or at such other place as is fixed by order of the court. A plaintiff who is a resident of this state may also be compelled by like notice to give a deposition at any place within the county where the action is commenced or is pending.

2. A plaintiff who is not a resident of this state may be compelled by notice under sub. (2) to attend at the plaintiff's expense an examination in the county of this state where the action is commenced or is pending or at any place within 30 miles of the plaintiff's residence or within the county of residence or in such other place as is fixed by order of the court.

3. A defendant who is not a resident of this state may be compelled:

a. By subpoena to give a deposition in any county in this state in which personally served, or

b. By notice under sub. (2) to give a deposition at any place within 30 miles of the defendant's residence or within the county of residence or at such other place as is fixed by order of the court.

4. A nonparty deponent may be compelled by subpoena served within this state to give a deposition at a place within the county of residence or within 30 miles of the nonparty deponent's residence or at such other place as is fixed by order of the court.

5. In this subsection, the terms "defendant" and "plaintiff" include officers, directors and managing agents of corporate defendants and corporate plaintiffs, or other persons designated under sub. (2) (e), as appropriate. A defendant who asserts a counterclaim or a cross-claim shall not be considered a plaintiff within the meaning of this subsection, but a 3rd party plaintiff under s. 803.05 (1) shall be so considered with respect to the 3rd party defendant.

6. If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2) (e), the place of examination shall be determined as if the residence of the deponent were the residence of the party.

(4) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. (a)

Examination and cross-examination of deponents may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under the officer's direction, record the testimony of the deponent. The testimony shall be taken stenographically or by videotape as provided by ss. 885.40 to 885.47 or recorded by any other means ordered in accordance with sub. (2) (c). If the testimony is taken stenographically, it shall be transcribed at the request of one of the parties.

(b) All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit the questions to the officer, who shall propound them to the witness and record the answers verbatim.

(5) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in s. 804.01 (3). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion.

(6) SUBMISSION TO DEPONENT; CHANGES; SIGNING. If requested by the deponent or any party, when the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by the deponent. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days after its submission to the deponent, the officer shall sign it and state

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on the record the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under s. 804.07 (3) (d) the court holds that the reasons given for the refusal or failure to sign require rejection of the deposition in whole or in part.

(7) **CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING.** (a) The person recording the testimony shall certify on the deposition that the witness was duly sworn by the person and that the deposition is a true record of the testimony given by the deponent. The person shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert the name of the deponent)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing and give notice of its filing to all parties.

(b) Documents and things produced for inspection during the examination of the deponent, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that 1) the person producing the materials may substitute copies to be marked for identification, if the person afford to all parties fair opportunity to verify the copies by comparison with the originals, and 2) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition to the court, pending final disposition of the case.

(c) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

History: Sup. Ct. Order, 67 W (2d) 665; Sup. Ct. Order, 67 W (2d) viii; 1975 c. 218; 1979 c. 116; 1983 a. 189.

Judicial Council Committee's Note, 1975: Subs. (7) (c) and (4) (a) are amended to recognize the Wisconsin Rules of Videotape Procedure and to make certain that a motion to the court is not required prior to taking a videotape deposition. [Re Order effective Jan. 1, 1976]

Highly placed state official who seeks protective order should not be compelled to testify on deposition unless clear showing is made that deposition is necessary to prevent prejudice or injustice. *State v. Beloit Concrete Stone Co.* 103 W (2d) 506, 309 NW (2d) 28 (Ct. App. 1981)

804.06 Depositions upon written questions.

(1) **SERVING QUESTIONS; NOTICE.** (a) After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by

subpoena as provided in s. 805.07. The attendance of a party deponent or of an officer, director, or managing agent of a party may be compelled by notice to him or his attorney meeting the requirements of s. 804.05 (2) (a). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes, except when the person seeking to take the deposition is the state agency or officer to whose custody the prisoner has been committed.

(b) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with s. 804.05 (2) (e).

(c) Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(2) **OFFICER TO TAKE RESPONSES AND PREPARE RECORD.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by s. 804.05, either personally or by someone acting under the officer's direction, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition to the clerk of the court where the action is pending, attaching thereto the copy of the notice and the questions received by the officer.

(3) **NOTICE OF FILING.** When the deposition is filed, the person who has recorded the testimony shall promptly give notice of the filing to all parties.

History: Sup. Ct. Order, 67 W (2d) 671; 1975 c. 218

804.07 Use of depositions in court proceedings.

(1) **USE OF DEPOSITIONS.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present

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and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or employe or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(c) The deposition of a witness other than a medical expert, whether or not a party, may be used by any party for any purpose if the court finds: 1. that the witness is dead; or 2. that the witness is at a greater distance than 30 miles from the place of trial or hearing, or is out of the state, and will not return before the termination of the trial or hearing, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3. that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or 4. that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5. upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. The deposition of a medical expert may be used by any party for any purpose, without regard to the limitations otherwise imposed by this paragraph.

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(e) Substitution of parties pursuant to s. 803.10 does not affect the right to use depositions previously taken; and when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(2) **OBJECTIONS TO ADMISSIBILITY.** Subject to sub. (3) (c) and to s. 804.03 (2), objection may be made at the trial or hearing to receiving in

evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(3) **EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.** (a) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) *As to taking of deposition.* 1. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

2. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

3. Objections to the form of written questions submitted under s. 804.06 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(d) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indexed, transmitted, filed, or otherwise dealt with by the officer under ss. 804.05 and 804.06 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

History: Sup. Ct. Order, 67 W (2d) 673; 1975 c. 218; Sup. Ct. Order, 73 W (2d) xxxii; 1983 a. 192.

Judicial Council Committee's Note, 1976: Section 804.07 (2) is taken from F.R.C.P. 32 (b). The reference in sub. (2) to "sub. (3) (d)" is changed to read "sub. (3) (c)" to correspond with subdivision (d) (5) in F.R.C.P. 32 (b) [Re Order effective Jan. 1, 1977].

Under (2) and (3) (c) 1, hearsay objection was not waived by failure to object at deposition. *Strelecki v. Firemans Ins. Co. of Newark*, 88 W (2d) 464, 276 NW (2d) 794 (1979).

804.08 DEPOSITIONS AND DISCOVERY

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804.08 Interrogatories to parties. (1) AVAILABILITY; PROCEDURES FOR USE. (a) Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under s. 804.12 (1) with respect to any objection to or other failure to answer an interrogatory.

(2) SCOPE; USE AT TRIAL. (a) Interrogatories may relate to any matters which can be inquired into under s. 804.01 (2), and the answers may be used to the extent permitted by chs. 901 to 911.

(b) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(3) OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory

reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

History: Sup. Ct. Order, 67 W (2d) 676; 1975 c. 218. See note to 804.01, citing *Vincent & Vincent, Inc. v Spacsek*, 102 W (2d) 266, 306 NW (2d) 85 (Ct. App. 1981). The effective use of written interrogatories. *Schoone and Miner*, 60 MLR 29.

804.09 Production of documents and things and entry upon land for inspection and other purposes. (1) SCOPE. Any party may serve on any other party a request (a) to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy, any designated documents (including writings; drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of s. 804.01 (2) and which are in the possession, custody or control of the party upon whom the request is served; or (b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation therein, within the scope of s. 804.01 (2).

(2) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under s. 804.12 (1) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(3) PERSONS NOT PARTIES. This rule does not preclude an independent action against a per-

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son not a party for production of documents and things and permission to enter upon land.

History: Sup. Ct. Order, 67 W (2d) 678; 1975 c. 218.

804.10 Physical and mental examination of parties; inspection of medical documents. (1) When the mental or physical condition (including the blood group) of a party is in issue, the court in which the action is pending may order the party to submit to a physical or mental examination. The order may be made on motion for cause shown and upon notice to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(2) In any action brought to recover damages for personal injuries, the court may also order the claimant, upon such terms as are just, to give to the other party or any physician named in the order, within a specified time, consent and the right to inspect any X-ray photograph taken in the course of the diagnosis or treatment of such claimant for the injuries for which damages are claimed. The court may also order such claimant to give consent and the right to inspect and copy any hospital, medical or other records and reports concerning the injuries claimed and the treatment thereof.

(3) (a) No evidence obtained by an adverse party by a court-ordered examination under sub. (1) or inspection under sub. (2) shall be admitted upon the trial by reference or otherwise unless true copies of all reports prepared pursuant to such examination or inspection and received by such adverse party have been delivered to the other party or attorney not later than 10 days after the reports are received by the adverse party. The party claiming damages shall deliver to the adverse party, in return for copies of reports based on court-ordered examination or inspection, a true copy of all reports of each person who has examined or treated the claimant with respect to the injuries for which damages are claimed.

(b) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with any other statute.

(4) Upon receipt of written authorization and consent signed by a person who has been the subject of medical care or treatment, or in case of the death of such person, signed by the personal representative or by the beneficiary of an insurance policy on the person's life, the physician or other person having custody of any medical or hospital records or reports concern-

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ing such care or treatment, shall forthwith permit the person designated in such authorization to inspect and copy such records and reports. Any person having custody of such records and reports who unreasonably refuses to comply with such authorization shall be liable to the party seeking the records or reports for the reasonable and necessary costs of enforcing the party's right to discover.

History: Sup. Ct. Order, 67 W (2d) 680; 1975 c. 218.

Although personal injury claimant's counsel attended stipulated independent medical examination without court order or defendant's knowledge, trial court did not abuse discretion in refusing to limit cross-examination of the physician since presence of counsel was not prejudicial and court order could have been obtained under Whanger guidelines. *Karl v Employers Ins. of Wausau*, 78 W (2d) 284, 254 NW (2d) 255.

Medical records discovery in Wisconsin personal injury litigation. 1974 WLR 524.

804.11 Requests for admission. (1) REQUEST FOR ADMISSION. (a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of s. 804.01 (2) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a

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reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to s. 804.12 (3) deny the matter or set forth reasons why the party cannot admit or deny it.

(c) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion.

(2) **EFFECT OF ADMISSION.** Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to s. 802.11 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

History: Sup. Ct. Order, 67 W (2d) 682; 1975 c. 218; 1977 c. 447 s. 210; 1983 a. 192.

Court erred by allowing defendant to withdraw admission of liability. Schmid v. Olsen, 111 W (2d) 228, 330 NW (2d) 547 (1983).

Summary judgment can be based upon party's failure to respond to request for admission, even where admission would be dispositive of entire case. Bank of Two Rivers v. Zimmer, 112 W (2d) 624, 334 NW (2d) 250 (1983).

804.12 Failure to make discovery; sanctions.**(1) MOTION FOR ORDER COMPELLING DISCOVERY.**

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a) *Motion.* If a deponent fails to answer a question propounded or submitted under s. 804.05 or 804.06, or a corporation or other entity fails to make a designation under s. 804.05 (2) (e) or 804.06 (1), or a party fails to answer an interrogatory submitted under s.

804.08, or if a party, in response to a request for inspection submitted under s. 804.09, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he or she applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to s. 804.01 (3).

(b) *Evasive or incomplete answer.* For purposes of this subsection an evasive or incomplete answer is to be treated as a failure to answer.

(c) *Award of expenses of motion.* 1. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

2. If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

3. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(2) **FAILURE TO COMPLY WITH ORDER.** (a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

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2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination

(b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure; unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(3) **EXPENSES ON FAILURE TO ADMIT** If a party fails to admit the genuineness of any document or the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in the making of that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1); or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

(4) **FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION OR SUPPLEMENT RESPONSES.** If a party or an officer,

director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails (a) to appear before the officer who is to take the party's deposition, after being served with a proper notice, or (b) to serve answers or objections to interrogatories submitted under s. 804.08, after proper service of the interrogatories, or (c) to serve a written response to a request for inspection submitted under s. 804.09, after proper service of the request, or (d) seasonably to supplement or amend a response when obligated to do so under s. 804.01 (5), the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2) (a) 1, 2 and 3. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by s. 804.01 (3).

History: Sup Ct. Order, 67 W (2d) 684; 1975 c. 94 s. 3; 1975 c. 200, 218.

If imposed solely for failure to obey court order, without evidence of bad faith or no merit, the sanctions of (2) (a) deny due process. *Dubman v. North Shore Bank*, 75 W (2d) 597, 249 NW (2d) 797.

Defendant's failure to produce subpoenaed documents did not relieve plaintiff of obligation to make prima facie case. *Paulsen Lumber, Inc v. Anderson*, 91 W (2d) 692, 283 NW (2d) 580 (1979).

See note to 655 17, citing *Mazurek v. Miller*, 100 W (2d) 426, 303 NW (2d) 122 (Ct. App. 1981).

Although plaintiff failed in duty to disclose expert's identity, defendant failed to show hardship which would justify excluding expert's testimony. *Jenzake v. City of Brookfield*, 108 W (2d) 537, 322 NW (2d) 516 (Ct. App. 1982).

Court exercised proper discretion in dismissing claim where claimants failed to provide responsive answers to interrogatories, where they engaged in dilatory conduct and where there was no justification for claimant's failure to appear and produce documents at depositions. *Englewood Apartments Partnership v. Grant & Co.* 119 W (2d) 34, 349 NW (2d) 716 (Ct. App. 1984).

Exhibit G

CONDENSED

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

PLAINTIFF,

-VS-

CASE NO. 04-CV-1709

UNCLASSIFIED-CIVIL: 30703

AMGEN, INC., A DELAWARE
CORPORATION, ET AL.,

DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

Tuesday, April 25, 2006

1:00 o'clock p.m.

The Court: WILLIAM EICH

Reported by: SANDRA L. McDONALD



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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,

PLAINTIFF,

-vs-

CASE NO. 04-CV-1709
UNCLASSIFIED-CIVIL: 30703

AMGEN, INC., A DELAWARE
CORPORATION, ET AL.,

DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

Tuesday, April 25, 2006

1:00 o'clock p.m.

The Court: WILLIAM KICH

Reported by: SANDRA L. McDONALD

1 APPEARANCES: (Continued)

2 KRISTI T. PRINZO,
3 DAVIS, POLK & WARDWELL,
4 Attorneys at Law,
5 450 Lexington Avenue,
6 New York, New York 10017,
7 appearing on behalf of the defendant,
8 AstraZeneca Pharmaceuticals;

9 JOE CAVITT,
10 HURLEY, BURISH & STANTON, S.C.,
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12 10 East Doty Street,
13 Madison, Wisconsin 53703,
14 appearing on behalf of the defendant,
15 Aventis Pharmaceuticals, Inc.;

16 JASON M. BRINO,
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20 Washington, D.C. 20037,
21 appearing on behalf of the defendant,
22 Baxter International, Inc.;

23 JOHN W. MARUSON,
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appearing on behalf of the defendant,
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NEIL MERGL,
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DONALD K. SCHOTT,
CURRIES & BRADY, LLP,
Attorneys at Law,
One South Pinckney Street,
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appearing on behalf of the defendant,
Johnson & Johnson, Inc.;

3

1
2 TRANSCRIPT OF PROCEEDINGS, taken in the
3 above-entitled matter, before SANDRA L. McDONALD, a
4 Notary Public in and for the State of Wisconsin, at
5 the law offices of Peterson, Johnson & Murray, S.C.,
6 131 West Wilson Street, Madison, Wisconsin, on the
7 25th day of April, 2006, commencing at 1:00 p.m.

8 *****

9 APPEARANCES

10 FL. JEFFREY ARCHIBALD,
11 ARCHIBALD CONSUMER LAW OFFICE,
12 1914 Monroe Street,
13 Madison, Wisconsin 53711,
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15 WILLIAM DIXON and ELIZABETH EBERLE,
16 MINER, BARNHILL, & GILLAND, P.C.,
17 44 East Mifflin Street, Suite 803,
18 Madison, Wisconsin 53703,
19 appearing on behalf of the plaintiff;

20 RYAN MITCHELL,
21 JONES DAY, Attorneys at Law,
22 77 West Wacker Drive,
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25 Abbott Laboratories and
Top Pharmaceuticals, Inc.;

BRIAN E. BUTLER,
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1 APPEARANCES: (Continued)

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3 MORGAN, LEWIS & BOCKIUS, LLP,
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7 appearing on behalf of the defendant,
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9 MIRA ERBILA,
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16 MARK H. LYNCH,
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22 GlaxoSmithKline;

23 CHRISTINE NEAGLE,
24 KAYE SCHOLER, LLP, Attorneys at Law,
25 425 Park Avenue,
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appearing on behalf of the defendant,
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LESTER A. PINES,
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Sinc, Inc. and Tova Pharmaceuticals
USA, Inc.;

MICHAEL P. CROOKS,
PETERSON, JOHNSON & MURRAY, S.C.,
Attorneys at Law,
131 West Wilson Street,
Madison, Wisconsin 53703,
appearing on behalf of the defendant,
March;

4

1 APPEARANCES: (Continued)

2 ROBERT FUNKHOUSER,
3 HUBBARD, HUGHES & REED, Attorneys at
4 Law, 1775 I Street NW,
5 Washington, D.C. 20006,
6 appearing on behalf of the defendant,
7 Merck.

8 * * * * *

9 (There were no witnesses called)

10 (There were no exhibits marked for identification)

11 (Original transcript filed with the Court)

1 (Attorneys Jeff Archibald, William Dixon and Elizabeth
2 Eberle introduced themselves off the record)

3 MR. FUNKHOUSER: Rob Funkhouser from
4 Hughes, Hubbard & Reed on for Merck, the
5 defendant.

6 MR. CROOKS: And, Judge, Mike Crooks
7 is on for Merck as well.

8 THE COURT: OKAY. Let me say, are we
9 ready to begin?

10 MR. FUNKHOUSER: Your Honor, there are
11 other counsel for other parties here. Would you
12 like to have us all announce ourselves on the
13 record?

14 THE COURT: Yes, why don't you do
15 that.

16 MR. MERKL: My name is Neil Merkl,
17 M-e-r-k-l, for Defendant Day and Defendant
18 Mylan.

19 MR. MITCHELL: Ryan Mitchell of
20 Jones Day for Defendant Abbott and Defendant
21 Tap.

22 THE COURT: I didn't get your first
23 name.

24 MR. MITCHELL: Ryan, R-y-a-n.

25 THE COURT: Thank you.

1 MR. BRUNO: This is Jason Bruno at
2 Dickstein, Shapiro for Defendant Baxter.

3 MS. NEAGLE: Christine Neagle,
4 C-h-r-i-s-t-i-n-e, N-e-a-g-l-e, for Novartis
5 Pharmaceuticals.

6 MR. BUTLER: Judge, Brian Butler at
7 Stafford Rosenbaum locally for Astrazeneca.

8 MS. PRINZO: And Kristi Prinzo,
9 K-r-i-s-t-i, P-r-i-n-z-o, for Astrazeneca.

10 MR. MARKSON: John Markson, your
11 Honor, local counsel for Day.

12 MR. PINES: Lester Pines, local
13 counsel for Teva Pharmaceuticals USA, Inc. and
14 Solor, Inc.

15 MR. CAVITT: Joe Cavitt, local counsel
16 for Aventis.

17 MR. SCHOTT: Don Schott, local counsel
18 for the Johnson & Johnson defendants.

19 MS. FABULA: Maja Fabula, M-a-j-a,
20 F-a-b-u-l-a, White & Case, for Sandoz.

21 MR. LYNCH: Mark Lynch for
22 Glaxosmithkline.

23 THE COURT: All right. That's it?

24 MS. HEUER: Kim Heuer for Pharmacia
25 Corporation and Pfizer, Inc.

1 THE COURT: All right. That's the
2 total?

3 (No response)

4 THE COURT: Mr. Archibald, will you be
5 making the case today for the State?

6 MR. ARCHIBALD: I will, your Honor.

7 THE COURT: All right. And Mr. Crooks
8 or Mr. Funkhouser, who will be appearing or
9 arguing at least for Merck?

10 MR. FUNKHOUSER: Rob Funkhouser will,
11 your Honor.

12 THE COURT: All right. Thank you.

13 MR. FUNKHOUSER: Although I may ask
14 Mr. Crooks to comment on some of the materials I
15 may not yet have seen.

16 THE COURT: All right. Let me
17 indicate that, as I'm sure you're aware, since
18 late yesterday, I've gotten about 80 or 90 pages
19 of materials from counsel, much of it within the
20 last 90 minutes, so I've done as much about
21 familiarizing myself with them as I possibly
22 could, so what I suggest we do is just begin.
23 And it's Merck's motion for the protective
24 order, so I presume, Mr. Funkhouser, that you
25 would begin.

1 MR. FUNKHOUSER: Thank you, your
2 Honor. Rob Funkhouser from Hughes, Hubbard,
3 Reed on behalf of Merck. Our initial goal was
4 to resolve this matter quickly and easily, and I
5 guess the 90 pages of paper that you've seen
6 recently indicates that we haven't been entirely
7 successful, but it is a fairly narrow issue.

8 The State takes the position that they are
9 entitled under the statute to take deposition
10 not only of Merck's designee, acknowledging that
11 that designee resides and works in Pennsylvania,
12 without really contesting that there will be a
13 significant inconvenience to Merck, significant
14 inconvenience to the witness and significant
15 costs on Merck of getting that witness to
16 Wisconsin.

17 their argument boils down to whether
18 the, "Transacts business in person," portion
19 of the Wisconsin deposition statute allows
20 them to hale anyone into the jurisdiction who
21 is a corporate defendant subject to general
22 jurisdiction within Wisconsin, and for that
23 proposition there is no authority whatsoever
24 other than the rule itself. The federal law
25 on that issue is absolutely clear, and not only

1 person," for a designee of an organization does
2 not allow you to drag into the jurisdiction a
3 witness from out of the jurisdiction, so that
4 for the portion of the language, "Transacts
5 business in person --" And we have looked for
6 Wisconsin law on this and found nothing to
7 indicate where that phrase might have come from
8 federal law, and the judicial note to that
9 section indicates that the entire provision came
10 from the federal service of process -- the
11 federal rules regarding the subpoena of
12 non-party witnesses, so that the meaning of the,
13 "Transacts business in person," provision of the
14 Wisconsin deposition statute does accord with
15 federal law, and the federal law that interprets
16 it is entirely inconsistent with the State's
17 position.

18 And the reason it seems to me that
19 that is clear, and it sort of goes back to -- it
20 ties into their subpoena argument as well. The
21 courts that have looked at the provision in the
22 federal courts in the context of whether you can
23 use a subpoena of a corporation that concededly
24 does business in a state to require it to
25 produce a witness from out of state have said

11

1 is it --

2 THE COURT: Let me ask you this.

3 MR. FUNKHOUSER: Yes.

4 THE COURT: The State says in its most
5 recent submission that there is no federal
6 equivalent and that the rule that we have always
7 gone by is that where a Wisconsin procedural
8 statute is modeled after a federal rule, then
9 the federal cases, et cetera are applicable, and
10 the State says that because there is no such
11 federal counterpart, your argument is based on
12 the federal rules, and those cases are really
13 absent here. How do you respond to that?

14 MR. FUNKHOUSER: Well, there's really
15 two points. One of them is that although there
16 is not a federal equivalent of 804.05(3) (b) 6,
17 there is the exact same language, "Transacts
18 business in person," in Federal Rule 45, which
19 is the rule that governs the limitations of
20 service of process of a non-party witness. And
21 we have included in our letter a few of the
22 cases that have addressed that provision, and
23 those federal cases interpreting the exact
24 phrase that's incorporated into the Wisconsin
25 statute has said the, "Transacts business in

1 that the, "Transacts business in person," is not
2 equivalent to the general jurisdiction
3 provisions that govern whether you can serve
4 process and hale those defendants into that
5 jurisdiction for purposes of bringing a case,
6 and that's exactly equivalent to the mistaken
7 argument that the State makes about the subpoena
8 power.

9 One of the attachments to their papers
10 that were served earlier today is a brand new
11 subpoena addressed to Merck at its registered
12 agent of service of process in Wisconsin which,
13 similarly for any other corporation, is CT
14 Corporation. And the subpoena provisions of the
15 Wisconsin statutes expressly provide for how
16 personal service shall be accomplished, and in
17 those provisions there's the usual provision,
18 which is that you can personally serve them, and
19 it talks about showing it and reading it to the
20 witness.

21 THE COURT: And is this personal
22 service of a summons?

23 MR. FUNKHOUSER: No, this is for a
24 subpoena.

25 THE COURT: Okay.

1 MR. FUNKHOUSER: And that requires
 2 that you exhibit it and read it to the witness
 3 and give them a copy or by leaving a copy at the
 4 witness' abode. And those provisions clearly
 5 don't apply to a corporation, and so 805.07
 6 provides one alternative way of serving a
 7 corporation, and that is limited to serving the
 8 officers, directors or managing agents of the
 9 corporation.

10 And the fact is that there is only one
 11 exception under 801.11(5) (a), and that the only
 12 exception applies to officers, directors or
 13 managing agents and indicates that the
 14 procedures for serving a corporation generally
 15 do not apply to serving a subpoena on a
 16 corporation for deposition or for documents or
 17 for something else. If the plaintiff's position
 18 were correct on the subpoena rule, then there
 19 would be no reason to limit the exception to
 20 personal service to this single mechanism of
 21 personally serving an officer, director or
 22 managing agent.

23 THE COURT: And where do you find this
 24 so-called exception? Is that in 801?

25 MR. FUNKHOUSER: Right, 805.07(5) has

13

1 the substituted service provision, and it says
 2 that a subpoena may be served as provided in
 3 885.03. That's the provision about reading it
 4 to the witness or giving it to him at his abode.
 5 Those don't apply to a corporation, except that
 6 service may be made only as provided in
 7 801.11(1) (b).

8 THE COURT: Okay. So that's
 9 805.07(5)?

10 MR. FUNKHOUSER: Right. And then that
 11 refers to the exception for general service of
 12 process in 801.11(1) (b), and if you turn to that
 13 provision, that only allows for service on a
 14 domestic or foreign corporation by personally
 15 serving an officer, director or managing agent
 16 of the corporation. There's another subsection
 17 of 801.11(5) that deals with serving as provided
 18 by statute.

19 Subsection C does that, and that would
 20 encompass such a thing as serving the registered
 21 agent for service of process, but the only way
 22 that you're allowed to serve a subpoena on a
 23 corporation under 805.07 is by the single
 24 exception that allows you to personally serve an
 25 officer, director or managing agent. So like

1 the limitation, the distinction between general
 2 jurisdiction and jurisdiction over the -- at the
 3 residence or place of employment of the
 4 individual witness that the federal courts have
 5 applied in interpreting the, "Transacts business
 6 in person," provision of the Federal Rule 45,
 7 the Wisconsin subpoena rules seem to make the
 8 same distinction saying, well, the fact that you
 9 can obtain jurisdiction over a corporation under
 10 sort of a minimal contact kind of test for
 11 purposes of suing him doesn't mean that you can
 12 obtain a -- serve a subpoena for the production
 13 of a witness in that jurisdiction, so that the
 14 two provisions are really consistent and
 15 inconsistent with the plaintiff's position on
 16 that issue.

17 The final point I want to make -- and
 18 I'm not going to repeat the case law in our
 19 papers, although we'd be happy to provide any
 20 additional materials you'd like on that or to
 21 respond to the letter that was served earlier
 22 today, if that would be of assistance, but --

23 THE COURT: For the moment,
 24 Mr. Funkhouser, let me ask you this.

25 MR. FUNKHOUSER: All right.

15

1 THE COURT: The State argues that
 2 because the statute is clear when it says the
 3 location should be determined as if the
 4 deponent's place of residence, employment or
 5 transacting business in person were that of the
 6 party, and because, as it says, at least Merck
 7 doesn't dispute that it does transact business
 8 in person in Wisconsin, that it follows that the
 9 corporate designee can be compelled to give
 10 testimony in Wisconsin. How do you respond to
 11 that?

12 MR. FUNKHOUSER: Well, I guess there's
 13 two points. One is that the subpoena provisions
 14 distinguish between a managing agent, an officer
 15 or director of the corporation, and it doesn't
 16 include the same provision for a designee, so
 17 that subpoena provision doesn't help their case
 18 on that point.

19 With respect to the deposition
 20 statute, we get back to the same language, which
 21 is, "Transacts business in person," and that's
 22 their interpretation of that language to mean
 23 that all you have to do is have someone from the
 24 corporation in the state doing something,
 25 conceding that there are no managing agents, no

1 officers, no directors, no decision makers of
 2 any kind and certainly not with respect to the
 3 topics that they've put in their notice, that
 4 the only type of people that Merck uses in
 5 Wisconsin are sales agents, which is not the
 6 subject of their notice. It doesn't seem to me
 7 that that advances them at all unless you accept
 8 their premise that any kind of doing business in
 9 Wisconsin subjects you — constitutes transacts
 10 business in person.

11 That would require — in the first
 12 place, it would require — that would be
 13 inconsistent with the federal cases interpreting
 14 exactly the same language, and it would also be,
 15 I think, a terrible policy decision in
 16 interpreting that language and one that they
 17 can't really point to either a — to any support
 18 for. They refer to the legislature passing the
 19 statute, but the only legislative history on
 20 that provision refers back to Federal 45, the
 21 federal rule that limits them from hauling in a
 22 witness based on where the corporation is, does
 23 business.

24 If I could just spend one minute on
 25 the convenience factors, then I'm happy to

17

1 respond to any further questions. That gets
 2 back to this issue about the burden on the
 3 State, and the burden on the State here
 4 concededly would only be the cost of their
 5 attorneys flying to take the depositions of the
 6 witnesses where it would be most convenient for
 7 the witness. It's not a matter of State
 8 business being disrupted by the necessity of
 9 having depositions taken and travel.

10 And there's also the issue of cost,
 11 but that goes both ways. None of the defendants
 12 are contending that we should be allowed to haul
 13 Wisconsin witnesses to the place most convenient
 14 for the other attorneys. There's nobody who is
 15 arguing that we should make it at the place
 16 that's most convenient for the attorneys. We're
 17 really focusing on what would least
 18 inconvenience the witnesses, and that has been
 19 the focus of the convenience provisions, whether
 20 in the federal rules or under the Wisconsin
 21 statute.

22 And then the second point about
 23 convenience is that we get back to the point
 24 that Judge Krueger made in the protective order
 25 motion, and that is it was the State's choice to

1 sue everybody at once. Many of the other AG
 2 actions that have been brought have been brought
 3 by a single defendant. Many of those cases are
 4 on the eve of trial right now, and so when I
 5 hear these complaints about the burdens of this
 6 action or the cost to the plaintiff and the fact
 7 that it's more convenient for them to have
 8 multiple defendants in one action and then
 9 complain about the fact that that requires them
 10 to travel a lot, it doesn't seem to me that
 11 that's very consistent with what they've — how
 12 they've chosen to bring their case, and as a
 13 rationale for issuing a protective order, it
 14 counts against them and not in their favor.
 15 Thank you.

16 THE COURT: All right. Thank you,
 17 Mr. Runkhouser. All right. And the State?

18 MR. ARCHIBALD: Your Honor, this is
 19 Jeff Archibald appearing on behalf of the State.

20 THE COURT: Uh-huh.

21 MR. ARCHIBALD: I think what the
 22 proper analysis here is that it should take a
 23 three-step approach. The first step I believe
 24 the Court should consider is whether or not the
 25 Wisconsin law is controlling, whether it's

19

1 directly on point and controls our situation.
 2 It clearly does, your Honor. 804.05(3) (b)6
 3 controls where a corporate designee's deposition
 4 can take place. That should be the beginning
 5 and the end of at least the initial analysis in
 6 this first step.

7 Now, at the risk — well, I'll just
 8 state or quote the statute which states that if
 9 a deponent is a person designated as a corporate
 10 designee, the place of examination shall be
 11 determined as if the deponent's place of
 12 transacting business in person were that of the
 13 party. That is the statute that is key to all
 14 of the analysis here, your Honor.

15 Now, Merck will argue that there is a
 16 federal rule somewhere out there that's
 17 analogous that our Wisconsin law is based upon.
 18 That is simply not true, your Honor. I spent
 19 hours yesterday reviewing the Federal Rules of
 20 Civil Procedure, including (3) (b) (6), Rule 45,
 21 and there is no rule that is even close, your
 22 Honor.

23 This rule in Wisconsin, the
 24 legislature has deemed, whether it's right or
 25 wrong, that the corporate designee's deposition

1 should take place in Madison, Wisconsin if Merck
 2 does business in person in Wisconsin, in
 3 Madison, Wisconsin. Now, Merck's house of cards
 4 falls apart because -- I think your Honor asked
 5 the question about, well, if the statute is
 6 clear and if there is no federal underlying
 7 counterpart, then shouldn't Wisconsin law
 8 control, and that is correct. Merck keeps
 9 pointing out that there's no case law in this.
 10 There's very good reason for that. There's no
 11 case law because the statute is unambiguous.

12 The next point I think that should be -- or
 13 the next step that should be taken in the
 14 analysis is, well, if Wisconsin law is
 15 controlling, which it is, then is there a reason
 16 to grant a protective order? Even though these
 17 are kind of an informal series of motions, I
 18 assume it's a formal motion for a protective
 19 order where Merck bears the burden of proof,
 20 showing one of four things. We went through
 21 this in the Pfizer protective motions hearings,
 22 and it's clear that Merck has to show one of
 23 four things under the protective order statute.

24 It has to show annoyance, embarrassment or
 25 oppression. None of the first three are in play

21

1 here. The only one, as it was with Pfizer, is
 2 that there must be an undue burden or an undue
 3 expense. That burden is on Merck. Not one
 4 affidavit has been submitted to show why this is
 5 unduly burdensome or unduly expensive. I think
 6 that in itself ends the analysis regarding the
 7 protective order.

8 However, we can look to the statute
 9 for an answer to this as well, and that's the
 10 804.05(3)(b)6 place of deposition statute. The
 11 legislature, again right or wrong, has
 12 determined that the residence of the corporate
 13 designees are totally irrelevant. Merck argues
 14 to the Court that the corporate designees live,
 15 I think, an hour outside of Philadelphia,
 16 there's an eight-hour round trip airplane trip
 17 that's required, and that it would be unduly
 18 expensive.

19 Again, the corporate designee's place
 20 of residence is totally irrelevant under
 21 Subsection 6, because that corporate designee is
 22 deemed to be transacting business in Madison,
 23 Wisconsin. Now --

24 THE COURT: And why is that,
 25 Mr. Archibald?

1 MR. ARCHIBALD: Because the statute
 2 says that wherever Merck is conducting business
 3 in person is where the corporate designee is
 4 deemed to be transacting business itself.

5 THE COURT: And as I understand it,
 6 Merck has salespeople who work in Wisconsin?

7 MR. ARCHIBALD: That's exactly right.
 8 They can't deny it. I don't mean to testify
 9 here, but I was a sales representative in the
 10 1980-81 period. I know many of the Merck
 11 representatives, and there are multiple
 12 representatives in the City of Madison itself.
 13 UW Hospital alone used to have its own
 14 representative.

15 THE COURT: I just wanted to make
 16 clear to myself that that's what you're talking
 17 about when you're talking about transacting
 18 business.

19 MR. ARCHIBALD: Yes.

20 THE COURT: All right.

21 MR. ARCHIBALD: Yes, your Honor.

22 THE COURT: Thank you.

23 MR. ARCHIBALD: Merck argues that we
 24 have not somehow met our burden to show that
 25 it's inconvenient to us. I don't understand the

23

1 argument. That's not our burden under a
 2 protective order. We have raised the issue in
 3 the appropriate statute. We are allowed to
 4 depose their people here in Madison, Wisconsin.
 5 We should be able to do so.

6 Even if we were, there's 36, 37
 7 defendants here. The cost to Wisconsin would be
 8 enormous to go to 37 different places of
 9 corporate residency as opposed to Merck's
 10 individual cost for this deposition. I don't
 11 think that's particularly relevant, but I think
 12 it is true.

13 THE COURT: Well, let me ask you this,
 14 Mr. Archibald. What if there were just one
 15 defendant? What if Merck were the only
 16 defendant? Would that make any difference?
 17 Would you still have the same arguments and
 18 expect the same result, that is, that their
 19 presence could be compelled here?

20 MR. ARCHIBALD: Absolutely, your
 21 Honor. There's a good policy reason for it,
 22 too, and I don't mean to overemphasize this,
 23 but I think it's extremely important, and it
 24 was raised by Merck. We are entitled or the
 25 legislature has said we are entitled to depose

1 those corporate designees who do business in
 2 person.
 3 There's a reason they added the
 4 verbiage or the words, "In person." It
 5 distinguishes those companies that may just have
 6 a tenuous contact with Wisconsin that subjects
 7 them to personal jurisdiction as opposed to
 8 companies like Merck that do an enormous amount
 9 of business in not only the City of Madison,
 10 Wisconsin, but throughout the State of
 11 Wisconsin.

12 THE COURT: And I gather,
 13 Mr. Archibald, that it makes no difference to
 14 you that these people have absolutely nothing to
 15 do in terms of their jobs or their knowledge
 16 with any of the things you're interested in
 17 determining in the discovery process?

18 MR. ARCHIBALD: It would make no
 19 difference whatsoever, even though there's been
 20 not a single affidavit as to that effect, no
 21 difference whatsoever, your Honor.

22 THE COURT: Okay. Thanks.

23 MR. ARCHIBALD: The third step -- and
 24 I hesitate to even go to it -- is the subpoena
 25 argument that has taken up a great deal of the

1 Court's time. Under 804.05(3) (b)3, the State is
 2 entitled to subpoena corporate designees, and we
 3 have done so. The reason we did so was that
 4 Merck made the argument in one of their
 5 responsive letters that it was just a
 6 hypothetical situation. And that's the reason
 7 we filed it this morning, and personal service
 8 was perfected at about 10:45 today.

9 Merck is making the argument that
 10 there's one exception to the rule -- and I don't
 11 understand it totally because I don't think it
 12 makes sense -- about substituted service.

13 Here's what we did under the subpoena, as we're
 14 allowed to under 805.07, which permits service
 15 of a subpoena under Chapter 885. We served the
 16 corporation. We did not serve an officer or a
 17 director of Merck.

18 We served the corporation personally,
 19 and if you look at the particular statutes that
 20 control and which we cited in the brief --
 21 that's Wisconsin Statute 180.1510(1) and
 22 180.0504 -- that's exactly what we're supposed
 23 to do, and that is personal service perfected on
 24 a corporation of not only process, but of
 25 notice, and included in that, of course, is a

1 notice of deposition. If the statutes are
 2 unclear, we cited a case which construes those
 3 statutes, which is Wisconsin 2004, a Supreme
 4 Court case of Kenosha Hospital Medical Center
 5 versus Garcia.

6 So back to the substituted service,
 7 that only occurs when you attempt nonpersonal
 8 service, which was not done here, and that's, as
 9 an example, where we can't -- or we name a
 10 particular vice-president of purchasing at Merck
 11 that we want to go and depose, we don't get the
 12 process to him directly, but we take it to the
 13 office, as we're allowed to under the
 14 substituted service, and serve the head of the
 15 office. That's what substituted service is
 16 about. It is inapplicable here. That's all.

17 THE COURT: All right. Thanks,
 18 Mr. Archibald. Mr. Funkhouser, any response
 19 you'd like to make?

20 MR. FUNKHOUSER: Just two quick
 21 points, your Honor, on the protective order
 22 issue and the not submitting affidavits. As the
 23 issue was presented to us and as the objection
 24 was presented to us by Mr. Archibald initially
 25 in a telephone conference and as we confirm in

1 the letter that was sent with Mr. Crooks' first
 2 letter to you on April 19th, this was originally
 3 presented as the State saying that no matter
 4 what the burden was, they would insist, based on
 5 their interpretation of the deposition statute,
 6 that they had a right to have Merck's witness
 7 there, that no matter what the burden was, they
 8 would insist on production in Madison,
 9 Wisconsin, so that it was a pure legal issue.

10 We confirmed that with Mr. Archibald in a
 11 letter, and that's when we asked to have this
 12 done on an abbreviated -- what we originally
 13 thought was going to be abbreviated letter
 14 briefs as opposed to filing a formal protective
 15 order motion with affidavits, and if there is
 16 any dispute either about the fact that there are
 17 no managing agents, no directors, no officers in
 18 Wisconsin or if there's any question about the
 19 burdens that would be imposed on the people in
 20 Pennsylvania on coming to Wisconsin, we would be
 21 happy to submit those, you know, to fill out the
 22 record or if your Honor thinks that that's in
 23 dispute.

24 Our understanding based on the
 25 initial telephone conference and as confirmed

1 in the letter and as seemed to be confirmed in
 2 Ms. Eberle's letter, was that there really was
 3 no dispute that it would be burdensome to Merck.
 4 The issue was simply the State felt they could
 5 force the appearance of witnesses there and they
 6 were going to take that, that right.

7 The second point about the subpoena
 8 issue — and it's probably something that's
 9 better served by your Honor's study of the
 10 statutes than our trying to walk through them
 11 over the phone, but the Supreme Court case he
 12 referred to is a general jurisdiction case
 13 that's talking about service of process. It's
 14 not a deposition subpoena.

15 And the deposition statute itself
 16 includes a separate provision for serving a
 17 defendant with a subpoena, and that provision
 18 makes no sense, at least with respect to a
 19 corporation under the State's interpretation of
 20 their right to serve a subpoena. There would be
 21 no reason to say you would have to serve a
 22 defendant personally with a deposition subpoena
 23 as an alternative to getting someone there who
 24 had a registered agent in the state.

25 THE COURT: Could you repeat that

1 point for me?

2 MR. FUNKHOUSER: Yes. The provision
 3 804.05 that provides for one of the methods that
 4 a defendant — this is under Section (3) (b) 3.
 5 It says a defendant who is not a resident of
 6 this state may be compelled by subpoena served
 7 within the State to give a deposition at any
 8 place within a hundred miles from the place
 9 where that defendant is served.

10 There wouldn't be any reason to have
 11 that provision in there if it were not for — if
 12 you could simply serve any — at least with
 13 respect to a corporation, if you could serve a
 14 corporation simply by serving its registered
 15 agent.

16 THE COURT: Thank you. Anything else?

17 MR. FUNKHOUSER: That's all I had,
 18 your Honor.

19 THE COURT: Okay. Thank you. Let me
 20 say this. Let me ask you again when the
 21 deposition is noticed for.

22 MR. FUNKHOUSER: It was originally
 23 noticed for May 1st, which is next Monday. The
 24 subpoena that we noticed this morning was for
 25 May 15th. I haven't yet confirmed if the

1 witness is available on the May 15th date. He
 2 had blocked out the May 1st date for
 3 Philadelphia.

4 THE COURT: I guess I want to be fair
 5 to all of you, and I just have simply not had
 6 the time to go into the statutes in the type of
 7 depth I would want to before I make a
 8 determination. What I would like to do is take
 9 this under advisement, and I guess my experience
 10 tells me that I could probably have this done by
 11 the end of the day tomorrow, and I guess what I
 12 would ask you would be how you would want me to
 13 transmit that to you, through e-mail or fax or
 14 what?

15 What I would intend to do is just put
 16 out a couple of pages of reasons for my
 17 decision, whatever it will be, and at this
 18 instant I would feel more confident in putting a
 19 little more study into it before reaching a
 20 decision.

21 MR. ARCHIBALD: We would prefer
 22 e-mail, your Honor.

23 MR. FUNKHOUSER: That would be fine,
 24 your Honor. I have one issue, and that is just
 25 so the witness could make arrangements. If the

1 ruling is that he must appear in Wisconsin, we
 2 may need to make some scheduling accommodations.

3 MR. ARCHIBALD: This is Archibald.
 4 We'll be reasonable in that regard, and we have
 5 already told Merck that we'll work within
 6 reasonable time limits with them to find a
 7 mutually-acceptable time.

8 MR. FUNKHOUSER: Yes. The original
 9 time we were given was before the amended
 10 complaint would be filed, and one of the reasons
 11 that we had offered to produce the witness now
 12 rather than — in Philadelphia rather than
 13 waiting was because of some commitments that he
 14 has later in the month which would make it
 15 difficult to complete the deposition by that
 16 deadline.

17 I know, your Honor, that that issue is
 18 before you on another motion involving Mylan,
 19 whether the deposition should proceed before
 20 that date, but I guess what I'm asking for is
 21 whether the State will — if a ruling is that
 22 the deposition goes forward in Philadelphia,
 23 whether the State will be prepared to proceed on
 24 that date there.

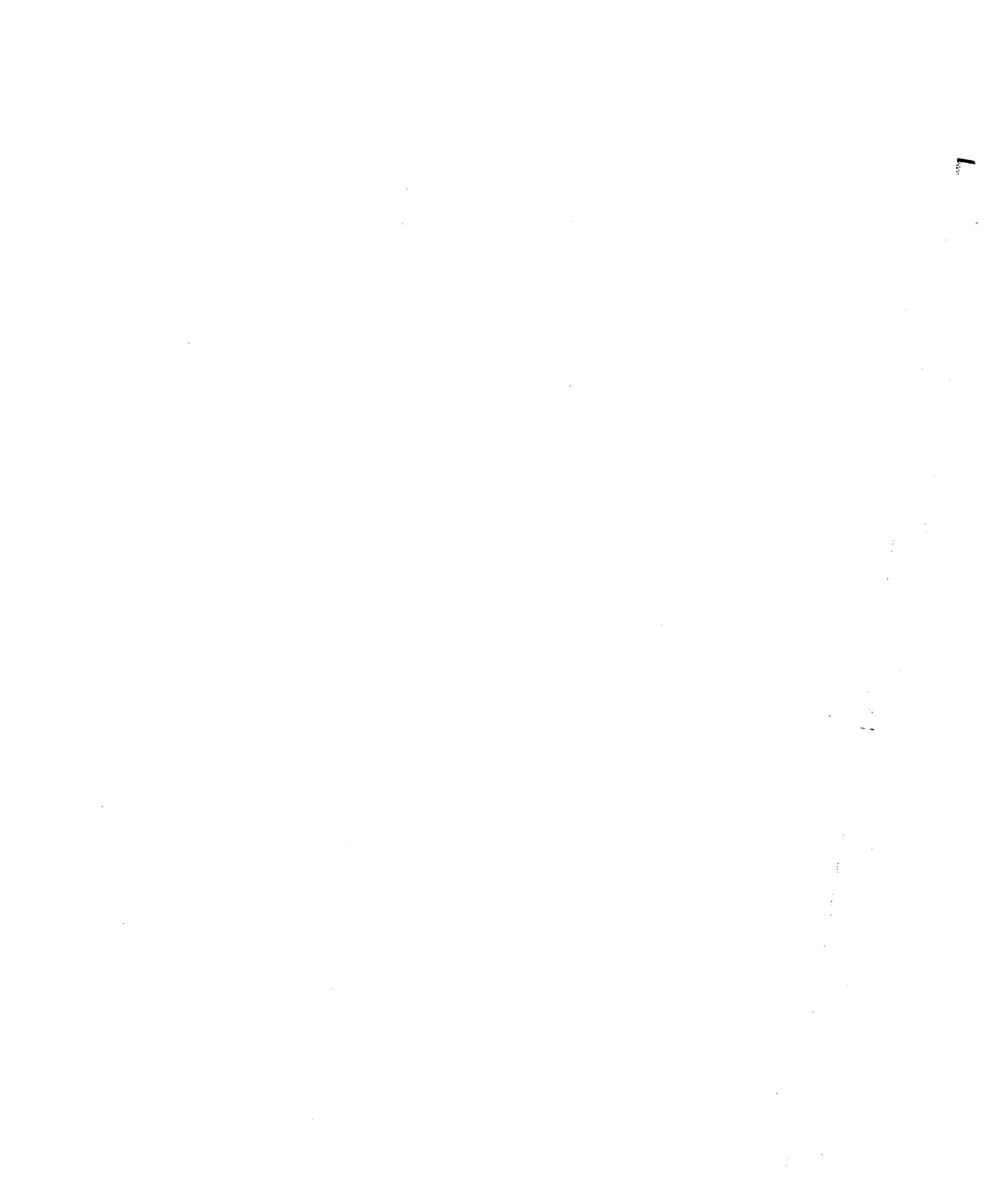
25 THE COURT: Now, which date is that,

1 the 1st or the 15th?
 2 MR. FUNNHOUSER: On May 1st. If
 3 there's a need, I mean, we can check the other
 4 dates. I just happen to know there are a number
 5 of other commitments the witness has later in
 6 the month.
 7 MR. ARCHIBALD: Again I'll repeat that
 8 we'll work with you on that, and we'll come to
 9 mutually agreeable time and place -- or place --
 10 or time, not the place. We know what the place
 11 should be.
 12 THE COURT: I will come to a
 13 reasonable place.
 14 MR. ARCHIBALD: Thank you, your Honor.
 15 That's what I meant.
 16 THE COURT: Okay. Is there anything
 17 else this morning?
 18 MR. ARCHIBALD: Not here.
 19 THE COURT: Okay. Well, I will get to
 20 work then, and thank you very much. I
 21 appreciate your efforts, and I appreciate your
 22 arguments this morning.
 23 (1:40 p.m.)
 24
 25

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1 *****
 2 STATE OF WISCONSIN,
 3 PLAINIFF,
 4 -vs- CASE NO. 04-CV-1709
 UNCLASSIFIED-CIVIL: 30703
 5 AMGEN, INC., A DELAWARE
 CORPORATION, ET AL.,
 6 DEFENDANTS.
 7 *****
 8
 9
 10 C E R T I F I C A T E
 11
 12 I, SANDRA L. McDONALD, do hereby certify
 13 that as the duly-appointed shorthand reporter, I took
 14 in shorthand the proceedings had in the
 15 above-entitled matter on the 25th day of April, 2006,
 16 and that the attached is a true and correct
 17 transcription of the proceedings so taken.
 18 Dated at Madison, Wisconsin, this 25th day
 19 of April, 2006.
 20
 21
 22 Notary Public, State of Wisconsin
 My Commission Expires 09-16-05
 23
 24
 25

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<p>STATE OF WISCONSIN,</p> <p>PLAINTIFF</p> <p>Vs.</p> <p>AMGEN, INC., <i>ET AL</i>,</p> <p>DEFENDANTS</p>	<p><u>DECISION & REPORT</u> <u>OF DISCOVERY MASTER:</u></p> <p><u>DEFENDANT MERCK'S MOTION FOR A</u> <u>PROTECTIVE ORDER</u></p> <p><u>APRIL 27, 2006</u></p> <p>###</p> <p>CASE No. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003</p>
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Attys. Jeffrey Archibald, William P. Dixon and Elizabeth J. Eberle for the Plaintiff State of Wisconsin. Oral argument by Mr. Archibald.

Attys. Robert B. Funkhauser and Michael Crooks for Defendant Merck & Co. Oral argument by Mr. Funkhauser.

INTRODUCTION & SUMMARY OF DECISION

The State of Wisconsin has sued more than thirty-five pharmaceutical manufacturers, claiming, in essence, that they have violated various state laws governing fraudulent pricing and similar activities by selling their products to wholesalers at prices less than those listed in industry price compendia, with the result that the State, whose Medicaid payments to health care providers are based on the listed prices, has suffered significant economic loss.

By order of the court dated June 23, 2005, I was appointed Special Master with authority, *inter alia*, to “decide discovery disputes ... within the scope of Wis. Stat. §§ 804.01(3) and (4), and §§ 804.12(1), (2)(b), and (4).” The case is in the pretrial discovery

stage and Defendant Merck seeks a protective order quashing a notice setting a deposition in Madison, Wisconsin, for a Merck corporate designee, who works and resides at Merck's headquarters in Pennsylvania.

Letter briefs and other submissions have been provided by counsel, and oral argument was held *via* telephone on April 25, 2004. In general terms, the issue is whether applicable Wisconsin statutes permit the State to compel the presence of Merck's nonresident corporate designee in Wisconsin for purposes of a deposition. As explained further below, I conclude that, because Merck maintains an active sales staff in Wisconsin, it is "transacting business in person" in the state—including the City of Madison—within the meaning of §804.05(3)(b)1, *Stats.* As a result, the deposition was properly noticed in Madison.¹ I therefore deny Merck's motion for a protective order.

DISCUSSION

The following statutes set forth the underlying authority for depositions and deposition subpoenas.

804.05 Depositions upon oral examination ...

(2) Notice of examination...

(a) A party desiring to take the deposition of any person ... shall give reasonable notice in writing [stating] the time and place for taking the deposition and the name and address of each person to be examined....

(e) A party may in the notice name as the deponent a public or private corporation The organization ... so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf,...

¹ Because I reach that conclusion, it becomes unnecessary to consider Merck's arguments relating to the subsequent service of a subpoena for the deposition.

(3) Depositions: Place of examination.....

(b)1. Any party may be compelled by notice under sub. (2) to give a deposition at any place within 100 miles from the place where that party resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of the court...

3. A defendant who is not a resident of this state may be compelled by subpoena served within this state to give a deposition at any place within 100 miles from the place where that defendant is served....

5. In this subsection, the terms “defendant” and “plaintiff” include officers, directors and managing agents of corporate defendants ... or other persons designated under sub. (2)(e) as appropriate

6. If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2)(e), the place of examination shall be determined as if the deponent’s place of residence, employment or transacting business in person were that of the party.

In its March 23, 2006, Notice of Deposition, the State demanded that Merck produce a corporate witnesses to testify, in Madison, on several topics relating to communications between Merck and two publishers of pharmaceutical pricing compendia, and on Merck’s knowledge of the prices charged by wholesalers for several pharmaceuticals produced by Merck. The deposition was scheduled for May 1, 2006. Merck, whose business is headquartered in Pennsylvania, objected to the location of the deposition, and when it appeared that no compromise in that regard could be reached, Merck moved for a protective order. Opposing the motion, the State argued that the deposition could properly be noticed for Madison because Merck, by maintaining a sales staff in Wisconsin, was “transacting business in person” in the state within the meaning of §804.05(3), *Stats*. It also argued that, in any event, all it need do would be to serve a subpoena on Merck’s registered agent (located in Madison) and, under relevant service-of-process statutes, there would be no question as to the propriety of locating the deposition in Madison. And, when Merck pointed out in its brief that no such subpoena

had been served, the State promptly issued and served a deposition subpoena on the registered agent.

The parties agree that there are no Wisconsin cases interpreting the deposition-location provisions of §804.05(3), *Stats.* Merck says, however, that because Wisconsin's civil procedure code is patterned after the Federal Rules of Civil Procedure, federal cases construing the rules are relevant here, citing the long-established rule that, where a Wisconsin civil procedure rule is based on a federal rule, "decisions of the federal courts, to the extent they show a pattern of construction, are considered persuasive authority." *See, Neylan v. Vorwald*, 124 Wis.2d 85, 99, 368 N.W.2d 648 (1985). And it says that those cases indicate that the corporation's home-office location is the only proper *locus* of corporate-designee depositions. The State disagrees, stating that—as Merck itself concedes—there is no specific federal rule governing the location of depositions.

Merck, however, points to the Wisconsin Judicial Council Note to § 804.05(3)(b), *Stats.*, which states that subsection (3) had been "amended to conform to the territorial scope of deposition notices and subpoenas to the 100-mile provision of Rule 45(d), F.R.C.P., as amended in 1985." *See*, Judicial Council Note to § 804.05, *Wis. Stats.* (1994). The Federal rule, which has since been renumbered Rule 45 (c)(3)(a), deals with protection of persons subject to subpoenas, and directs courts to quash subpoenas which, among other things, "require[] a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person..."

The statutes are, however, significantly different and, more importantly, the Judicial Council note suggests by its very language that the legislature was not adopting the federal rule in its entirety—or even substantially—but rather was importing the quoted excerpt only to describe "the territorial scope of deposition notices" in terms of the 100-mile limitation set forth in the rule.² It thus seems to me that the connection

² In this regard, the State points out that the 1985 amendment to §804.05(3), *Stats.*, simply changed the territorial scope of the rule from 30 to 100 miles. *See*, §804.03(2)(b)1 & 6 (1983-84).

between §805.05(3) and F.R.C.P. 45 is so tenuous that it would be inappropriate to consider the cited cases as persuasive precedent.³

There is no question that Merck maintains sales representatives in Wisconsin—including Madison. And §804.05(3)(b)1, *Stats.*, plainly allows a noticed deposition to be held within 100 miles from the place where the party “transacts business in person.” And subsection 6, which deals with depositions of corporate designees, is to the same effect: it states that the location will be determined as if the designee’s “place of residence, employment or transacting business in person” was the same as the corporation’s; in other words the designee’s deposition is properly located wherever the corporation transacts such business. And, as I have indicated, that location, in both instances, is Madison.

Merck also puts forth a lengthy argument that the State’s subsequent service of a deposition subpoena on the corporation’s registered agent in Madison does not invoke §804.05(3)(b)3 (which states that a non-resident party’s deposition can be compelled at a location within 100 miles of the place where the subpoena is served) because it does not comply with various statutes dealing with personal and substituted service of subpoenas and other legal process. It is an argument that need not be considered, however, in light of my conclusion that, because Merck “transacts business in person” in Madison, §804.05(3)(b)1, *Stats.*, authorizes the deposition to be noticed there.⁴

³ I note also that, while Merck cites three district court cases (and one court of appeals case) for the proposition that, under Rule 45, corporate-designee depositions are to be held at or near the corporation’s home offices, it does not indicate whether there was any claim—or any ruling—in any of those cases with respect to the “regularly transacts business” language, which is at the heart of the instant dispute.

⁴ Merck also argued that the language in §805.04(3)(b)1, *Stats.*—“or at such other convenient place as is fixed by an order of the court”—should result in my granting its motion for a protective order. As the State points out, however, no evidence was presented on that point, and very little argument was directed that way. It may be assumed, I am sure, that travel from Pennsylvania to Madison—which undoubtedly would involve an overnight stay—will carry some inconvenience to the designee (as would locating the deposition in Pennsylvania inconvenience the State, at least to some degree—recognizing, of course, that the choice of the forum, and the election to join more than 35 defendants in a single action, was the State’s). On this record, however, I am not persuaded that the inconvenience is so great as to warrant exercising my discretion to re-locate the deposition.

CONCLUSION

I conclude, therefore, that, under applicable Wisconsin statutes, the State's Notice of Deposition properly located the deposition in Madison. It follows that Merck's Motion for a Protective Order should be, and hereby is, denied.

Dated at Madison, Wisconsin, this 27th day of April 2006

William Eich
Special Master