

<p><b>STATE OF WISCONSIN,</b></p> <p><b>PLAINTIFF</b></p> <p><b>VS.</b></p> <p><b>AMGEN, INC., ET AL,</b></p> <p><b>DEFENDANTS</b></p>	<p><b><u>DECISION &amp; REPORT OF DISCOVERY MASTER:</u></b></p> <p><b><u>PLAINTIFF'S MOTION TO "PURSUE DISCOVERY OF ITS ENTIRE CASE."</u></b></p> <p><b><u>OCTOBER 12, 2006</u></b></p> <p><b>###</b></p> <p>CASE No. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003</p>
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Charles Barnhill, *et al.*, for the Plaintiff State of Wisconsin.

Attys. William M. Conley and Jennifer A. Walker for Defendant Amgen, Inc.; Atty. Michael P. Crooks for Defendant Merck & Co., Inc.; Attys. Kim Grimmer and Jennifer L. Amundsen for Defendant Novartis; Attys. Daniel W. Hildebrand and Jon P. Axelrod for Defendant GlaxoSmithKline.<sup>1</sup>

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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

<sup>1</sup> In addition to the listed appearances (comprising the parties who elected to file briefs on the motion) the following additional defendants join in opposing the State's motion: Abbott Laboratories, AstraZeneca Pharmaceuticals, Aventis Pharmaceuticals, Baxter Healthcare, Ben Venue Laboratories, Boehringer Ingelheim Pharmaceuticals, Bristol-Myers Squibb, Dey, Inc., Immunex Corporation, Ivax Corporation, Janssen Pharmaceutical Products, Johnson & Johnson, McNeil-PPC, Merck, Mylan Laboratories, Ortho Biotech Products, Pharmacia, Pfizer, Roxane Laboratories, Sandoz, inc., Shering Plough Corporation, Sicom Inc., TAP Pharmaceutical Products, Reva Pharmaceuticals USA, Warrick Pharmaceutical Corporation, Watson Pharma, Inc., and ZLB Behring, Inc.

other laws. The underlying facts have been discussed in prior decisions and need not be repeated here. 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).”

In an earlier motion, I was asked by one of the defendants (Pfizer) to stay all discovery for the reason that a motion to dismiss certain counts in the State’s complaint was pending in the Trial Court and it was thus unknown which counts might survive the motion.<sup>2</sup> I ruled that, while Pfizer had not persuaded me that it was entitled to an order quashing the State’s Notice of Deposition pursuant to the “undue burden” and other terms of § 804.01(3)(a), *Stats.*, it would, nonetheless, be appropriate “under all of the circumstances” of the case (specifically referencing the pending motion to dismiss), to limit the number of drugs subject to discovery to fifteen.

The State has now filed a motion, stating—in its entirety:

Plaintiff moves the Special Mater to permit it to pursue discovery on the entirety of its case, not just fifteen drugs, for the reasons set forth in the attached memorandum.

The plain language of the State’s Motion leads to only one conclusion: the only relief being sought is repeal of the 15-drug limitation established in the *Pfizer* case, thus restoring the *status quo* prior to the Trial Court’s decision on the motions to dismiss and the filing of the Second Amended Complaint. And because the reasons underlying the limitation I imposed in *Pfizer*—the pendency of the motion to dismiss and the option to replead—no longer exist, I grant the motion, with the understanding that this decision will in no way limit or impede the Defendants from pursuing appropriate objections and motions to such existing discovery demands as may still retain vitality, and any such demands the State may elect to pursue in the future.

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<sup>2</sup> The Trial Court granted the motion with respect to several counts, allowing the State to replead—which it did, filing a Second Amended Complaint on or about June 28, 2006.

## DISCUSSION

The State argues that it has a right to “develop all of the facts necessary to prove its case,” subject, of course, to “the court’s power to ... curb ... inequities.” It also maintains that “dividing up discovery by drug segments” will lead to unnecessary duplication nor or in the future. And it says that, in light of the fact that it has now amended its complaint in response to the Trial Court’s order, the basis for the fifteen-drug limitation has evaporated.

Defendants argue that, not only does the State’s motion disregard the unique circumstances of each of the thirty-some defendants with respect to record-keeping, pricing and marketing practices, but, in some cases at least, it disregards agreements made by the parties at earlier “meet-and-confer” sessions. They also fear that granting the motion will somehow foreclose them from pursuing pending objections to prior discovery demands made by the state, and/or from challenging any future demands. Some defendants stress the difficulty in complying with such requests due to intervening mergers and realignments.

As indicated, the fifteen-drug limitation was established in response to a motion by one or more defendants to stay any and all discovery pending resolution of the motions to dismiss. Concluding that Defendants had not established grounds for such relief under applicable statutory standards—and noting that the Trial Court had expressly declined to issue such a stay—I went on to state:

There is, however, one modification I believe to be appropriate under all of the circumstances. In [a] companion decision ..., 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 do 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.*<sup>3</sup> (Emphasis added.)

I agree with the State that simply lifting the fifteen-drug limit will not circumvent the meet-and-confer process, nor will it nullify or adversely affect the defendants' right to object to the State's discovery notices and demands—whether those objections are presently pending or to be filed in the future. To the extent prior discovery demands have been objected to, those objections, to the extent they remain pertinent in light of the Second Amended Complaint, may continue to be negotiated and, failing that, Defendants are free to file appropriate motions. And, plainly, Defendants retain the right to object to such new discovery notices and demands as the State may put forth in the future.

The sole effect of this decision is to lift the fifteen-drug limitation I imposed in *Pfizer* for the limited purpose of allowing at least some discovery to proceed in the period of uncertainty surrounding the pending motions to dismiss. Meet-and-confer sessions may—and, hopefully, will—continue and I would emphasize again the value, if not the necessity, of cooperation and accommodation in this regard. As the Trial Court has stressed (and as I have noted), it was the State's decision to proceed against all defendants in a single action and that factor, in and of itself, will have an impact on discovery. But, as counsel well know, a spirit of cooperation and accommodation can not only streamline the discovery process, but can strengthen it as well; and that's to everyone's advantage.

#### **CONCLUSION**

For the reasons discussed above, I grant the State's motion to repeal the fifteen-drug limitation set forth in the *Pfizer* decision, emphasizing again that this decision does

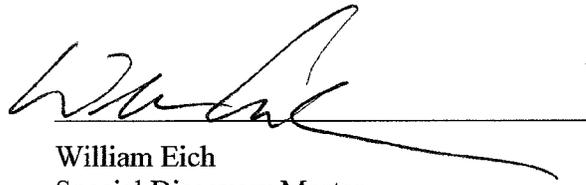
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<sup>3</sup> See, *Decision & Report: Defendant Pfizer's Motion for a Protective Order*, January 31, 2006, p. 7. I also noted in that decision that the Trial Court had declined to stay discovery while the motions to dismiss were pending. *Id.*, at p. 4.

not affect any agreements that have been negotiated by the State and any Defendant or Defendants. Nor does it affect or preclude pursuit of any pending, but as-yet-undecided objections or motions relating to discovery that the parties have filed to date. Finally, this decision has no effect, and imposes no limitation, upon the Defendants' right to raise appropriate objections, motions or responses to any future discovery demands put forth by the State.

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Dated at Madison, Wisconsin, this 12th day of October, 2006



William Eich  
Special Discovery Master