STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN, PLAINTIFF VS. AMGEN, INC., *ET AL*, DEFENDANTS	**DECISION & REPORT OF DISCOVERY MASTER:** **DEFENDANT JOHNSON & JOHNSON'S MOTION FOR A PROTECTIVE ORDER** **MAY 14 ,2008** ≠≠≠≠ CASE NO. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003

APPEARANCES

Attys. Donald K. Schott and James W. Richgels for Defendant Johnson & Johnson

Attys. Charles Barnhill and Elizabeth Eberle for the Plaintiff State of Wisconsin

INTRODUCTION

The history of the action and my appointment as Special Discovery Master has been discussed before and need not be repeated here.

The Johnson & Johnson defendants[1] (J&J) seek an order barring the State from proceeding with depositions of four J&J company representatives noticed for April 29, 2009.[2] According to J&J, counsel for the State has noticed the depositions of the

[1] Johnson & Johnson, Janssen L.P., Ortho-McNeil Pharmaceutical, Inc., Ortho Biotech Products, L.P., and McNeil-PPC, Inc.

[2] The motion was filed on April 18, 2008. On April 20, I wrote to counsel indicating that, because of out-of-town commitments between April 22 and April 29, the motion could not be decided prior to the scheduled deposition date of April 29, and a briefing schedule was agreed to contemplating the filing of the final brief on May 2, 2008.

witnesses—all of whom live in either New Jersey or Washington, D.C.—in Madison, which J&J contends is unduly burdensome and unfair under all of the circumstances.

The State, responding, points to my April 27, 2006, decision on a motion by Merck & Company for a protective order quashing a notice setting a deposition in Madison for a corporate designee residing in Pennsylvania. I denied the motion, concluding: [a] that, by maintaining a sales force in Wisconsin, Merck was "transacting business in Wisconsin within the meaning of § 804.05(3)(b)1, *Wis. Stats.*, which states that a party may be compelled to give a deposition "at any place within 100 miles from the place where that party ... transacts business in person, or at such other convenient place as is fixed by order of the court;" and [b] that Merck had not persuaded me that the inconvenience was so great as to warrant exercising discretion under the final clause of the statute to re-locate the deposition.[3] Slip Op., at 5 n. 4. And it says that the same is true here: that J&J has shown no undue hardship or inconvenience, and, balancing all the interests favors its position that the witnesses should be produced in Madison.

DISCUSSION

To begin, J&J doesn't appear to dispute that, as was Merck in the earlier decision, it is transacting business in Wisconsin within the meaning of § 804.05(3)(b)1, *Wis. Stats.* Its argument is that because having the witnesses travel from the east coast to Madison would be unduly inconvenient, I should exercise my discretion under the "or such other convenient place as is fixed by ... the court" provisions of the statute and order the depositions to be taken at a location closer to their places of residence.

In support of its argument, J&J points to the fact that counsel for the State—who are also representing the State of Kentucky in a companion AWP case (a state whose discovery laws apparently do not authorize in-state depositions of out-of-state parties under any circumstances)—had abandoned notices for the same witnesses in Kentucky,

[3] The decision was affirmed by the Circuit Court.

filing virtual carbon-copies in Wisconsin in order to avoid the expense of having to travel to the east coast in that case. J&J states in its brief, for example:

> It is painfully clear that these depositions are being sought for use in Kentucky, Not Wisconsin. Indeed, Attorney Barnhill freely admits he withdrew the Kentucky notice and reissued it in Wisconsin simply so that he would not have to travel. His purpose is confirmed by the fact that the Kentucky and Wisconsin notices are virtually identical. And ... the Wisconsin notice seeks testimony fro Centocor, a J&J company that is a defendant in Kentucky but not in Wisconsin.
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> The Court's ruling against Merck should not be used as [a] bludgeon to harass witnesses in ways that other jurisdictions do not permit. Attorney Barnhill's convenience is not the only consideration. The convenience of the witnesses (and their counsel) must also be considered.... [Motion, at 8-9]

In its response, the State notes first that J&J, in its "Kentucky" argument, does not challenge the Wisconsin relevance of the information the State is seeking from the witnesses. And the State argues that the Wisconsin depositions should not be barred simply because holding them in Wisconsin will save both states money.

> Scheduling J&J's deposition in Wisconsin will save Wisconsin time and money. And if the deposition is useable in Kentucky it will save Kentucky time and money. No case holds that it is improper for a litigant to try to save time and money in discovery. (Indeed, one suspects that taxpayers would undoubtedly applaud such a motive.) The very point of Wis. Stat. § 804.05 is to make it more convenient and inexpensive for instate litigants to compel corporations or other businesses who make money in Wisconsin to appear and defend their conduct here. Thus, the motive J&J ascribes to Wisconsin's deposition notice is, in fact, endorsed by Wisconsin's statutes. [Response Brief, at 2-3]

The State is correct here—but only to a point. In my view, the statute does not have the central purpose of assuring the convenience of "instate litigants." It does recite that out-of-staters conducting business in Wisconsin may be compelled to submit to depositions in Wisconsin; but it adds a *caveat*: "... or at such other convenient place as is

fixed by an order of the court." This discretionary authority to make a different provision in a particular case is consistent with § 804.01(3)(a), *Wis. Stats.*, which authorizes courts to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ....[t]hat the discovery may be had only on specified terms and conditions, including a designation of the time or place." And these principles apply to all litigants, not just "instate litigants."

The question becomes, then, whether J&J has put forth sufficient reasons to justify the exercise of such discretion here. And I believe it has not. While its "Kentucky" argument is interesting, and has a certain degree of facial appeal, J&J has not put forth any authority suggesting that the State's candid concession that it "swapped" the Kentucky deposition notices and (essentially) re-filed them in Wisconsin in an attempt to avoid extra costs in both actions, violates applicable statutes or case law. I am not persuaded that, by itself, the fact that the same testimony may be useable in a companion action in another jurisdiction—and thus save time and money in one or both actions—constitutes grounds for entry of the order J&J seeks in this proceeding.

As for hardship and inconvenience, J&J has filed affidavits from the four corporate witnesses which refer generally to the inconvenience of taking two days for travel to and from Wisconsin, in addition to attending the actual depositions. Beyond that, one or two of the witnesses pointed to specific conflicts with respect to the April 29 date—which, as noted above, *supra,* note 2, has already passed.

There is, obviously, inconvenience on both sides in any case involving out-of-state parties. As the parties have pointed out, no matter where the depositions are held, there will be inconveniences: additional time and expense to the State for having its counsel travel east for the depositions, and/or to J&J for sending its west. On this record, however, it is impossible to gauge with even a modicum of precision the degree of inconvenience to either side resulting from the extra time and travel—much less to

compare or balance them. Indeed, this is precisely the type of issue counsel should be able to agree upon among themselves.[4]

Because, however, the matter has been brought before me, and because I conclude that J&J has not shown undue, or otherwise sufficient hardship or inconvenience to warrant invoking the "such other convenient place" language of § 804.05(3)(b)1, *Wis. Stats.*, or the "undue hardship" provisions of § 804.01(3)(a), I deny the motion.

CONCLUSION & ORDER

Based on the foregoing, I enter the following Order.

[1] J&J's Motion for a Protective Order, filed on or about April 18, 2008, is hereby denied.

[2] Unless otherwise agreed to by the parties, the depositions shall be scheduled at a single location and, at a time or times that will allow them to proceed one after the other, so as to minimize the necessary inconvenience to the witnesses and counsel.

Dated at Madison, Wisconsin, this 14th day of June, 2008.

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William Eich
Special Discovery Master

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[4] I stated in an earlier decision involving a J&J motion for a protective order that "discovery in a case of this size and complexity must necessarily involve a degree of accommodation—a balancing of competing interests and goals—if the litigation is to proceed with any degree of alacrity or efficiency." I continue to feel that way, and believe the instant dispute is a prime example of one that would best—and most economically—be resolved informally by the parties and counsel themselves. [Decision & Report of Discovery Master, July 14, 2006, at 7]