

STATE OF WISCONSIN,  
  
 PLAINTIFF,  
  
 Vs.  
  
 ABBOTT LABORATORIES, *ET AL.*,  
  
 DEFENDANTS

**DECISION OF THE SPECIAL  
 DISCOVERY MASTER ON PFIZER’S  
 MOTION FOR PROTECTIVE ORDER  
 JUNE 19, 2007**

CASE NO. 04-CV-1709  
 UNCLASSIFIED-CIVIL: 30703

**Appearances**

For the State: Attys. Jeffrey Archibald and Elizabeth Eberle  
 For Defendant: Attys. Beth J. Kushner and Jamie McColl

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**Background: The Parties’ Positions**

Pfizer, Inc., one of the defendants in this antitrust action by the State of Wisconsin against several pharmaceutical manufacturers, has moved for an order quashing a Notice of Deposition issued by the State requiring Pfizer to designate a corporate representative to testify on eighteen separate subjects—relating to the relationship between Pfizer and one of its wholly-owned subsidiaries, Pharmacia.

In its motion papers, Pfizer asserts first that it acquired Pharmacia in April, 2003—very late in the relevant time period for discovery in this action, which it states is January 1, 1993, to June 3, 2004, the date on which the complaint was filed in this action.<sup>1</sup> It says that, as a result, “Pfizer and Pharmacia were completely unrelated and

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<sup>1</sup> The State disagrees with Pfizer’s position on relevant discovery dates, asserting that the relevant time period extends at least to the present—citing as authority an observation in Judge Niess’s May 20, 2008, decision denying the State’s Motion for Summary Judgment where Judge Niess, considering whether the State had shown a *prima facie* case for summary judgment, stated at one point: “The misrepresented WACs and AWP’s caused the third parties to publish artificially high drug prices which, in turn, caused, *and still causes*, the Wisconsin Medicaid program to overpay for defendants’ drugs. [Decision, at 4, Emphasis added] As may be seen, this dispute does not affect my decision on the instant motion. While, without

district companies for 10 years of the 11 year period,” and it notes that “[e]ven after the merger, Pharmacia has maintained its own corporate identity as a subsidiary of Pfizer.” [Brief, at 3] Thus, says Pfizer, the State is requesting information from the wrong party. It says, too, that the State is “using the wrong discovery method,” in that its deposition request would place upon Pfizer “the burden and expense of educating witnesses on these issues and requiring them to travel to Wisconsin to take a memory test under oath about eighteen subject matters that relate to another company and cover a 10 year period of time...” [Id., at 3-4] And it argues that this constitutes the type of “undue burden” under § 804.01(3)(a), *Stats.*, that would authorize a court to enter a protective order.

In its response to the Motion, the State acknowledges that the deposition was noticed in furtherance of its intention to try the Pfizer and Pharmacia cases together. The State also points to the deposition of at least one Pfizer corporate designee that Pharmacia ceased to exist upon its acquisition by Pfizer. With respect to Pfizer’s argument that it is pursuing the wrong company, the State asserts that only five of the eighteen inquiries deal exclusively with Pharmacia, and that “if Pfizer does not, in fact, have information regarding those topics, it need only state so,” in light of the language of § 804.05(2)(e), *Stats.*, which states that corporate designees need testify only “as to matters *known or reasonably available* to the organization.”<sup>2</sup> [Brief, at 4; emphasis the State’s] The State points to this language as assuming that corporate designees will necessarily need to be “educated” in order to testify as to matters “known or reasonably available” to the corporation. Beyond that, the State argues that Pfizer has not put forth any evidence of expenses or other “burdens” that would permit the court to “weigh the burden and expense of the discovery against the value of the information sought”—as Pfizer

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more, I do not consider Judge’s Niess’s apparently offhand remark to constitute a judicial determination with respect to the outer boundaries of the relevant discovery period, it also seems to me that if, at some future time, liability is found on the part of one or more defendants, the damages recoverable might well extend to all times in which the conduct found to support liability may be shown to have continued. And I have not been informed in the instant proceedings that any specific end-date for discovery has been ordered, agreed to or otherwise determined. Whatever the case, because I grant Pfizer’s motion on grounds that the noticed deposition is premature and not directed toward the discovery of evidence that is relevant to the action at this stage of the proceedings, I need not consider the parties’ “end-date” arguments at this time.

<sup>2</sup> If, on the other hand, says the State, Pharmacia has truly been disbanded, and is wholly controlled by Pfizer (which control it says it has evidence of), “Pfizer will have the necessary information...” [Brief, at 4]

acknowledges in its brief is the appropriate methodology on such motions. *See, Vincent & Vincent, Inc. v. Spacek*, 102 Wis.2d 266, 272 (Ct. App. 1981).

At oral argument, Counsel for Pfizer, stressing that the various subjects noticed by the state go not to the merits of the action, but rather to the limited issue of trial consolidation, points out that the time deadline for consolidation set by the trial court has passed, and that, as a result, if the State seeks consolidation (and related discovery), it will have to first obtain relief from the trial court, and that, as so framed, the issue is not one for the discovery master at this stage of the proceedings.

Subsequent to the oral arguments, I received letter briefs on what Pfizer characterized as a “newly-raised issue;” namely, the State’s assertion that deposing a Pfizer designee about the history and operations of Pharmacia was directed towards “piercing the corporate veil,” which, according to the State, is appropriate in this case because the State is seeking injunctive relief with respect to the alleged improper price reporting activities of the several defendants. And Pfizer argues that that theory is inapplicable because Pharmacia, not having been acquired by Pfizer until 2003, “was a completely separate company for 10 of the 11 years at issue,” and could not reasonably be expected to have controlled it during that period. [Letter Brief, at 1]

Responding to all this, the State repeats its assertion that at least one Pfizer designee has testified that Pharmacia was “totally disbanded” upon its acquisition by Pfizer, and that such “domination” is one of the factors considered in determining whether a corporate veil should be “pierced” in any given instance. With respect to the years prior to the merger, the State says that it is entitled to testimony from the parent company of a “disbanded company” because “there is no one else to answer the State’s questions,” repeating its earlier assertion that, if the sought-after information “is *not* reasonably available [to Pfizer], it [Pfizer] has no such obligation.”<sup>3</sup> [Letter Brief, at 2]

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<sup>3</sup> The state also notes that “[t]estimony from the [Pfizer] designee ... that the requested information ... is not reasonably available, coupled with existing testimony from Pharmacia designees that they have no such information, will preclude introduction of evidence at trial contrary to the State’s evidence on the subject.

## Discussion

As indicated, the State acknowledges that the purpose of its deposition notice is to gather evidence relevant to its desire to consolidate the Pfizer and Pharmacia actions and try them together. The State acknowledged in its initial memorandum opposing Pfizer's motion that it had "noticed the deposition *in furtherance of its intention to bring Pfizer and Pharmacia to trial together.*"<sup>4</sup> [Brief, at 1; emphasis added] And it went on to emphasize that it noticed the deposition "on the same date that [it] notified the Court in its proposed trial plan that it intended to try Pfizer and ... Pharmacia together." [*Id.*] It is plain, then, that the purpose of the deposition is to gather evidence supporting the State's request to try together—to consolidate its actions against these two defendants.

The trial court has previously determined that the several "Amgen" cases will be tried separately, stating in its Order Provisionally Granting Defendants Separate Trials that "each defendant will be accorded a separate trial on Plaintiff's claims against it." [Order, at 4] The court went on to set forth a procedure to govern requests for consolidation—a procedure requiring the filing of a motion addressing specific enumerated issues. The court concluded: "Absent such a motion, the case will be tried against each defendant in separate trials." [*Id.*, at 5] Later, in its Scheduling Order, the court expressly directed the State to "move to consolidate the defendants it wishes to try together ... no later than February 2, 2008." [Scheduling Order, ¶ 4] The State did not file a consolidation motion; although, as indicated, on February 1, 2008, it did submit a "trial plan" to the court, indicating its intent to try Pfizer and Pharmacia together. As Pfizer points, out, however, the trial plan was not in the form of a motion, and did not address the issues specified in the consolidation procedures set forth in the trial court's "separate trials" order.

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Thus testimony from a corporate designee that such information is *not* reasonably available is also valuable to the State and prevents [it] from being sandbagged at trial." [Letter Brief, at 2]

<sup>4</sup> Later in the State's brief is the heading "THE DEPOSITION NOTICE SEEKS INFORAMTION REGARDING THE RELATION BETWEEN APRIZER AND PHARMACIA IN RESPONSE TO PFIZER'S MOTION FOR SEPARATE TRIALS." [Brief, at 2]

I must thus agree with Pfizer that, in terms of discovery, the State’s deposition notice—concededly issued to seek evidence relevant to the consolidation of its claims against Pfizer and Pharmacia—is premature because: [a] the trial court has ordered separate trials and has set forth specific deadlines and specific procedures to be followed by the State should it desire to seek consolidation; [b] it does not appear that the State has followed those procedures or met those deadlines; and, [c] even if the State’s trial plan could be considered a consolidation motion, and that it has been properly filed in light of the requirements stated in the court’s “separate trials” order, the trial court has yet to rule on the request, or otherwise indicate any departure from its order directing separate trials. On this record, absent such a ruling or determination by the court, I consider the State’s Notice of Deposition, limited as it is to “consolidation” issues, to be beyond the scope of discovery allowed by § 804.01(2)(a), *Stats.*, which limits discovery to matters “relevant to the subject matter involved in the action.” Until permission issues from the trial court, consolidation is a non-issue; and, as a result, discovery directed to consolidation issues does not appear to me to be, in the words of the statute, relevant to the subject matter involved in the action—as that action presently sits.

Because I so conclude, I do not reach the other issues argued by the parties.

### **Conclusion**

For the reasons stated above, I grant Pfizer’s motion to quash the Notice of Deposition dated February 1, 2008.

Dated at Madison, Wisconsin, this 19<sup>th</sup> day of June, 2008.

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William Eich  
Special Discovery Master