

<p>STATE OF WISCONSIN,</p> <p>PLAINTIFF</p> <p>Vs.</p> <p>AMGEN, INC., ET AL,</p> <p>DEFENDANTS</p>	<p><u>DECISION & REPORT</u> <u>OF DISCOVERY MASTER:</u></p> <p><u>MOTION OF DEFENDANT TEVA</u> <u>PHARMACEUTICALS USA, INC.</u> <u>FOR A PROTECTIVE ORDER</u></p> <p><u>JUNE 6, 2006</u></p> <p>####</p> <p>CASE No. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003</p>
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Appearances

Atty. Charles Barnhill, Miner, Barnhill & Galland, Madison, for the plaintiff State of Wisconsin

Attys. T. Reed Stephens, Elizabeth I. Hack and Philip F. Ackerman, Sonnenschein Nath & Rosenthal, Washington D.C., and Atty. Lester Pines, Cullen Weston Pines & Bach, Madison, for defendant Teva Pharmaceuticals USA, Inc..

Introduction

The background of this litigation, and my appointment as Special Discovery Master, has been discussed in prior decisions on various motions filed by the parties. It need not be repeated here.

One of the defendants, Teva Pharmaceuticals, seeks a protective order adjourning the noticed deposition of a corporate representative "to a ... date which affords Teva a reasonable opportunity ... to prepare a representative deponent." Specifically, Teva's motion asserts that

... requiring a representative ... to testify ... before Teva has had the opportunity to complete a review of the documents that the Plaintiff has requested so that Teva can properly identify and prepare an

appropriate representative is prejudicial to Teva, unduly burdensome, highly inconvenient, and not in the interests of justice.¹

The action was commenced in June, 2004, naming 37 pharmaceutical manufacturers as defendants. Several defendants moved to dismiss the State's complaint on a variety of grounds. In decisions issued on April 3 and May 18, 2006, the Trial Court denied all motions save one: In the April 3 decision it granted the motion with respect to all claims based on fraud (specifically, Counts I, II and IV), concluding that the Complaint had failed to plead the fraud-based claims with the particularity required by § 802.03(2), *Stats.* The Court gave the State sixty days to re-plead or face dismissal of the affected counts. As indicated, all other motions were denied.²

The deposition notice at issue here was filed by the State on March 1, 2006. It requests Teva to designate a witness to testify concerning the following matters:

1. [E]vidence or information, if any, about which it is aware, which shows that any of the [16] drugs listed on the attached sheet ("targeted drugs") were purchased by retail pharmacies at a price equal to or greater than the current Average Wholesale Price (AWP) published in either First Data Bank or the Red Book in any year from 1993 to the present.
2. [E]vidence or information about which it is aware 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 in each year from 1993 to the present.
3. What contacts Teva, or its subsidiaries, have had with First Data Bank or the Red Book about any of the targeted drugs.
4. Whether Teva, or any of its subsidiaries ever communicated to either First Data Bank or the Red Book that the published Average

¹ Teva also requests that the deposition be held at a place other than the noticed location, Madison, Wisconsin—specifically at a "location consistent with § 804.05(3)(b)(1), *Stats.* I have, in an earlier ruling, overruled a similar objection raised by another party in these proceedings. I have been informed that the Trial Court has sustained that ruling. It follows that Teva's claim in this regard need not be considered further.

² In deciding several statute-of-limitations arguments, the Court did rule in the May 18 decision that any claims based on § 100.18, *Stats.*, accruing prior to June 16, 2001, were barred.

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 since 1993.

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.³

Discussion

Teva asserts generally that because it has not been a participant in earlier related federal and state actions, it is "starting from scratch" and needs more time to gather its own information and prepare its representative witness. It states, equally generally, that:

... to prepare adequately one or more representative deponents just for Plaintiff's first topic ... would require not only a complete review of approximately 180,000 documents already gathered, but also a review of 13 years of business records and interviews of Teva current and former employees whose tenure intersected the proposed 13 year time period to identify such specific evidence.

And it assigns the following purpose to the State's deposition:

Plainly, [the State's] purpose in demanding a representative deponent at this very early stage in the proceedings is to attempt to rush Teva into submitting a deponent for sworn testimony, who, on the basis of rushed and incomplete preparation, might make potentially ill-informed, erroneous statements that Wisconsin would attempt to treat as admissions on behalf of Teva on a wide-ranging array of vague topics. This risk is particularly great where, as here, Teva has not had an opportunity to fully gather, digest, and analyze its own information, and to responsibly prepare a representative deponent. This result would be highly prejudicial to Teva under the circumstances....

³ The Notice also required Teva to bring to the deposition documents responsive to the six categories.

Teva offers no evidence in support of the assertion.

In apparent support of its argument that it has been diligently preparing to respond to various discovery requests since these proceedings were instituted, Teva has submitted the affidavit of its Legal Affairs Manager stating that, in June, 2005, the company began gathering documents it considered “potentially responsive” to the State’s discovery and document requests—eventually identifying approximately 185,000 documents and hiring a consultant to scan the documents and prepare a database. The affidavit also states that all such work was completed in December, 2005. Teva does not indicate, however, what has—or has not—occurred in this regard in the intervening six months; and, as indicated, its objections are highly generalized and, in some respects speculative (*e.g.*, its concern that the witness “might make” statements that could be “potentially” erroneous).

The State’s response, while similarly general in nature, makes the following points. With respect to the first topic, it states that the information it has to date suggests that Teva has no evidence that its drugs were purchased at a price even approaching the AWP, and it says that if this is so, all the witness need do is say so—and, if it isn’t, Teva “is free to testify otherwise.” As for the other topics, the State responds as follows:

Request No. 2 asks for any information ... that retailers were paying less than the published AWP for its drugs. This is the kind of evidence that a company secures by asking employees whose job it is to keep track of prices. It would be surprising if defendant had to comb through 186,000 documents to collect this information. Even if this were the case, we assume one purpose of all the scanning done by Teva was to put it into a position of being able to respond to plaintiff’s discovery rather expeditiously.

Request No. 3 asks for the prices Teva reported to the medical compendiums. This testimony will come from whoever’s job it is to correspond with the compendiums, and the documents relating to it should be in that person’s correspondence file.

Request No. 4 asks for testimony about whether Teva ever communicated with the compendiums ... The person testifying on request number 3 should have this knowledge.

Request No. 5 asks for defendant's AMPs ... and how they were calculated. Since the AMPs have to be reported to the Federal government quarterly, Teva ought to be able to produce them with a push of a button. And surely it should not take long to find a person who knows how these AMPs are calculated.

Request No. 6, seeing evidence that the [AWP] for Teva's drugs exceeded its AMPs, could conceivably require more time for Teva to identify a witness and assemble the required data; but Teva has made no showing that it could not do this in the time it was allotted.

Under § 804.01(3)(a), *Stats.*, a protective order may be issued “for good cause shown” (and where “justice requires”) in order to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense...” What Teva asks in this case is to postpone any representative deposition for an unstated period of time in order to give it ample opportunity to gather and review documents in its possession that are being sought by the state in other discovery efforts, and until it has had the opportunity to “identify and prepare an appropriate representative” to be deposed. As indicated above, the primary basis for such an order, according to Teva, is the mass of 185,000 documents in its company files—documents it concedes were identified, scanned and collected into a computer database at least six months ago. Beyond that, it posits that it needs an undefined period of time in which to prepare its witness in order to avoid the “potential” that he or she “might” testify erroneously on some points due to lack of adequate preparation. Considering those contentions light of the State's response and the record before me, I conclude that Teva has not shown good cause for issuance of the order it seeks.

Finally, the parties make passing reference in their submissions to the need to await amendment of the complaint in light of the Trial Court's March and May decisions—particularly with respect to its direction that the State's fraud-based claims contained in Counts I, II and IV of its Amended Complaint, must be re-pled with the

required specificity. I indicated in my May 31, 2006, Decision and Report with respect to the Motion of Mylan Pharmaceuticals, Inc. for a protective order, that the defendant's representative deposition should be postponed until a date "after the State has complied with the Trial Court's order granting leave to amend its complaint." For the reasons stated in that decision, I believe the same should be true here. Thus, while, as I have concluded, Teva is not entitled to a protective order postponing the representative deposition until such (unstated) time as it determines that its witnesses is fully prepared, it is entitled to a postponement of the deposition on the same terms as set forth in the Mylan decision.⁴

Conclusion

For the reasons stated, Teva's Motion for a Protective Order indefinitely postponing the representative deposition notice by the State on March 1, 2006, is denied. Consistent with my decision of May 31, 2006, on Defendant Mylan's Motion for a Protective Order, however, the deposition will be stayed until a time after the State has amended the fraud-based claims in its complaint.

Dated at Madison, Wisconsin, this 6th day of June, 2006.

A handwritten signature in black ink, appearing to read "William Eich", written over a horizontal line.

William Eich

Special Discovery Master

⁴ In the concluding pages of its reply memorandum, Teva briefly raises matters pertaining to related documents in these proceedings, claiming that the State has named sixteen, rather than the specified number of fifteen, drugs as "targets," and that some of the drugs on the list are incorrectly named. These seem to me to be matters for the parties' own resolution and need not be discussed here.