STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**

STATE OF WISCONSIN, **PLAINTIFF** **VS.** **AMGEN, INC., *ET AL*,** **DEFENDANTS**	**DECISION & REPORT OF DISCOVERY MASTER:** **DEFENDANT MERCK'S MOTION FOR A PROTECTIVE ORDER** **APRIL 27, 2006** ≠≠≠≠ CASE NO. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003

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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.

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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 form 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 pattered 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 ponts 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]

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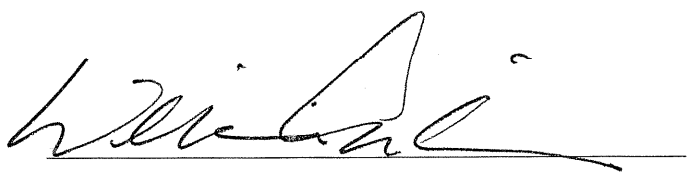
[3] I note also that, while Merck cites three district court cases (and one court of appeals case) for the proposition that, under Rule 45, corporate-designee depositions are to be held at or near the corporation's home offices, it does not indicate whether there was any claim—or any ruling—in any of 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