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

STATE OF WISCONSIN, **PLAINTIFF** **VS.** **AMGEN, INC., *ET AL*,** **DEFENDANTS**	**DECISION & REPORT OF DISCOVERY MASTER:** **DEFENDANT MYLAN'S MOTION FOR A PROTECTIVE ORDER** **MAY 31, 2006** //// CASE NO. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003

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Attys. David J. Harth, David E. Jones and Lissa R. Koop, Heller Ehrman LLP, Madison, for the Defendant.

Charles Barnhill, William P. Dixon, Elizabeth J. Eberle and Robert S. Libman, for the Plaintiff State of Wisconsin.

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INTRODUCTION & SUMMARY OF DECISION

This is an action by the State of Wisconsin against several pharmaceutical manufacturers based on allegations that Defendants have violated Wisconsin antitrust and other laws. Specifically, the State alleges that Defendants have reported artificially inflated wholesale drug prices to pharmaceutical compendia, while "hiding" the true prices, with the result that purchasers, such as the State of Wisconsin—whose Medicaid reimbursement formula for prescription drugs is based on those published prices[1]—have

[1] As the trial court has noted:

> [I]n determining reimbursement, the State … relies heavily on information from Defendants themselves. Among the pricing information available from Defendants are prices known as Average Wholesale Price (AWP) and Wholesale

suffered substantial financial loss. And the State claims that these acts violate several Wisconsin statutes dealing with price deception and similar matters. Specifically, the State says:

> In sum, it is unlawful for a company to publish a price for a product—whether it is called a suggested list price, a manufacturer's price or a wholesale price—where that price does not represent a price at which the product is actually sold.

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 State has served a Notice of Deposition requiring Mylan to designate a witness to give testimony concerning: [a] its "contracts for the sale of its general pharmaceuticals," with various customers and their affiliates "during the period 1999 to the present, and the manner in which they were secured;" and [b] the "basis for the A[verage] W[holesale] P[rice]s and W[holesale] A[cquisition] C[ost]s Mylan reported to First Data Bank and the Red Book[2] from 1993 to the present." While the parties were negotiating the nature and scheduling of the deposition, the Trial Court, on April 3, 2006, ruled that the State's Amended Complaint did not meet the pleading requirements of the civil procedure code insofar as it attempted to allege claims for fraud. The court stated that:

> In order to maintain these causes of action premised on fraud, Plaintiff must re-plead them, giving as many specifics as it can.

Acquisition Cost (WAC),both of which are prices disseminated by the Defendants to the public via publication in certain medical compendia."

The State alleges that these listed prices do not represent the actual price paid by providers (and, through them, consumers), but are inflated. And it says that because the market (and the number of drugs involved) is extremely large, and, it its words, "shrouded in secrecy," it is difficult to gather accurate pricing information.

[2] These are two of the medical compendia mentioned above.

> Each Defendant s entitled to know, with as much detail as Plaintiff can provide, **which** of its drugs are involved and **what** (name, date) publication of AWP is false and the **actual** price that should have been published. [Decision of April 3, 2006, at 13. Emphasis in the original.]

The Court gave the State until June 6, 2006, to re-plead the claims.

Mylan has not objected to continuing document discovery, but takes the position that it is "entitled to know the true scope of the allegations made against it before it should have to put up a company spokesperson…" [Motion, at 3] And it requests that the deposition of its representative be postponed until after the State has "amended its complaint to cure the defects identified in the [Trial Court's decision]."

For the reasons that follow, I conclude that Mylan has shown cause for issuance of the order it seeks; and I grant the Motion.

DISCUSSION

As Mylan points out, issuance of a protective order is a discretionary determination, grounded upon the moving party's showing of good cause that such an order is necessary to "protect [it] from discovery that would result in annoyance, embarrassment, oppression, or undue burden or expense." Sec. 804.01(3)(a)(1), (4), *Stats*; ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 271-72 (Ct. App. 1981). The court's powers in this regard have been described as "broad." Wisconsin Practice., Civil Discovery § 1.11.

The Trial Court's April 3rd decision made several points I consider highly relevant to the instant motion. As indicted, the State claims that the Defendants took steps to conceal their price misrepresentations. And, under § 802.03(2), *Stats*., when alleging fraud, "the circumstances constituting the fraud … shall be stated with particularity…" And, as the Trial Court pointed out, quoting from ***Friends of Kenwood***

v. Green, 239 Wis.2d 78,87 (Ct. App. 2000), the requirement exists not only to provide the defendant with adequate information to frame a response, but also "to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude, to minimize 'strike suits,' *and to discourage the filing of suits in the hope of turning up relevant information during discovery*." [Emphasis added.]

The Trial Court also noted that:

> While Plaintiff has done a masterful job [in its Amended Complaint] of describing a "dauntingly complex" drug sale and reimbursement system, it has failed … to set forth the activities of each defendant and to put everyone on notice for what activities, occurring when and how, it wishes to hold each defendant responsible. Probably for good reason, *Plaintiff seems as though it wants to put the burden on each company to come forward with an explanation for each and every AWP listing since 1992. This is not permissible.*

I agree with Mylan that what the State is seeking in this deposition is discovery to assist it in framing a complaint that will meet the requirements of the law, as set forth in the Trial Court's decision. Indeed, the State concedes that this is so, and goes on to state: "Through the deposition of Mylan, Wisconsin seeks evidence of the wholesale prices of the targeted drugs and Mylan's basis for causing to be published inflated wholesale prices in the reporting services." (Brief, at 3, 4) And if that doesn't fly in the face of ***Friends of Kenwood***, it comes awfully close—and it comes equally close to what the Trial Court described as the "impermissible" result of "[placing] the burden on [the defendant] to come forward with an explanation for each … AWP listing since 1992."

The State argues that Mylan has failed to establish good cause to postpone the disposition until the fraud claims are properly pleaded. I disagree. As the Trial Court emphasized, the Complaint as presently drafted has failed the statutory test for providing adequate notice of the State's fraud claims to Mylan and the other defendants in these cases. And Mylan makes the point—a good one, I believe—that it is unreasonable and/or burdensome within the meaning of § 804.01(3)(a), *Stats.*, to require a defendant to

produce a witness to speak on its behalf when, as the Trial Court has ruled in this case, the plaintiff has yet to offer a statement of its position that would enable the defendant to fairly respond. As Mylan states:

> Without knowing what allegations the State is going to make … Mylan cannot adequately prepare a witness to speak on its behalf. .... Mylan will be … prejudiced if it is forced to produced a §8-4.05(2)(e) witness without … knowing the particulars of the claims being made against it. [Brief, at 5]

CONCLUSION

For the reasons discussed above, I conclude that Defendant Mylan has shown good cause for issuance of the protective order it seeks under § 804.01(3)(a), *Stats*., adjourning the § 804.05(2)(e) deposition of its representative to a date after the State has complied with the Trial Court's order granting leave to amend its complaint.

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Dated at Madison, Wisconsin, this 31st day of May, 2006

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William Eich
Special Discovery Master