

STATE OF WISCONSIN,  
 PLAINTIFF  
 VS.  
 AMGEN, INC., *ET AL*,  
 DEFENDANTS

**DECISION & REPORT  
OF DISCOVERY MASTER:**

**DEFENDANT PFIZER’S MOTION  
FOR A PROTECTIVE ORDER**

**JANUARY 31, 2006**

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CASE No. 04 CV 1709  
UNCLASSIFIED-CIVIL: 3003

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P. Jeffrey Archibald, Special Assistant Attorney General, and Cynthia R. Hirsch, Assistant Attorney General, for the Plaintiff (Oral Argument by Mr. Archibald).

Attys. John C. Dodds, Kim Heuer and Beth J. Kushner, for Defendants Pfizer and Pharmacia Oral Argument by Mr. Dodds).

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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 the Defendants have violated various Wisconsin antitrust and other laws. Specifically, the State alleges that Defendants have reported artificially inflated wholesale drug prices to pharmaceutical compendiums, 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), have suffered serious financial loss. Pfizer and the other Defendants have moved to dismiss the complaint on several grounds, and that motion is pending before the Trial Court.

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).”

Defendants Pfizer and Pharmacia seek a protective order with respect to a notice of deposition issued by the State requesting that a Pfizer designee appear and testify with respect to some 88 drugs manufactured by the company..

For the reasons stated below, I deny the motion—with one exception; the State’s deposition will be limited to 15 drugs (of its choosing).

### **BACKGROUND**

The State’s Notice of Deposition asks that Pfizer name a corporate designee to testify with respect to the following topics:

[1] ... evidence or information ... which shows that any of the [listed] drugs ... were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price (AWP) published in either first Data Bank or the RedBook in any year from 1993 to the present.

[2] ... evidence ... which shows ... that the published AWP was higher than the price pharmacies were actually paying for any of the targeted drugs in each year....

[3] ... evidence of contacts Pfizer, Inc., or its subsidiaries, have had with First Data Bank or the Red Book about any of the targeted drugs.

[4] Whether Pfizer ... ever communicated [to the compendiums] that the published Average Wholesale Prices of their drugs were neither a price that was actually an average of wholesale prices, nor a price that was actually paid by the retail classes of trade, and if so, when such communications took place and of what they consisted.

[5] The Average Manufacturer’s price (AMP) reported to the federal government of each of the targeted drugs in each year...

[6] Any evidence which shows that the actual average wholesale price at which any of the targeted drugs sold in any given year was greater than the AMP.

The notice required that the deponents bring to the deposition:

1) all evidence or information showing that any of the ...drugs were sold at a price equal to or greater than the published AWP ... 2) ... all evidence or information showing that actual average wholesale prices of its ...drugs were less than the published AWP, 3) .. any evidence of communications between Pfizer and the RedBook about or concerning any of the targeted drugs, 4) ... the reported AMPs of each targeted drug, and 5) ... any evidence ... showing that the actual average wholesale price of any of the targeted drugs was greater than the reported AMP.

Pfizer then filed the instant motion seeking a protective order “deferring any deposition until after all dispositive motions are resolved.”

### DISCUSSION

Section 804.01(3)(a), *Stats.*, allows the court, for “good cause” shown, to enter any order that justice may require to protect a party from “annoyance, embarrassment, oppression or undue burden or expense”—including orders precluding, limiting or deferring discovery. The burden is, of course, on the moving party to establish good cause. *Earl v. Gulf & Western Mfg. Co.*, 123 Wis.2d 200, 208 (Ct. App. 1985).

Pfizer has not filed any affidavits, or otherwise presented any direct evidence that an order is necessary to protect it from annoyance, embarrassment, oppression or undue burden or expense.<sup>1</sup> Instead, it argues that a protective order is warranted in this case because: [a] motions to dismiss are pending; [b] the notice fails to comply with the requirements of § 804.05(2)(e), *Stats.*, which, among other things requires that notices of

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<sup>1</sup> As indicated below, it does assert that there are “less burdensome” means of acquiring the desired information, but, other than to state generally in its Reply Brief that presenting a witness or witnesses to testify “would be time-consuming and expensive” in light of the “ambiguous, unclear and overly broad nature of the ... notice” (Reply Brief, at 5), it offers no specifics.

depositions of a corporate officer “designate with reasonable particularity” the matters to be inquired into; and [c] “there are less burdensome alternatives for Plaintiff to obtain the information sought.”

To begin, I agree with the State that it is important to note what this motion is *not* about. Much is made in Pfizer’s motion, brief and argument about the weakness of the allegations of the complaint, and the State quite correctly points out that the sufficiency of that document is the subject of the pending motion to dismiss. Having said that, I must also note, however, that while the validity of the Complaint is not part of these proceedings, its allegations are of at least limited relevance with respect to the reasonableness of the discovery request.

There is, in addition, considerable discussion of the fact that the State’s notice of deposition was served after Pfizer had filed interrogatories and document requests concerning evidence in the State’s possession regarding the allegations in the Complaint. That also is not an issue in these proceedings; § 804.01(4), *Stats.*, provides, for example, that “the fact that a party is conducting discovery ... shall not operate to delay any other party’s discovery.”

As indicated, Pfizer argues first that the existence of the motion to dismiss constitutes grounds to quash the State’s Notice of Deposition because, at this point, “the Court has not decided whether plaintiff may proceed with any claims as to Pfizer and, if so, the scope of those claims.” [Reply Brief, at 2] It also argues that the effect of the State’s request is to require Pfizer to assume “the burden of proving that it did not commit the alleged fraud...” [Id.]. The arguments are understandable and, to a degree at least, plausible. But, as the State points out, the Trial Court, over arguments similar to those raised in these proceedings, denied Pfizer’s motion to stay discovery pending determination of the dismissal motion. It is within the Trial Court’s discretion to defer discovery until after all dispositive motions are resolved, *Swan Sale Corp. v. Joseph Schlitz Brewing Co.*, 126 Wis.2d 16, 29-30 (Ct. App. 1985), and, to me, the Court’s denial of Pfizer’s motion to stay discovery disposes of the argument.

Pfizer next contends that the notice is not in proper form—that it does not “designate with reasonable particularity the matters on which examination is requested,” as required by § 804.05(2)(e), *Stats.* The crux of Pfizer’s argument on the point is that the notice is “ambiguous, unclear and overly broad,” [Motion, at 4] Beyond that, Pfizer offers no real argument on the point, and has supplied no references to affidavits or other proofs in support of its Motion. The only specific objection appearing in the Motion papers is a statement in a November 29, 2005, letter from Pfizer’s counsel to the State’s attorneys indicating that she does not understand what the State means by the word “contacts” in paragraph 3 (which, as indicated above, asks about “contacts Pfizer ... ha[s] had with First Data Bank or the Red Book about any of the targeted drugs”). [Motion, Exhibit C] Yet the same attorney’s affidavit states that, when she raised that complaint with the State’s counsel, he “clarified that the State seeks information about the nature and extent of Pfizer’s communications with First Data Bank and the RedBook with respect to any reporting of drug prices.” [Motion, Exhibit A, at ¶ 8] And, in his own affidavit, Plaintiff’s counsel states that, in discussions, the parties “agreed to Pfizer’s suggestion that it interpret the term ‘contacts’ to mean ‘correspondence’...” [Dixon Affidavit, at ¶ 5] On this record, I find Pfizer’s argument that the notice is not in proper form to be unavailing.<sup>2</sup>

Pfizer’s final argument is that there are “less burdensome alternatives” for the State to obtain the information it seeks. It offers no suggestions in this regard, however, other than to state:

If the Special Master believes that any further discovery is appropriate at this time, there are less burdensome ways to conduct it. Plaintiff has been completely unwilling to discuss any alternatives to the deposition notice. [Motion, pp. 3-4]

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<sup>2</sup> Elsewhere in the letter, counsel states that the Notice is “unclear” because paragraphs 1 and 2 “appear to seek the same information.” [Motion, Exhibit C] I do not consider this to be in any way an objection fatal to the Notice.

The only specific suggestion from Pfizer as to what would be a “less burdensome alternative” came at oral argument on the motion when its counsel stated:

With respect to Pfizer, we offered to provide detailed transactional information on any two drugs of plaintiff’s choosing, so the plaintiff could determine for itself what we contend is the case, which is that as respects Pfizer, this claim has no merit at all for the simple reason that it never reported AWP’s, never provided AWP’s to price publishers, which is the linchpin of what this complaint is all about.

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... With respect to Pharmacia, we offered to provide discovery as to the drugs as to which the plaintiffs have alleged some specific misconduct. As to Pfizer, there are no such drugs. There are no such allegations.

Nonetheless, we offered to provide plaintiffs with transactional information which would show all the prices in the market for any two drugs of their choosing and then to have a discussion about the merits of their claims with respect to Pfizer.

The reason we made that offer ... is because we believe there’s a reason why there are no allegations as to Pfizer in this complaint. We didn’t do it. In fact, historically Pfizer has never provided the price publishers with AWP’s for its product and we wanted to have a discussion with plaintiffs about that fact. That offer was refused in favor of the position that they are entitled to all the discovery they want or they want nothing. [Transcript of January 4, 2006, hearing, pp. 36-37]

In my decision on a companion motion in this case, bearing today’s date, I discussed the benefits to all concerned of cooperation in the discovery stages of complex litigation.

In 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 proceedings. The spirit of Wisconsin’s discovery statutes is to facilitate the fullest possible exchange of information between the parties—in the belief that the ends of justice are best met when, at the time of trial, both sides are

fully informed on all matters at issue. And to the extent that less advocacy at the discovery stage of the proceedings facilitates the information exchange, it can only enhance the value (and the benefits) of advocacy at trial.

Here, the State elected not to accept Pfizer's offer. In other instances, perhaps, the spirit of cooperation may have engendered acceptance; but, on this record, Pfizer simply has not persuaded me that, under the applicable statutes—notably the “undue burden” provisions of § 804.01(3)(a), *Stats*—it is entitled to an order quashing the Notice of Deposition and directing the State to accept the offer. It is true that, under § 804.01(3)(a)3, the court has discretion to direct that the requested discovery be had by a different method than that selected by the party seeking it, but here, too, Pfizer has not carried its burden to show why, specifically, justice requires the entry of such an order”—much less what other form of discovery would cure the problems it only very generally suggests. It may be that the State's Complaint does not, as Pfizer contends, contain sufficient allegations of fraud to stand. If that is true, it will be dismissed by the Trial Court. But Pfizer's argument here that the complaint's deficiencies make it more reasonable to issue an order protecting it from the State's discovery requests is really an argument to stay discovery pending determination of the motion; and, as indicated above, I have rejected that argument.

There is, however, one modification I believe to be appropriate under all of the circumstances. In the companion decision referred to above, I limited the number of drugs subject to discovery to 15, concluding that was a reasonable offer on the responding party's part. In this case, as noted, while the pendency of the dismissal motions to not constitute grounds to enter an order postponing the requested discovery, I do believe that the fact that the Trial Court has yet to rule on those motions—and thus, as Pfizer states, we do not know at this point in what form the action may continue against Pfizer, if indeed it continues at all—I consider it reasonable and appropriate to similarly limit the requested discovery here by limiting the number of drugs subject to the Notice of Deposition to 15, to be selected by the State.

## CONCLUSION

I conclude, therefore, that:

- Pfizer has not established that the State's Notice of Deposition is defective.
  
- With the following exception, Pfizer has not established that grounds exist to enter an order deferring the noticed deposition until some time after the pending dismissal motions have been decided.
  
- It is reasonable and appropriate to enter an order limiting the number of drugs subject to the deposition to no more than 15—to be selected by the State and listed in an Amended Notice of Deposition.

It follows that:

[1] Pfizer's Motion for a Protective Order will be granted to this extent: the total number of drugs to be subject to the Amended Notice of Deposition will be 15, to be selected by the State.

[2] In all other respects, Pfizer's motion is denied.

[3] Because neither party prevailed in whole on the Motion, no costs or fees will be awarded.

Dated at Madison, Wisconsin, this 31st day of January, 2006.

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William Eich  
Special Master