

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

ABBOTT LABORATORIES, INC., et. al.,

Defendants.

Case No.: 04 CV 1709

DEFENDANT AMGEN INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO BE PERMITTED TO PURSUE DISCOVERY OF ITS "ENTIRE CASE"¹

Plaintiff's motion to pursue discovery of its entire case is nothing more than an attempt by plaintiff to sweep very real and highly individualized discovery issues under the rug. Plaintiff's motion effectively seeks a global order that would direct all defendants, regardless of individual circumstances and prior understandings with plaintiff, to now turn over literally millions of pages of documents related to over 5,000 different drug forms, most of which were only recently identified in the Second Amended Complaint. Plaintiff's request fails to acknowledge: (1) the individual circumstances of each defendant, including unique burdens in complying with such an order; (2) the meet-and-confers and agreements

¹ In addition to defendants who may be filing separate oppositions indicating their joinder in this opposition, the following defendants join in this opposition: Abbott Laboratories, Inc., AstraZeneca Pharmaceuticals LP, AstraZeneca LP, Aventis Pharmaceuticals, Inc., Baxter Healthcare Corporation, Ben Venue Laboratories, Inc., Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim Roxane, Inc., Bristol-Myers Squibb Company, Dey, Inc., Immunex Corporation, Ivax Corporation, Ivax Pharmaceutical, Inc., Janssen Pharmaceutical Products, LP, Johnson & Johnson, Inc., McNeil-PPC, Inc., Merck & Company, Inc., Mylan Laboratories Inc., Mylan Pharmaceuticals Inc., Ortho Biotech Products, LP, Ortho-McNeil Pharmaceutical, Inc., Pharmacia, Pfizer, Inc., Roxane Laboratories, Inc., Sandoz, Inc., Schering-Plough Corporation, Sicor Inc., TAP Pharmaceutical Products Inc., Teva Pharmaceuticals USA, Inc., Warrick Pharmaceutical Corporation, Watson Pharma, Inc., Watson Pharmaceuticals, Inc., and ZLB Behring, Inc.

that several defendants have already reached with plaintiff; and (3) defendants' various objections to plaintiff's document requests, most of which have yet to be challenged, let alone ruled upon.²

Rather than engaging in appropriate discussions with each defendant concerning discovery issues, plaintiff instead seeks to avoid resolving legitimate discovery issues that vary among defendants by seeking a universally-applicable order. Plaintiff elected to bring a single action against 36 separate defendants, who manufacture different drugs and have different recordkeeping practices, in a single lawsuit. Having chosen to pursue its claims in this manner, it cannot avoid its obligation to negotiate the scope of discovery with each individual defendant simply because it is more convenient or easy for plaintiff to do so. Each defendant, understandably, has its own unique discovery issues and burdens that can only be addressed on a case-by-case basis. Plaintiff's motion should be denied.

² This is not the first time plaintiff has attempted to resolve individual defendant issues on a "one-size-fits-all" basis. In July, plaintiff sent a letter to undersigned counsel for Amgen Inc. ("Amgen"), ostensibly as the "Wisconsin defense coordinator," asking for a meet-and-confer to discuss, among other things: defendants' designation of documents as confidential or highly confidential; various defendants' supposed refusals to comply with Wis. Stat. 804.08; various defendants' alleged failure to inform plaintiff whether their document discovery responses were complete and exhaustive; and various defendants' claimed failure to produce documents in an electronically searchable form. See Letter from Charles Barnhill to Steven F. Barley, dated July 13, 2006, attached as Exhibit A. Amgen's counsel advised plaintiff that while he acts as liaison with plaintiff in connection with *plaintiff's* responses to defendants' discovery, he was not authorized to serve, nor could he serve, in the capacity as coordinating counsel in responding to individual issues relating to individual defendants' responses to plaintiff's discovery requests. Amgen's counsel reminded plaintiff that each defendant has unique positions regarding discovery issues and associated burdens, which cannot be addressed on a global basis. See Letter from Steven F. Barley to Charles Barnhill, dated July 17, 2006, attached as Exhibit B. Six days later, plaintiff sent another letter—this time to all defense counsel—demanding that defendants produce documents related to *all* drugs identified in the Second Amended Complaint. If any defendant objected, plaintiff said it would "ask Judge Eich for a ruling on the objection." See Letter from Charles Barnhill to All Defense Counsel, dated July 19, 2006, attached as Exhibit B to Plaintiff's Memorandum in Support of Plaintiff's Motion to Be Permitted to Pursue Discovery of Its Entire Case. As plaintiff correctly points out, most defendants refused to accede to plaintiff's demand, many requesting an opportunity to meet-and-confer with plaintiff to see if common ground could be reached. See Exhibits C-G of Plaintiff's Memorandum in Support of Plaintiff's Motion to Be Permitted to Pursue Discovery of Its Entire Case.

A. The Plaintiff's Motion Disregards the Unique Circumstances of Each Defendant.

Each defendant's business, corporate history, hard-copy and electronic document controls and methods of retrieval, experiences in other AWP-related litigation, and discovery status in this case requires that plaintiff address discovery issues on a defendant-by-defendant basis. For instance, some of the defendants, as they exist today, are not the same companies that manufactured and sold pharmaceutical products reimbursed by Wisconsin's Medicaid program in the period plaintiff claims is covered by the suit. For example, Pfizer, Inc. and Watson Pharma, Inc. are the result of a series of mergers that occurred during the relevant time period.³ These newly formed companies retained records relevant to the drugs of their former companies in different ways. Collecting these records is likely to be enormously burdensome or impossible for some of these defendants.⁴ Plaintiff cannot avoid individual discussions about these burdens by seeking a blanket order.

Defendants are also involved in widely different businesses, many with dramatically disparate ways of marketing, pricing, distributing, and reporting. These different business approaches generate different types of records and issues. Thus, the burden of producing documents about particular drugs or biologics in response to one request may not be the same for one defendant as another.

³ See Pfizer, Inc., Annual Report (Form 10-K), at 1 (Mar. 10, 2004); Watson Pharmaceuticals, Inc., Annual Report (Form 10-K), at 3 (Mar. 30, 2001); Affidavit of Michelle L. Butler filed on behalf of Watson Pharma, Inc. and Watson Pharmaceuticals, Inc. ("Butler Aff.") ¶ 4, attached as Exhibit C.

⁴ See Butler Aff. ¶¶ 4-5.

Defendants are also at different stages of discovery in various other AWP-related cases. Some defendants have, to date, incurred millions of dollars of expenses producing millions of records in electronic formats acceptable to plaintiff's counsel in other litigation contexts.⁵ Other companies that have only recently been named in one or more of these cases may have only recently begun to respond to civil discovery. For some companies, literally hundreds of drugs or biologics may be at issue.⁶ For others, only a handful may be involved.⁷ Regardless of each defendant's unique situation, it is obvious that the burdens on these defendants are real and cannot be ignored by an attempt to gloss over individual issues generated by plaintiff's demands.

B. The Plaintiff's Motion Disregards Prior Meet and Confers Between Individual Defendants and Plaintiff.

As importantly, many of the defendants have already engaged plaintiff in numerous meet-and-confers regarding the scope of discovery.⁸ Some have even reached specific agreements.⁹ Some have, consistent with Special Master Judge Eich's previous orders, agreed with plaintiff to limit their production to what was produced in the MDL until plaintiff had an opportunity to review those materials.¹⁰ Others have reached agreements with plaintiff essentially deferring issues

⁵ See Affidavit of Joseph H. Young filed on behalf of Amgen Inc. ("Young Aff.") ¶ 2, attached as Exhibit D.

⁶ See Exhibit E of plaintiff's Second Amended Complaint.

⁷ *Id.*

⁸ See Butler Aff. ¶ 3; Young Aff. ¶ 3; Affidavit of Lyndon M. Tretter filed on behalf of Bristol-Myers Squibb Company ("Tretter Aff.") ¶¶ 2, 8-9, attached as Exhibit E; Affidavit of Robert J. McCully filed on behalf of Aventis Pharmaceuticals Inc. ("McCully Aff.") ¶¶ 7, 14, 16, attached as Exhibit F.

⁹ See Affidavit of Christine A. Neagle filed in support of Novartis Pharmaceuticals Corporation's Memorandum in Opposition to Plaintiff's Motion to Be Permitted to Pursue Discovery of its Entire Case ("Neagle Aff.") ¶¶ 3, 11-12, filed with the Court today.

¹⁰ Tretter Aff. ¶ 2. See Decision & Report of Discovery Master: Plaintiff's Motion to Compel AstraZeneca Defendants (Jan. 31, 2006) at 13-14; Decision & Report of Discovery Master: Defendant Johnson & Johnson's Motion for Protective Order (July 14, 2006) at 8.

regarding scope pending a review by plaintiff of its utilization data to determine whether and how its requests, and the defendant's responses, might be more narrowly focused.¹¹

Meet-and-confer sessions are particularly appropriate in a large, diverse case of this nature. That process should be allowed to run its proper course and not be prematurely cast aside in favor of plaintiff's motion which would in one fell swoop vitiate prior discussions and agreements. While some of the agreements reached with defendant manufacturers may have been based on the understanding that plaintiff could broaden the scope of discovery after it filed its Second Amended Complaint, others may not. It is frankly unfair to those defendants who have relied in good faith on the agreements reached during these meet-and-confers to now be faced with responding to a broader set of requests.

C. Plaintiff's Motion Disregards Individual Defendants' Responses and Objections to the Plaintiff's Discovery Requests.

Plaintiff's motion also disregards defendants' individual responses and objections to plaintiff's discovery requests. Plaintiff served discovery requests on all defendants in January and November 2005. Defendants filed timely responses and objections to those requests. Only a few defendants' objections have been challenged, heard, or adjudicated to date. In fact, plaintiff has brought motions to

¹¹ Young Aff. ¶¶ 4-5. Importantly, the amount which Wisconsin has reimbursed providers for the drugs identified in plaintiff's Second Amended Complaint no doubt varies significantly. In fact, plaintiff's utilization data may indicate that certain defendants' drugs are reimbursed by Wisconsin Medicaid at such low levels that the burden to a particular defendant of collecting and reviewing relevant documents for these drugs will outweigh the benefit to plaintiff. See Affidavit of Kristi T. Prinzo filed on behalf of AstraZeneca Pharmaceuticals LP and AstraZeneca LP ("Prinzo Aff.") ¶¶ 18-20, attached as Exhibit G; McCully Aff. ¶¶ 9, 12-13.

compel against only four groups of defendants.¹² As to the others, there is currently no motion before the Court.

Plaintiff is now asking the Court to summarily set aside these objections and order each defendant to produce documents related to *every* drug identified in its Second Amended Complaint for *every* document request propounded by plaintiff, without regard to burden or other valid bases for objection. Not only does Wis. Stat. 804.12(1) expressly set out a procedure for moving to compel when a party disagrees with a discovery objection, but Special Master Judge Eich was appointed by the Court with an eye toward providing prompt resolution to such disputes.¹³

Each defendant has a right to be heard on its own objections. If plaintiff finds affording each defendant such rights burdensome due to numerous objections made by numerous defendants, that burden is self-inflicted, created by the plaintiff's decision to force a large number of diverse manufacturers into one lawsuit. Plaintiff cannot deprive a defendant of a hearing or judicial determination on its objections by forcing *all* defendants to respond to *all* requests that it believes

¹² Plaintiff's motion to compel the Boehringer defendants was filed on October 3, 2005, and later withdrawn. On October 5, 2005, plaintiff filed a motion to compel against Sandoz Inc. ("Sandoz"), which was withdrawn. On November 22, 2005, plaintiff filed a motion to compel against AstraZeneca Pharmaceuticals LP ("AstraZeneca"). Judge Eich granted plaintiff's motion in part but limited AstraZeneca's response to the 15 drugs identified by AstraZeneca. *See* Decision & Report of Discovery Master: Plaintiff's Motion to Compel AstraZeneca Defendants, January 31, 2006. On March 7, 2006, plaintiff filed a motion to compel against Novartis Pharmaceuticals Corporation ("NPC"), which Judge Eich denied on May 2, 2006. *See* Decision & Report of Discovery Master: Plaintiff's Motion to Compel NPC, May 2, 2006. On May 4, 2006, Sandoz filed a motion for a protective order and plaintiff responded with a cross-motion to compel. Judge Eich denied the motion for a protective order (except for concluding that the corporate-designee deposition was not authorized to be held in Wisconsin) and granted the plaintiff's motion to compel. *See* Decision & Report of Discovery Master: Plaintiff's Motion to Compel Sandoz, July 26, 2006.

¹³ On June 23, 2005, the Court appointed Judge Eich as Special Master in this case with authority to "decide discovery disputes . . . within the scope of Wis. Stat. §§ 804.01(3) and (4), and §§ 804.12(1), (2)(b), and (4)."

may bear on its case, however broad or irrelevant those requests may be to any one defendant's particular circumstances.

D. The Plaintiff's Motion Disregards the Efficiencies of Resolving Disputes Under the Process Already Established for this Case.

Contrary to plaintiff's suggestion, the discovery process is working.

The limited number of disputes that have been brought before the Court to date indicate an effort by both sides to resolve discovery disputes informally and pragmatically. On those occasions where the Court has been required to rule, defendants not directly involved in the dispute have carefully considered the Court's rulings in their meet-and-confers with plaintiff.¹⁴ As a result, the Court has not been confronted with serial, repetitive discovery motions, nor is it likely to be.

To the extent that discovery issues will be brought before the Court, it is in no way an indication of inefficiency, but rather an indication of the legitimate disputes that can and do arise in a lawsuit of this magnitude. The present attempt by plaintiff to circumvent the orderly resolution of discovery disputes is not "efficient," but is rather an attempt to bypass the legitimate, varied rights of individual defendants. As the Special Master has repeatedly pointed out, discovery in a case of this size will only work if the parties are willing to compromise, something plaintiff seems unwilling to do despite the very real burdens and issues that exist with certain defendants.¹⁵

¹⁴ See Butler Aff. ¶ 3.

¹⁵ See Decision & Report of Discovery Master: Plaintiff's Motion to Compel AstraZeneca Defendants (Jan. 31, 2006) at 10 ("[i]n litigation of this magnitude, the interests of the parties, the public, and the judicial system itself, are better served by compromise (and a little give-and-take), than by nose-to-nose advocacy at the discovery stage of the proceeding."); Decision & Report of Discovery Master: Defendant Johnson & Johnson's Motion for Protective Order (July 14, 2006) at 10 ("discovery in a case of this nature and size works best, if it is

E. Issues Unique to Amgen

Amgen's situation demonstrates the types of unique and material issues that plaintiff wants to ignore. For example, plaintiff's "narrowed list of targeted drugs," sent to Amgen in April, purports to identify nine products, two of which are not even drugs.¹⁶ Amgen and plaintiff are in the midst of discussing these two terms, including what they are and how plaintiff arrived at them.¹⁷ Plaintiff's global order seeks to ignore these types of very real and legitimate issues. Similarly, the parties are continuing to discuss issues relating to plaintiff's utilization of some of Amgen's products, including whether and how plaintiff's requests, and Amgen's responses, might be more narrowly focused in order to avoid a costly and wasteful "data dump."¹⁸ These are precisely the types of discussions that can only take place during individual meet-and-confers, and cannot and should not be resolved through a global order.

to work at all, when all parties accept the fact that the process is, at bottom, one of accommodation and reasonable cooperation.").

¹⁶ See Young Aff. ¶ 3, n 1.

¹⁷ *Id.*

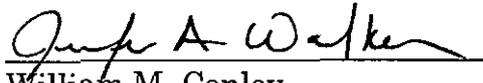
¹⁸ *Id.* at ¶¶ 4-5.

F. Conclusion

For all the reasons set forth above, Amgen respectfully requests that the Court deny Plaintiff's Motion to be Permitted to Pursue Discovery of its "Entire Case."

August 22, 2006

Respectfully submitted,



William M. Conley
Jeffrey A. Simmons
FOLEY & LARDNER
150 East Gilman Street
Verex Plaza
Madison, WI 53703
Telephone: (608) 257-5035
Facsimile: (608) 258-4258

Joseph H. Young
Steven F. Barley
Jennifer A. Walker
Hogan & Hartson L.L.P.
111 South Calvert Street
Baltimore, Maryland 21202
Telephone: (410) 659-2700
Facsimile: (410) 539-6981

Counsel for Defendant Amgen Inc.

Certificate of Service

I, Jennifer A. Walker, hereby certify that on this 22nd day of August, 2006, a true and correct copy of the foregoing was served on all counsel of record by Lexis Nexis File & Serve®.

/s/ Jennifer A. Walker
Jennifer A. Walker