

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

---

STATE OF WISCONSIN,

)

Plaintiff,

)

)

v.

)

)

ABBOTT LABORATORIES, ET AL.,

)

)

Defendants.

)

)

Case No.: 04 CV 1709

---

**DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S RENEWED MOTION IN  
FAVOR OF SHARING DISCOVERY WITH OTHER STATES**

---

On November 29, 2005, Judge Krueger issued an order, after full briefing and argument, denying the State of Wisconsin's motion to be permitted unilaterally to provide confidential discovery materials produced by defendants in this case to the Attorneys General of *other* states with similar pharmaceutical pricing lawsuits or investigations. In a motion titled "The Reasons in Favor of Sharing Discovery with Other States" (hereinafter "Renewed Sharing Motion"), the State (sometimes hereinafter referred to as "Plaintiff") now asks the Court to overturn this previous final ruling by Judge Krueger, and to issue a new order that permits the State to give defendants' confidential documents to any other governmental entity outside of Wisconsin that has filed a similar lawsuit, without the defendants' consent. For the reasons stated below, the Court should again reject this motion, which is in substance simply a motion for reconsideration of Judge Krueger's previous order.

## I. INTRODUCTION

Defendants have collectively produced voluminous data and millions of pages of documents in this case. Many of these documents and data contain confidential or commercially sensitive information, including competitive pricing information concerning the specific drugs at issue in this case. This discovery was produced pursuant to a Protective Order, entered by Judge Krueger, which dictates the terms of how all parties shall deal with proprietary or commercially sensitive information, trade secrets, pricing information, or other information that should be subject to confidential treatment. *See* Protective Order entered on May 11, 2005 and finalized on November 29, 2005 (Ex. 1 hereto), at ¶¶3-8.

The State's lawyers here are also representing a number of other states in "AWP" pharmaceutical pricing cases that are similar, but not identical, to this litigation. In 2005, they asked Judge Krueger to modify the Protective Order in order to permit the State unilaterally to "share" confidential discovery materials produced in this case with other states litigating or investigating AWP cases. That request was denied in a well-reasoned opinion, and discovery has proceeded in this case and in others.

Plaintiff now wants this Court to reconsider Judge Krueger's prior ruling, but it does not satisfy the standard for a motion for reconsideration. Judge Krueger's decision is just as right today as it was when she issued it. Plaintiff also argues that the "landscape has changed" so that this Court, for new reasons, should now allow it unilaterally to share defendants' confidential documents with other non-Wisconsin entities under this Court's supervision. But most of the Plaintiff's supposedly new arguments for such unilateral "sharing" are not new at all, and the others are not persuasive. This Court should not modify the Protective Order.

## II. PLAINTIFF HAS NOT MET THE HIGH STANDARD FOR THE COURT TO GRANT A MOTION FOR RECONSIDERATION

With its Renewed Sharing Motion, Plaintiff now asks this Court to reconsider a previously-decided final order. This motion should be denied outright because Plaintiff does not meet the high standard necessary for a Wisconsin court to reconsider a final order. The Plaintiff must show that when Judge Krueger denied its original “sharing” request, she erroneously exercised her discretion. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis. 2d 297, 403-04 (Wis. Ct. App. 2004) (“We review a trial court's decision on a motion for reconsideration under the erroneous exercise of discretion standard.”); *State v. Alonzo R. (In re Wala P.)*, 230 Wis. 2d 17, 21 (Wis. Ct. App. 1999) (In reviewing an order denying a motion for reconsideration, we apply the same erroneous exercise of discretion rubric as we do in reviewing an order denying the underlying motion).

Plaintiff cannot come close to making this showing. During an exhaustive briefing and argument of the issues in 2005, Plaintiff fully advocated the reasons why it thought it should be allowed unilaterally to share defendants’ confidential documents with other governmental entities outside of this litigation -- and the defendants pointed out the many reasons why such unilateral sharing with non-parties should not be allowed. Afterward, Judge Krueger issued a thoughtful opinion denying the Plaintiff’s request and holding that the previously-entered Protective Order (without “sharing” provision) would remain the governing Protective Order in the case. *See* Exhibit 2 hereto. In her opinion, Judge Krueger articulated multiple reasons why the Plaintiff’s “sharing” request should be denied, including that:

- (1) There is no dispute that the litigation involves confidential documents and data;

(2) Most Courts presiding over “AWP” litigation that had previously considered state “sharing” requests like Wisconsin’s had rejected them;<sup>1</sup>

(3) A court in Wisconsin cannot effectively monitor and enforce compliance, by multiple governmental entities *outside* of the State of Wisconsin, with a Protective Order entered by a Wisconsin state court;

(4) An order that allows extra-territorial “sharing” by the Plaintiff could turn the Wisconsin Court into a nationwide discovery clearinghouse and thereby place an undue burden on the Wisconsin Court; and

(5) Such extra-state dissemination of confidential documents is “well-beyond the proper purposes of discovery” and “does nothing to promote resolution of *this* case.”

Judge Krueger’s opinion is clearly a “reasoned application of proper principles of law to the facts of the case,” *In re Wala P.*, 230 Wis. 2d at 21, and the Plaintiff does not even *attempt* in its Renewed Sharing Motion to show that she erroneously exercised her discretion by denying its original motion. For this reason alone, Plaintiff’s Renewed Sharing Motion should be denied.

In fact, in addition to the reasons set forth by Judge Krueger in her opinion, there are many more good reasons to deny the Plaintiff’s request unilaterally to share defendants’

---

<sup>1</sup> When Judge Krueger issued her opinion, such requests had been rejected by courts in New York, Connecticut, Minnesota and West Virginia. *See Defendants’ Memorandum of Law in Support of Their Joint Motion to Enter The Temporary Qualified Protective Order As Final* (June 3, 2005). Since that time, the Court presiding over AWP litigation in Kentucky also rejected that state’s request to be permitted to share defendants’ confidential documents with other states. *See* Qualified Protective Order entered in *Commonwealth of Kentucky v. Alpharma, Inc., et al*, No. 04-CI-1487 on November 30, 2006 (Ex. 3). Courts in Illinois and Alabama have recently entered Protective Orders that allow for limited sharing under certain conditions, with notice to the defendants and subject to an objections process.

confidential documents with non-Wisconsin governmental entities -- all of which this Court should consider in determining whether Judge Krueger erroneously exercised her discretion when she denied the request before. They include:

(1) Other states and governmental entities that have filed AWP litigation are perfectly capable of obtaining the discovery they need from the defendants (including the defendants' confidential documents) through the use of discovery processes that exist in their own litigation;

(2) As compared to the Wisconsin lawsuit, many of the AWP lawsuits filed by the seventeen other states, the Department of Justice and the approximately fifty New York Counties differ in significant ways -- including with respect to the identity of the defendants, the drugs at issue and the legal claims pled. There is not a single defendant here that is also a defendant in all of these other lawsuits. Even for the defendants that are also named in several of the other lawsuits, the claims at issue and the drugs at issue are often significantly different. For many defendants, there are documents that will be produced in the Wisconsin case that are not relevant in any way to the claims asserted by non-Wisconsin entities, and *vice versa*;

(3) The defendants should have the ability to maintain control of the production of their confidential documents and to ensure -- through litigation or discovery agreements in each lawsuit -- that (a) only documents relevant to each case are produced in each case; (b) the defendant knows exactly what confidential documents have been produced to what litigants; and (c) the defendants' documents' confidentiality will be adequately protected by an Order entered in a state that clearly has jurisdiction over the litigants. Seventeen states, the federal government and some fifty New York Counties are a lot of litigants. Giving the Plaintiff here the ability unilaterally to "share" defendants' sensitive documents with this many entities, under the

protection of a Wisconsin state court Protective Order, will create an unnecessary risk that confidential materials will be disseminated outside of the litigation, even if inadvertently;

(4) States (and other governmental entities) may be able to circumvent discovery limitations issued by the courts in their jurisdictions if Plaintiff here is allowed unilaterally to share, with them, the confidential documents it obtains here. For example, Wisconsin may have broader claims against a particular defendant (involving more drugs, a longer time-frame or a broader state-specific statute) than another state and may obtain discovery here that includes confidential documents related to those broad claims. If Wisconsin is permitted unilaterally to share those documents with another state that has narrower claims against that defendant, then that other state could obtain confidential documents through the “back door” of a “sharing” request to Wisconsin, including documents which the Court in the other state’s *own case* had already found or would find to be undiscoverable in the other state’s case. Even if there is a procedure established that allows for objections to such a sharing request in Wisconsin, the Wisconsin Court would get dragged into discovery issues that should be decided by another state court.

In short, the Plaintiff State of Wisconsin has not made the showing required to overturn Judge Krueger’s order, nor can it do so.

### **III. THE “LANDSCAPE” HAS NOT CHANGED IN ANY WAY THAT MAKES A UNILATERAL “SHARING” PROVISION APPROPRIATE**

Plaintiff now asserts that the “landscape” of the AWP litigation has changed drastically since November of 2005, and that the changes necessitate a modification of the Protective Order. In fact, however, several of the Plaintiff’s asserted “landscape changes” are merely restatements of arguments previously made to Judge Krueger, and the rest do not justify a different result.

Specifically, the Plaintiff now says that (1) it has narrowed its sharing request so that it is more manageable, (2) it has established a multi-state legal team comprised of non-party attorneys that will allow it to become “a more efficient litigator,” and a sharing order here will help that effort (3) several defendants have recently entered what the State calls (inaccurately) “sharing” stipulations (4) Plaintiff’s attorneys will turn their attention to other states, and be unable to give Wisconsin effective representation, if a sharing provision is not entered here, (5) defendants have misused the prohibition on sharing, and (6) state law enforcement officials should not be deprived of the “longstanding practice” of sharing work and documents with other state litigants outside of Wisconsin.

The Plaintiff’s second, fourth and sixth points are not new arguments at all, but were asserted in similar form before, to no avail. Plaintiff’s second argument in favor of a Wisconsin “sharing” provision -- that it will become “a more efficient litigator” if it is allowed to share defendants’ confidential documents with its national coalition of similarly situated plaintiffs and attorneys -- is no different in substance from an argument in favor of sharing that it made before. But, as Judge Kruger pointed out in her prior opinion, the Plaintiff’s “sharing” plan -- which would require the Court in Wisconsin to monitor the confidentiality of documents dispersed all over the country -- would not likely advance *this* case and would certainly *not* increase “judicial” efficiency; rather, it would increase the burdens on this Court.

The Plaintiff’s fourth argument -- that if the Court does not allow sharing here, plaintiff’s counsel will “necessarily focus their discovery” in states that do allow sharing -- is just another way of asserting the old argument (rejected by Judge Krueger) that the Wisconsin case will somehow suffer if the Plaintiff cannot share documents it obtains through Wisconsin’s discovery

rules with other litigating governmental entities. In fact, the notion that Wisconsin's discovery rules do not provide the necessary tools for the State of Wisconsin to get the discovery it needs here is preposterous. Moreover, even if it were true, as the Plaintiff suggests, that Wisconsin can do better if it obtains defendants' confidential documents through the "back door" of another state court order that does allow sharing, then the Plaintiff really does not need a "sharing" order here too. At any rate, the State's counsel cannot ethically be suggesting that they will place the interests of the large "enforcement group" (a group, it should be noted, that includes multiple states represented by the same outside counsel retained by Wisconsin) ahead of the interests of Wisconsin by "changing the discovery focus" away from Wisconsin in a way that would prejudice their client here -- so such a suggestion should have no bearing on this Court's consideration of the Renewed Sharing Motion.

The Plaintiff's sixth argument is that "sharing work and documents among the State law enforcement officials is a longstanding practice" that the Court should not reject. This argument has no greater force today than it did in 2005 when it was rejected by Judge Krueger. When the State files a civil lawsuit, as it has done here, it is not exempt from the civil rules governing the handling of confidential discovery documents. It is not traditionally the province of the Wisconsin courts to monitor and enforce confidentiality orders outside of its borders, and the Court's resources should be devoted to presiding over the litigation of the Wisconsin case before it.

The Plaintiff's first, third and fifth arguments in support of its Renewed Motion for Sharing, though not previously considered by Judge Krueger, should not change the result. First, Plaintiff argues that it should now be allowed to share documents because it has reduced the

scope of its sharing request from all states who were either litigating *or investigating* AWP cases to just the seventeen states, one federal government agency and fifty New York counties which are currently litigating such cases. But this supposed reduction in scope still does not solve the problems created by allowing the Plaintiff unilaterally to share each defendants' documents with these other entities. Plaintiff is still seeking to share defendants' confidential documents with some sixty-eight other entities -- which is not a small number of out-of-state litigants. Plaintiff is still asking this Court to enforce the confidentiality provisions of a Wisconsin protective order against all sixty-eight of these out-of-state litigants. Plaintiff's renewed "sharing" request does not alter the fact that not all of the other governmental litigants have sued all of the defendants here, so granting its request would still permit Plaintiff unilaterally to share each individual defendant's documents with some non-Wisconsin litigants that have *not sued* that particular defendant. In addition, even for Wisconsin defendants who *have* been sued in other states, Plaintiff's supposed narrowing of its request does not change the fact that Plaintiff is still seeking permission to share that defendant's confidential documents with non-Wisconsin litigants that are pursuing different claims, in many cases with respect to different drugs. As discussed above, unilateral sharing should not be allowed under these circumstances.

Plaintiff's third argument in favor of sharing is extremely misleading and, in fact, demonstrates why a court-ordered sharing provision is not needed here. Plaintiff contends that "at least five defendants have now concluded that sharing is in their interests." That is simply not the case. The named defendants concluded that it made sense to engage in negotiations, separately, with *just* the States that had sued *that defendant* to see if there were core documents

that each particular defendant could agree to produce *itself* to those selected States.<sup>2</sup> Such agreements do *not* allow any State to unilaterally to share that defendant's documents with any other litigating governmental entity at the state's pleasure. It is disconcerting that the Plaintiff here has chosen to use these sensible, negotiated agreements -- under which the defendants have control over the production of their own documents -- to support a request for a broad unilateral sharing provision that the Plaintiff well-knows these defendants oppose.

It is also important to note that the Stipulation negotiated by SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK") that is attached to the State's Renewed Sharing Motion also provides a mechanism for the multi-state production of GSK's confidential documents by GSK (not the sharing of those documents by any state) in a way that does *not* require any one State court (*e.g.* the Wisconsin Court) to ensure that the documents are treated confidentially. Instead, the Stipulation explicitly states that documents designated as confidential that are part of the "Core Documents" produced will be governed by the Protective Orders entered *in each individual action* -- thereby relieving any one Court of the obligation to enforce a confidentiality order outside of its own borders. *See* GSK Stipulation at ¶¶ 4-5 (attached as Exhibit B to the State's Renewed Sharing Motion). The fact that these kinds of tailored stipulations can be and have been negotiated between the Plaintiff (and other states) and individual defendants demonstrates that a blanket provision that allows the Plaintiff to share all

---

<sup>2</sup> As Plaintiff notes, GSK, Pfizer/Pharmacia, Sandoz and AstraZeneca have entered into such stipulations. In addition, other defendants, including, for example Novartis, are in the process of negotiating similar, tailored, individual multi-state discovery stipulations.

of the defendants' confidential documents unilaterally is *not* necessary. The parties can work out sensible discovery stipulations themselves.<sup>3</sup>

Plaintiff's sole remaining argument that unilateral sharing should be allowed here is that defendants have cross-noticed certain depositions of third-parties or defendants' representatives in multiple cases, without first producing defendants' confidential documents to each litigant that is subject to the cross-notice. But the issues raised by whether many of these depositions were properly cross-noticed have nothing to do with whether defendants' confidential documents should be subject to unilateral sharing. Many of the cross-noticed depositions were depositions of government officials that were taken to demonstrate their knowledge of the AWP system. Defendants' confidential documents were not relevant to these depositions, so whether such documents were "shared" or otherwise produced prior to these depositions is irrelevant. And with respect to the depositions of defendants' representatives, the "core document" discovery stipulations already separately negotiated between Plaintiff and some defendants demonstrate that there are far simpler ways than a court-ordered blanket sharing provision to ensure that the Plaintiff has obtained sufficient documents from a particular defendant to be able to participate meaningfully in such cross-noticed depositions. Indeed, the fact that the State is willing to agree to such cross-noticing as part of such tailored document discovery stipulations proves the point.

---

<sup>3</sup> It is also noteworthy that all states that signed the GSK stipulation, including Wisconsin, agreed to cross-notice key GSK depositions so that GSK's Rule 30(b)(6) witnesses would not have to be deposed multiple times.

#### IV. CONCLUSION

For all of the reasons set forth above, this Court should not reverse the well-reasoned decision of Judge Krueger, as the Plaintiff now requests, by adding provisions to the Protective Order governing confidential documents that would allow the Plaintiff unilaterally to share the defendants' confidential documents with seventeen other states, the federal government and some 50 New York Counties.

Dated: June 25, 2007

Respectfully submitted,

By:

  
Daniel W. Hildebrand  
Jon P. Axelrod (Bar # 1012131)  
DEWITT ROSS & STEVENS, S.C.  
2 East Mifflin Street, Suite 600  
Madison, WI 53703  
Tele: (608) 255-8891  
Fax: (608) 252-9243

Frederick G. Herold  
DECHERT, LLP  
2440 El Camono Real, Suite 700  
Mountain View, CA 94040-1499  
Tele: (650) 813-4800  
Fax: (650) 813-4848

Thomas H. Lee, II  
Michael J. Newman  
DECHERT LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104

Mark H. Lynch  
COVINGTON & BURLING  
1201 Pennsylvania Avenue, N.W.

P.O. Box 7566  
Washington, D.C. 20044-7566  
Tele: (202) 662-6000  
Fax: (202) 662-6291

*Counsel for Defendant SmithKline Beecham Corporation,  
d/b/a GlaxoSmithKline*

*On Behalf of All Defendants*