

STATE OF WISCONSIN,

PLAINTIFF

Vs.

AMGEN, INC., *ET AL*,

DEFENDANTS

**DECISION & REPORT  
OF DISCOVERY MASTER:**

**DEFENDANT SANDOZ' MOTION  
FOR A PROTECTIVE ORDER;  
PLAINTIFF'S MOTION TO COMPEL**

**JULY 26, 2006**

CASE No. 04 CV 1709  
UNCLASSIFIED-CIVIL: 3003

**APPEARANCES**

Attys. Paul Olszowka and Shannon A. Allen for the Defendant

Atty. Charles Barnhill for the State of Wisconsin

**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 “average wholesale drug prices,” or “AWPs,” to pharmaceutical reporting services, 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<sup>1</sup>—have suffered substantial financial loss. And the State

<sup>1</sup> 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 Acquisition Cost (WAC), both of which are prices disseminated by the Defendants to the public via publication in certain medical compendia.”

[Footnote continued....]

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 served its first set of five interrogatories and six document production requests on Sandoz in May, 2005. Additional document requests were served in November, 2005. In March, 2006, the State served a notice of deposition requiring Sandoz to produce a corporate designee to testify on six stated subjects. The interrogatories, the document requests and the deposition notice are similar, if not identical, to papers served on various other defendants in this action, and have been discussed in prior special-master discovery decisions.

After the Trial Court’s April 3, 2006, order dismissing certain claims in the State’s complaint and giving it time to re-plead, Sandoz apparently took the position that it would not answer the interrogatories, produce any additional documents, or tender its designee for deposition, until the complaint was amended (and possibly longer). When the parties were unable to work out any form of compromise on these (and other) discovery issues, the State moved for an order to compel Sandoz to produce the requested documents, answer its interrogatories, and produce the designee for deposition. Sandoz

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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, in its words, “shrouded in secrecy,” it is difficult to gather accurate pricing information.

moved for a protective order which would, among other things, postpone the deposition until it has completed its review of the many documents requested by the state.

The central issues on the motions, as discussed in the parties' briefs, are these: [1] whether requiring Sandoz to produce a corporate designee for depositions will constitute an undue burden on Sandoz and/or whether the interest of justice requires postponement of the depositions; [2] whether the State's notice of deposition is inadequate; and [3] whether the deposition of Sandoz's designee may be conducted in Wisconsin.<sup>2</sup>

For the reasons that follow, Sandoz's Motion for a Protective Order will be denied in all respects except one—its argument that the deposition of its corporate designee is not authorized to be held in Wisconsin. I agree with that position. Accordingly, with that exception, the State's Motion to Compel will be granted.

### **DISCUSSION**

The State's Notice of Deposition requests Sandoz to "designate a person or persons" to testify on the following topics:

[1] ... [E]vidence or information, if any, about which it is aware, which shows that any of the ["targeted"] drugs ... were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price (AWP) published by [the reporting services] in any year from 1993 to the present.

[2] ... [E]vidence or information ... which shows, or which defendant believes may tend to show, that the published AWP was higher than the price pharmacies were actually paying for any of the targeted drugs...

[3] What contacts Sandoz, or its subsidiaries, have had with [the reporting services] about any of the targeted drugs.

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<sup>2</sup> As indicated, the Trial Court, on April 3, 2006, entered an order dismissing certain claims set forth in the State's Complaint, giving it sixty days to re-plead. As also indicated, Sandoz took the position that it could not reasonably be compelled to not produce its corporate witness, or respond to the State's other discovery requests, until the amended complaint was filed. Because the Amended Complaint was filed several weeks ago, I consider Sandoz's arguments based on the Court's April 3 order, and the absence of a "full complaint," to be moot.

[4] Whether Sandoz, or any of its subsidiaries, ever communicated to [the reporting services] that the published Average Wholesale Prices of their drugs were [not prices] 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 targeted drug from 1993 to the present.

[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 reported AMP.

Sandoz argues first that conducting the corporate-designee depositions while it is still in the process of locating and producing the many documents requested by the State "unfairly cuts short Sandoz's ability to prepare for [the] deposition, and creates the possibility that ... the parties will have disputes whether the designated deponent was adequately prepared." [Opening Brief, at 11] First, Sandoz asserts that the State is ignoring the fact that it has itself "demanded" that the designee have background knowledge that can only be obtained through extensive document review:

To illustrate, Plaintiff has describe Deposition Topic No. 1 as seeking the alleged "fact" that "published AWP for Sandoz' drugs were higher than the prices that pharmacies were paying." ... But preparing such a witness is no easy matter given Plaintiff's statement that the designee for this topic should have "knowledge of the contract prices, any incentives such as rebates, discounts, or chargebacks, and the reported AWPs." ... It is this very demand ... that requires Sandoz to complete its document review before producing a witness (and that would cause undue prejudice to Sandoz if it were compelled to produce a witness before the review was completed). Simply put, Plaintiff cannot demand that Sandoz's corporate designed have knowledge about a wide array of topics and then deny Sandoz the time necessary to prepare that witness. [Reply Brief, at 7]

Sandoz continues:

As another example ... in defining [its] Deposition Topics No. 3 and No. 4 (involving Sandoz's contacts with pricing compendia and the nature of those communicators), Plaintiff glibly suggests that one person could testify about both, namely "the person with responsibility for corresponding with the compendia." However ... at least two different

Sandoz employees have had communications with the compendia, neither of w[hom] is still with the company. [Id.]

It also states that there is a danger of the deposition witness having to testify twice (“once as a designee and then potentially in his or her individual capacity about documents that would be produced afterward”). Finally, Sandoz raises similar points with respect to the State’s interrogatories—that review of the documents is equally necessary to respond to them.

The State maintains that Sandoz is, in effect, seeking an “indefinite continuance” of the deposition. Pointing to Sandoz’ own estimate that it will take at least six months to complete its review of the documents that have been requested to date (and the State says there likely will be more as time goes by), the State asserts that this would result in a stay until some time in early 2007, and probably beyond. And it says that the Trial Court has already denied a motion by defendants to stay discovery pending resolution of a motion to dismiss—and points out that, in an earlier decision,<sup>3</sup> I treated that denial as dispositive of a related issue. As I indicated in that decision, however, the Trial Court was asked to stay discovery pending determination of the defendants’ motion to dismiss and declined to do so. Noting that, under the cases, it is within the Trial Court’s discretion to defer discovery until dispositive motions are resolved, I considered the Court’s denial of the stay to be dispositive of an identical request by Defendant Pfizer (who had asked me to quash a deposition notice based on the existence of the dismissal motion). But, as I have stated, the dismissal motion is history and the Complaint has been amended. As a result, while the Trial Court’s decision on the motion to stay discovery, and my decision on the Pfizer motion, are instructive, they are of only limited relevance here. The question in Pfizer was limited in scope: should all discovery be delayed because of the existence of a motion to dismiss? Here there is no such motion pending, and the question is simply whether the corporate-designee deposition should be stayed because other discovery is ongoing.<sup>4</sup>

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<sup>3</sup> Decision on Defendant Pfizer’s Motion for a Protective Order, January 31, 2006.

**[Footnote continued....]**

Sandoz, however, has not persuaded me that allowing the corporate-designee deposition to proceed while other discovery is ongoing would constitute the type of undue burden the discovery statutes are designed to relieve. As indicated, much of Sandoz’s argument is directed toward what it describes as “the unfairness and burden that will inure to Sandoz by continuing with discovery in the absence of a complaint.” [Reply Brief, at 1] Again, the argument lost its relevancy when the Complaint was amended. *See*, note 2, *supra*. Its primary argument on these motions is that extensive document review (taking at least six months) is necessary in order to properly “prepare” the witness for the deposition. In support of that position, Sandoz’s attorney has filed an affidavit in which he states that, in Sandoz’s view of the deposition notice, “the documents that could have to be analyzed to prepare for this deposition are voluminous.”

So far, Sandoz has identified (and has been in the process of reviewing) files from fifteen custodians, including salespersons, sales executives, and marketing personnel, whose files could contain documents responsive to the State’s document Requests Nos. 3 and 4. These files contain approximately 380,000 documents, totaling over 1.3 million pages. [Olszowka Affidavit, at 9]

Sandoz’s argument equates the scope of the deposition with the scope of the ongoing document requests, appearing to take the position that the deposition witness must develop an intimate knowledge of 1.3 million pages of material—presumably so that he or she can respond in detail to any question referring to any of those documents. It should be remembered, however, that what is being undertaken here is a deposition—an oral examination of a witness seeking testimony [a] as to various practices of Sandoz and the existence or non-existence of information regarding AWP’s submitted to the reporting services, [b] whether that information differed from actual prices paid for the various products, [c] what contacts and communications Sandoz had with the reporting

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<sup>4</sup> The State also says it should be entitled to determine the order and timing of discovery on its own. It is true that § 804.01(4), *Stats.*, states, among other things, that “methods of discovery may be used in any sequence...,” but, as we all well know, the statutes also empower the courts to intervene in the process to prevent inequities and the imposition of undue burdens on the parties.

services with respect to the products, and [d] whether Sandoz ever informed them that the reported (and published) prices were not the actual transactional prices. Some of those topics may be suited to oral testimony, and some may not; and I agree with Sandoz that deposition testimony is not a substitute for, or the equivalent of, document production. I would assume, however, that in these depositions, as in all depositions, if the witness is unable to answer a question, or lacks specific knowledge of the particular bit of information being sought, all he or she need do is say so. And if the sought-after information is in the documents themselves, they, not the witness, would necessarily become the primary source of that information. Given the nature of depositions, I am unable to accept what I understand to be Sandoz's premise: that at least half a year will be necessary to prepare the witness—to familiarize him with over a million pages of material—in order that he may testify with respect to the six listed topics.

Sandoz also complains that the Notice of Deposition is overbroad—that it fails to state the topics with the “reasonable particularity” required by the code. It says that the topics are “vague, ambiguous, and unfairly purport to impose on Sandoz a burden to interpret at its own risk what information the plaintiff seeks.” [Reply Brief, at 13] Specifically, Sandoz states:

Topics 1 and 2 refer to prices paid by “retail pharmacies” and prices paid by just “pharmacies.” Topic No. 4 refers to “retail classes of trade.” By Plaintiff's use of these terms, it would appear to seek information as to certain types of Sandoz customers. But Plaintiff has provided no explanation... of what criteria should be used to determine whether a customer is a “retail pharmacy,” a “pharmacy,” or in the “retail classes of trade.”

In addition, all Topics are unduly burdensome and overly broad to the extent that plaintiff seeks designees to testify regarding all of the fifty-two different drug products it has identified as being relevant. .... The list of fifty-two products relates to over three hundred actual, priced inventory items of different package sizes. Thus even if Sandoz only sold these items to ten different customers, given that the Topics purport to reach back over a dozen years, these Topics require Sandoz to prepare its designee(s) to have some understanding of multiple thousands of transactions.

The State begins by pointing out that, in response to Sandoz's initial objections to the Notice, it provided a detailed description of the information it was seeking. In its Brief in these proceedings, the State contends that the topics it has proposed do not seek information that should take many months and the digestion of millions of pages of information, to enable the corporate-designee witness to testify:

Subject No. 1 seeks any evidence that is in Sandoz's possession that shows that retail pharmacies ever purchased its drugs for a price equal to or greater than Sandoz's published AWP. Documents produced by Sandoz, as well as the arguments Sandoz and the other defendants have raised in their ... motions to dismiss ... make clear that there is no such evidence. While there is likely to be a dispute over the legal significance of this fact, the State is entitled to establish this fact through the deposition testimony of a Sandoz corporate designee.

Subject No. 2 seeks information showing that the published AWP for Sandoz's drugs were higher than the prices that pharmacies were paying. Documents produced by Sandoz .... make clear that this, too, is a fact that Sandoz will not dispute. Again, although the parties may disagree over the import of this fact, the State is nevertheless entitled to establish it through deposition of a ... designee.

Subject No. 3 seeks information about Sandoz's contracts with ... (the pricing compendia). ... the State has described for Sandoz the types of information it seeks through this subject matter. Testimony on this subject will come from the person with responsibility for corresponding with the compendia.

Subject No. 4 seeks to determine whether Sandoz ever communicated with the compendia telling them that the AWP it was publishing for Sandoz were not the true prices. The person testifying about subject no. 3 will have this knowledge.

Subject Nos. 5 and 6 seek information regarding the Average Manufacturer's Prices ... reported by Sandoz to the federal government. Sandoz has already produced AMPs to the State. Review of the AMPs themselves is not required for a Sandoz designee to testify about how the AMPs are calculated and how Sandoz interprets the terms set forth in the statutory definition of AWP. [Brief, at 24.25]

Sandoz's argument that the terms "pharmacy," "retail pharmacies," and "retail classes of trade," are ambiguous and warrant nullifying the Notice of Deposition is not persuasive. The State points out, for example, that Sandoz's own discovery materials use the term "pharmacist," and Sandoz is, as the state notes, a sophisticated pharmaceutical

manufacturer. Additionally, the State says that it fully intends to ask the designee to explain Sandoz's understanding of these terms—and if the witness considers this, or any other, question to be unclear or ambiguous, he or she may seek clarification from the questioner.

I reach a similar conclusion with respect to Sandoz's arguments that the Notice is unduly burdensome because, by seeking information about fifty-two drugs, the State itself is requiring that the witness have knowledge of "multiple thousands of transactions." As the State has noted, in light of the position taken by Sandoz and the other defendants in this litigation that the AWP bears no relationship to actual market prices, it is difficult to see why every sales transaction for each of the drugs must be reviewed in detail in order to prepare the witness to testify on the noticed topics. Nor do I consider the fact that, with respect to its communications with the reporting services pricing compendia, because the two employees who were responsible for such communicators no longer work for Sandoz, the deposition is unduly burdensome and should be barred. Again, I agree with the State that, under § 804.05(2)(3), *Stats.*, corporate designees are to testify, not necessarily from personal knowledge, but "as to matters known or reasonably available to the organization." And I see no reason why—as the State suggests—the current Sandoz employee responsible for such communications cannot testify in that regard

Sandoz also argues that, because the explanatory letter the State sent to Sandoz's counsel following its initial objections to the deposition notice, contains, here and there, phrases such as "among other things," and "but not limited to," the notice does not, as a matter of law, set forth the topics with "reasonable particularity." *See*, for example, *Reed v. Bennett* 193 F.R.D. 689, 692 (D. Kan. 2000); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002), which have apparently held that the use of such qualifying phrases in a Notice of Deposition runs contrary to the "reasonable particularity" requirements of designee-deposition statutes. As the State points out, however, the references Sandoz has isolated and critiqued are not found in the Notice of Deposition (which was the subject matter of the cited cases) but in the letter the State sent

to Sandoz attempting to particularize the sought-after information after Sandoz had objected to the Notice as overbroad. And I take the State at its word that it does not intend to ask about subjects not set forth in the Notice. Certainly if, at any time during the deposition, Sandoz's counsel feels these boundaries are being transgressed, appropriate objection may be made.

Sandoz also contends that because one of the Topics in the Notice of Deposition describes the information being sought as “*evidence* or information .. about which it is aware....,” and another as “[a]ny *evidence* which shows....,” (emphasis added) the Notice is designed to (or may possibly) reach Sandoz's attorneys' privileged work product. The State explains that use of the term “evidence” in the Notice is an everyday matter—that it is a “common term used by lawyers to refer to documents, testimony or other factual information (which is subject to discovery).” I agree. And I agree also that, should it be that any question asked by the State appears to seek privileged information, the witness may properly be instructed not to answer.

Finally, Sandoz argues that, should the depositions proceed (as I herein rule they should), they should not be held in Wisconsin. Section 804.05(2), *Stats.*, provides that a corporate-designee witness may be compelled to give a deposition “at any place within 100 miles from the place where that party resides, is employed, *or transacts business*, or at such other place as is fixed by an order of the court...” It is undisputed that Sandoz does not have any sales or other personnel—or even a registered agent—located in Wisconsin, and is not registered to do business in the state. [Prybeck Affidavit, at 2-3]

In an earlier decision in this case,<sup>5</sup> I ruled that Defendant Merck & Co., which is located in Pennsylvania, could be required to produce a corporate-designee witness in Wisconsin under the provisions of § 804.05(2), *Stats.* Emphasizing that Merck maintained a permanent sales staff in Wisconsin, and noting also that it maintained a registered agent here, I concluded that that constituted a sufficient presence to invoke the “transact[ing] business in Wisconsin” provisions of the statute. Here, however, it is clear

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<sup>5</sup> Decision & Report, Defendant Merck's Motion for a Protective Order, April 27, 2006.

that Sandoz has no such presence,<sup>6</sup> and Sandoz contends that the earlier decision should not be considered binding on its situation.

The State, in its reply brief, does not respond to the argument.<sup>7</sup> As I indicated in the Merck decision, there is a dearth of case law on the point; and I have not been directed to any related decision suggesting that the mere fact that an out-of-state manufacturer's goods are sold at retail in Wisconsin—and no more—may be considered “transacting business” in the state so as to subject its officers and employees to examination in Wisconsin under the statute. I conclude, therefore, that it has not been established that Sandoz is transacting business in Wisconsin within the meaning of § 804.05(2).

### **CONCLUSION & ORDER**

For the reasons discussed above, I issue the following Order:

[1] Sandoz's Motion for a Protective Order is denied in all respects save one: Because the State has not persuaded me that Sandoz is transacting business in the state within the meaning of § 804.05(2), *Stats.*, I conclude that the corporate-designee deposition is not authorized to be held in Wisconsin.

[2] With that exception, the State's Motion to Compel is granted. Sandoz will be required to comply with the interrogatories and document requests previously

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<sup>6</sup> Indeed, the Prybeck affidavit notes that, in a period of two and one-half years, Sandoz representatives set foot in Wisconsin on only three occasions. [Id., at 3]

<sup>7</sup> Oddly, it is an argument the State encouraged Sandoz to make. In its Response Brief, The State comments on a footnote statement in Sandoz's opening brief suggesting that the Merck ruling may not apply to Sandoz and that, in any event, the location should not be determined at this time. The State's principal brief, responding to that suggestion, took the position that the issue should be decided in these proceedings, not deferred: “If Sandoz believes the (Merck) ruling is not applicable to it, the time to make that argument is now.” [Response Brief, at 13]. As indicated, Sandoz makes the argument in its Reply Brief, but the State, in its reply to that brief, does not discuss the issue.

served upon it, and the State may re-issue the corporate-designee deposition notice setting the deposition for a time at least 30 days from the date of this order.

Dated at Madison, Wisconsin, this 26th Day of July, 2006

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William Eich  
Special Discovery Master