

specified, but asked the Plaintiff's counsel to take the deposition in Philadelphia, Pennsylvania, near the witness's place of business. Plaintiff's counsel refused to consider any location other than Madison, Wisconsin, and insisted that Merck seek a protective order prior to the Notice date if it did not agree to the location specified. (Crooks Aff. ¶¶4-5 & Ex. B.)

By letter dated April 19 Merck asked Discovery Master Eich to resolve the dispute by teleconference. Plaintiff agreed to this method of proceeding by a letter dated April 20. Judge Eich set a telephonic hearing for April 25. (Crooks Aff. ¶¶6-7 & Exs. C, D.)

On April 24, Merck submitted a letter brief to Judge Eich requesting a protective order changing the place of the deposition from Madison, Wisconsin to Philadelphia, Pennsylvania. (Crooks Aff. Ex. E.) On April 25, Plaintiff submitted its letter brief ("Pl.'s Letter Brief"). (Crooks Aff. Ex. F.) On the same day, Plaintiff also served a subpoena for deposition and documents on CT Corporation, Merck's registered corporate agent for service of process in Wisconsin. *Id.* The subpoena document request was substantially identical to the one in Plaintiff's March 24 notice, only specifying the date of deposition as May 15.²

Merck's motion was argued on April 25. On April 27, Judge Eich issued the Master's Report, denying Merck's motion on the basis of a construction of the relevant Wisconsin statute that Merck believes to have been erroneous. (Master's Report, at 6; Crooks Aff. Ex. H.)

This appeal presents an issue of statutory construction, subject to *de novo* review, on a question of considerable significance to Merck and the other defendants in this case, indeed, to any corporation transacting business in Wisconsin. No reported Wisconsin decision has construed the deposition statute in question, and the analogous federal court authority is entirely to the contrary.

² After the Master's Report was issued, Plaintiff and Merck agreed to adjourn the date of the deposition to June 20, 2006. (Crooks Aff. ¶11.)

The Discovery Master's ruling that Merck may be compelled to produce corporate designees for deposition in Wisconsin under Wis. Stat. § 804.05 is contrary to established law, plausible statutory construction, and good policy, and should be reversed. Merck also seeks to quash the Plaintiff's belated subpoena of its designee, as ineffectively served under the relevant provisions of Sections 804.05, 805.07, 885.03, and 801.11 of the Wisconsin Statutes.

II. WISCONSIN HAS PROVIDED BY STATUTE THAT DEPOSITIONS OF CORPORATE DESIGNEES ARE TO BE TAKEN AT OR NEAR THE WITNESS'S PLACE OF BUSINESS

Judge Eich based his conclusion that a Merck corporate designee may be compelled to come to Wisconsin for his deposition on the fact that Merck "transacts business in person" in Wisconsin. (Master's Report, at 5.) But whether Merck transacts business in person in Wisconsin is irrelevant to determining whether its corporate designee may be compelled to attend a section 804.05(2)(e) deposition in Wisconsin.³ The plain language of the relevant statutory provision dictates that Merck's corporate designee be deposed at a location within 100 miles of the designee's residence, place of employment, or where he transacts business in person. *See* Wis. Stat. § 804.05(3)(b)(1), (6). These limitations require Plaintiff to take the designee's deposition in Pennsylvania.

A. Relevant Statutory Provisions

Three Wisconsin statutory provisions are relevant to the current dispute. Plaintiff has noticed Merck to designate a person to be deposed on its behalf under Wis. Stat. § 804.05(2)(e), which provides, in relevant part:

A party may in the notice name as the deponent a public or private corporation ... and designate with reasonable particularity the matters on which examination is requested. The organization ... so named shall designate one or more ... persons

³ Merck does not concede that it "transacts business in person" in Wisconsin for the purposes of Wis. Stat. § 804.05(3)(b)(1). *See infra*, pp. 9-10.

who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.

The place where a party may be compelled to be deposed is addressed in Wis. Stat. § 804.05(3)(b)(1), which provides:

Any **party** may be compelled by notice under sub. (2) to give a deposition at any place within 100 miles from the place **where the party resides, is employed or transacts business in person, or at such other convenient place** as is fixed by an order of court.

(emphasis added). Wis. Stat. § 804.05(3)(b)(6) limits that general statement in situations in which, as here, the party is a corporation and the notice requires the designation of witnesses on particular topics. That statute provides:

If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2)(e), the place of examination shall be determined **as if the deponent's place of residence, employment or transacting business in person were that of the party.**

(emphasis added).

Plaintiff interprets these provisions as allowing it to require Merck's witness (and presumably those of the other three dozen out-of-state corporate defendants named in the First Amended Complaint) to appear for his deposition in Wisconsin, because Merck does business in Wisconsin. But neither Wisconsin law, nor the cases decided under the analogous Federal Rules of Civil Procedure, supports Plaintiff's position.

B. The Plain Language of the Statute Dictates that Merck's Corporate Designee Should be Deposed in Pennsylvania.

Plaintiff argues that, because Merck does enough business in Wisconsin to subject it to personal jurisdiction here, the entire state may be considered Merck's place of business and may be attributed to Merck's Pennsylvania-based employee. (Pl.'s Letter Brief, at 1, 3, 5.) But Plaintiff has it backwards. Section 804.05(3)(b)(6) not attribute Merck's residence (which is only fixed artificially in Wisconsin) to the witness. Rather, the statute, which limits the broader

language of Wis. Stat. § 804.05(3)(b)(1), attributes the witness's residence in Pennsylvania to Merck.

This is the plain meaning of section 804.05(3)(b)(6): the place of examination of a corporate designee is determined “as if the deponent's place of residence, employment or transacting business in person” – in this case, Pennsylvania – “were that of the party” – in this case, Merck.

Although no reported Wisconsin case appears to address this provision, a 1976 Marquette Law Review article examining the newly adopted Wisconsin Rules of Civil Procedure endorsed precisely this construction of Wis. Stat. § 804.05(3)(b)(6). The article explains:

[W]hen a deponent is an officer, director, or managing agent, subsection (3)(b)6. provides that the deponent's residence becomes the residence of the party for the purpose of determining where the deposition may be taken....

Patricia Grazcyk, *The New Wisconsin Rules of Civil Procedure: Chapter 804*, 59 Marq. L. Rev. 463, 495 (1976). The same article, which was prepared with the assistance of two members of the Judicial Council Committee that drafted the Rules, provides the following concrete illustration of how the Rule operates:

If X, a Wisconsin resident, sues Y, an Illinois corporation, with managing agents in Illinois, Florida and Ohio, and X serves a notice of the taking of a deposition on Y, Y is free to select Z, its Florida officer, as the deponent. Z's residence now becomes the residence of the party for purposes of determining the place of examination. Y may therefore force X to incur the expense of traveling to Florida as a price of commencing the action.

Id. at 495-96. A plaintiff's only recourse, “if these requirements work a hardship,” is to apply for a protective order under section 804.01(3). *Id.* at 496. This is a contemporaneous analysis, informed by the input of the drafters. *See id.* at 463 (Editor's Note).

The tortured construction of this section proposed by Plaintiff would require the Court to construe sub. (3)(b)(6) as assigning the corporation's “place of [1] residence, [2] employment, or

[3] conducting business in person” to the individual deponent. But a corporation can have no “place of employment” and is not normally spoken of as having a “place of residence” or a place of “conducting business *in person*.” Indeed, the words “in person” would have been omitted if the intent had been to refer to the corporation’s place of conducting business. The only way to apply all of the terms of the statute logically is to take them as applying to the individual witness, and to require that the deposition of the corporation by its designee be taken where the witness himself has a place of residence, a place of employment, and conducts business in person: in Pennsylvania.

C. Analogous Federal Law and Precedent Support Merck’s Construction of the Statute.

Federal courts have generally held that corporate designees and employees should be deposed at the corporation’s primary place of business. Merck’s interpretation of sub. 804.05(3) thus has the virtue not only of conforming to the words of the statute, but also of harmonizing the outcome under Wisconsin’s statutory provisions more closely to that which would result from the application of the Federal Rules of Civil Procedure and relevant case law.

1. Relationship of federal and Wisconsin deposition provisions

Wisconsin’s civil procedure code is patterned after the Federal Rules of Civil Procedure. *See Korkow v. Gen. Cas. Co. of Wisconsin*, 117 Wis.2d 187, 193, 344 N.W.2d 108, 111 (1984). Accordingly, “[w]here a Wisconsin rule of Civil Procedure is based on a Federal Rule of Civil Procedure, decisions of the federal courts, to the extent they show a pattern of construction, are considered persuasive authority.” *Neylan v. Vorwald*, 124 Wis.2d 85, 99, 368 N.W.2d 648, 656 (1985).

The annotations to Wis. Stat. §804.05(3)(b), Judicial Council Notes (1986), indicate that the Wisconsin statute in question is intended to follow the Federal Rules: “Subsection (3)(b) is amended to conform the territorial scope of deposition notices and subpoenas to the 100-mile

provision of Rule 45(d), F.R.C.P. as amended in 1985.” Though not identical, the “transacts business in person” provision of sub. (3)(b) appears related to the territorial limitations on subpoenas of non-party witnesses set forth in FRCP 45(c)(3)(A)(ii), providing that the court shall quash a subpoena that “requires a person who is not a party or an officer of a party to travel more than 100 miles from the place where that person resides, is employed or *regularly transacts business in person*” Fed. R. Civ. P. 45(c)(3)(A)(ii).

Judge Eich justified his rejection of Federal Rule 45 case law as an aid for interpreting the Wisconsin statute on the grounds that the 1986 Amendment “only changed the territorial scope of the rule from 30 to 100 miles.” (Master’s Report, at 4 n.2.) In fact, the 1986 Amendment imported into Wis. Stat. § 804.05(3)(b)(1) *almost wholesale* the Federal Rule’s language: “100 miles from the place where that person resides, is employed or regularly transacts business in person.” Fed. R. Civ P. 45(c)(3)(A). Prior to the 1985 Amendment, Wis. Stat. §804.05(3)(b)(1)’s relevant predecessor statute read: “A defendant who is not a resident of this state may be compelled... [b]y notice under sub. (2) to give a deposition at any place within 30 miles of the defendant’s residence or within the county of residence or at such other place as is fixed by order of the court.” Wis. Stat. § 804.05(3)(b)(3) (1983-84).

In addition, Wis. Stat. § 804.05(5) follows the wording of FRCP 30(d)(4), under which these and many other Federal courts have issued protective orders under the federal analog to Wis. Stat. § 804.01(3)(a)(2) to require corporate depositions to take place where the defendant’s witnesses work and reside.

2. Under federal law, corporate designees are generally deposed at the corporation’s place of business.

Although no reported decision of a Wisconsin court appears to have addressed this deposition location issue, there is an abundance of federal authority that a corporate defendant’s deposition should be taken at its place of business, and that the convenience of *the witness*

should be the overriding factor in determining where the deposition takes place. *See, e.g., Zuckert v. Berkliff Corp.*, 96 F.R.D. 161 (N.D. Ill. 1982). The *Zuckert* court stated: “If a corporation objects to depositions at a location other than its principal place of business, the objection should be sustained unless there are unusual circumstances which justify such an inconvenience to the corporation.” 96 F.R.D. at 162. *See also Chris-Craft Indus. Products, Inc. v. Kuraray Co., Ltd.*, 184 F.R.D. 605, 607 (N.D. Ill. 1999) (“[T]he purposes underlying the general rule that the depositions should proceed at the corporation’s principal place of business create a presumption that the corporation has good cause for a protective order.”); *Price Waterhouse LLP v. First American Corp.*, 182 F.R.D. 56, 62 (S.D.N.Y. 1998) (“Rule 45’s goal is to prevent inconvenience to the flesh-and-blood human beings who are asked to testify, not the legal entity for whom those human beings work. . . . [T]his focus is apparent from the Rule’s . . . ‘in person’ requirement.”). These considerations particularly apply where, as here, the notice is accompanied by a demand that deponents bring documents to the deposition. *Zuckert*, 96 F.R.D. at 162.

The current versions of both leading federal treatises take precisely the same position as *Zuckert* and refer to dozens of decisions taking the same approach. *See 7 Moore’s Federal Practice* § 3020[1][b] (2006) (“The deposition of a corporation through its officers or directors must normally be taken at the principal place of business . . .”); 8A Wright & Miller, *Federal Practice & Procedure*, § 2112, at 81 (same) (1994 and 2005 Supp.). *Accord Work v. Bier*, 107 F.R.D. 789, 793 n.4 (D.D.C. 1985) (“universally accepted rule in federal litigation is that, in the absence of special circumstances (such as an impoverished plaintiff and a very affluent defendant), a party seeking discovery must go where the desired witnesses are normally located”).

At least one other state court, applying a provision similar to Wisconsin's, has determined that, in a State's civil action against out-of-state corporate defendants, depositions of defendants' designees should take place at the defendants' principal place of business. *State of Montana v. Hartford Fire Ins. Co.*, No. BDV 99-209, 2001 Mont. Dist. LEXIS 1982 (Mont. Dist. Ct. May 4, 2001). There, the court rejected the State's position that notices to the defendant insurance companies for corporate depositions in Montana required that designees who did not work or reside in Montana be deposed there. While recognizing that the text of the Federal Rules differed, the court found persuasive the "general principles" on which federal courts rely. Accordingly, the court ruled the depositions should proceed at the defendants' principal places of business. 2001 Mont. Dist. LEXIS 1982, at *6. This Court likewise should reject Plaintiff's efforts to upset this established rule on deposition location for corporate designees.

3. Plaintiff's interpretation of the Sub. 804.05(b)(3) "transacts business in person" is not supported by federal courts' construction of similar language.

Plaintiff, in opposing Merck motion for a protective order, attempts to conflate the "transacts business in person" place of deposition standard with the "transact business" test for personal jurisdiction. (Pl.'s Letter Brief, at 5.) Thus, it justifies its contentions that Merck "transacts business in person" with the assertion that Merck "amply avails itself of the benefits of transacting business in Wisconsin." (Pl.'s Letter Brief, at 3.)⁴ Such availment language is, of course, a standard only applicable in the jurisdictional context. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (discussing 'purposeful availment' standard for exercise of specific jurisdiction over non-resident defendants).

⁴ The phrase "transacts business in person" only appears in section 804.05(3)(b) the phrase "transact business" appears in numerous other provisions of the Statutes related to corporations and in Wisconsin case law addressing personal jurisdiction over foreign corporations. *See, e.g., Wis. Stat. § 180.0121 et seq.; Fields v. Peyer*, 75 Wis.2d 644, 658-59, 250 N.W.2d 311, 319 (1977) (holding that "transact business" under Wis. Stat. § 180.847 requires greater set of contacts than is required for personal jurisdiction over a corporation).

Federal courts interpreting FRCP 45(c)(3)(a) have rejected the argument that the “regularly transacts business in person” provision is equivalent to the determination of whether there is general jurisdiction over a corporate party. *See, e.g., Price Waterhouse*, 182 F.R.D. at 62 n.3 (finding of personal jurisdiction over foreign accounting firm did not support subpoena for Rule 30(b)(6) deposition where no partner/employee with knowledge of topics resided or was employed in New York); *Regents of Univ. of California v. Khone*, 166 F.R.D. 463, 464 (S.D. Cal. 1991) (FRCP 45(c)(3)(A) limit on subpoena power focuses on “the burden to the witness of being required to physically appear,” not jurisdiction issues like “the forum state’s power or the notice to the witness”).

Federal courts applying the FRCP 45(3)(A)(ii) “in person” language to corporate designees subject to FRCP 30(b)(6) subpoenas interpret the provision to protect individual designees from the burdens of the deposition process. *See Goodyear Tire & Rubber Co. v. Kirk’s Tire & Auto Servicecenter of Haverstraw, Inc.*, 211 F.R.D. 658, 662 (D. Kan. 2003) (quashing subpoena served on corporation requiring corporate “representatives to travel more than 100 miles from the place where they reside, are employed or regularly transact business in person”), *Stanford v. Kuwait Airlines Corp.*, No. 85 Civ. 0477, 1987 WL 26829, at *3 (S.D.N.Y. Nov. 25, 1987) (when non-party corporation is subpoenaed to produce designee under FRCP 30(b)(6), the geographical proscriptions of FRCP 45(c)(3)(A) should be applied with respect to “the individual employees who are the subject of a subpoena served upon a corporation”); *see also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623-624 (5th Cir. 1973) (“a person designated by an organization pursuant to Rule 30(b)(6) could not be required to travel outside the limits imposed by Rule 45(d)(2)”).

**D. Considerations of Witness Convenience and Case Management Warrant
A Protective Order**

Plaintiff has suggested that the hardship it has assumed by its decision to sue dozens of corporations weighs in favor of situating the deposition in Wisconsin. (Eberle Letter, dated April 20, 2006, at 1; Crooks Aff. Ex. D.) As this Court has correctly observed, Plaintiff has assumed this burden through its tactical choice. (Decision & Order, dated Nov. 29, 2005, at 3.) Plaintiff's voluntary litigation strategies should not affect the Court's consideration of equity or the convenience of the individual witness.

The personal burdens on witnesses and the public interest in dissuading litigants from using the inconvenience of a forum as a litigation tactic have persuaded most courts to require depositions at a location most convenient for the witness. *See* 2 R. Haig, *Business and Commercial Litigation in Federal Courts* § 19.6, at 305-306 (ABA Lit. Section 1998) ("On the whole, the customary practice of respecting the residence of the witness in all cases seems to work best. The requirement of producing witnesses in the forum is often invoked as an economic weapon, and adherence to a rule that requires witnesses to travel seems to promote litigation."). *Cf. State of Montana v. Hartford Fire Ins. Co.*, No. BDV 99-209, 2001 Mont. Dist. LEXIS 1982, at *3 (Mont. Dist. Ct. May 4, 2001) ("A defendant . . . does not choose the forum and, therefore, the Court is more likely to protect it from a deposition set in the forum district.")

**III. PLAINTIFF'S SUBPOENA CANNOT SUPPORT PLAINTIFF'S EFFORT
TO COMPEL MERCK'S DESIGNEE'S DEPOSITION IN MADISON,
WISCONSIN.**

Plaintiff also asserts that the deposition of Merck's witnesses should proceed in Wisconsin because Plaintiff belatedly served a deposition subpoena on Merck by its registered agent, CT Corporation. (Pl.'s Letter Brief, at 3.) But that subpoena only demonstrates Plaintiff's lack of confidence in its statutory argument. Plaintiff should not be allowed to enter by the back

door where it cannot go by the front. In any event, the plain language of the relevant statutes requires personal service on the witness, *i.e.*, the individual designated to testify. Service on the corporation's agent does not meet the requirements for serving the person who will testify.

Wis. Stat. § 805.07 provides three methods for serving subpoenas: (1) by personal service under Wis. Stat. § 885.03, (2) by substituted personal service under Wis. Stat. § 801.11(1)(b), and (3) for officers, directors, and managing agents of corporations, substituted service under Wis. Stat. § 801.11(5)(a). Plaintiff argues that, because it addressed the subpoena to Merck, it was authorized to serve the subpoena upon Merck's designated agent under Wis. Stat. § 885.03 and Wis. Stat. § 180.1510(1). (Pl.'s Letter Brief, at 4.)

Wis. Stat. § 885.03 outlines the requirements for personal service upon a witness as follows: "Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode." Wis. Stat. § 180.1510(1) states that the "registered agent of a foreign corporation authorized to transact business in this state is the foreign corporation's agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation."

According to Plaintiff, personal service upon the corporate agent was the equivalent of personal service upon the "witness." It justifies this argument by reference to Wis. Stat. § 804.05(2)(e), which states that "[a] party may in the notice name as the deponent a public or private corporation The organization or state officer so named shall designate one or more ... persons who consent to testify on its behalf...." Therefore, the Plaintiff argues, because Merck is named as the deponent in the subpoena, Merck is the "witness" referred to in Wis. Stat. § 885.03. By positing that the subpoena is "permitted by law to be served on the corporation" under Wis. Stat. § 180.1510(1), Plaintiff mistakenly concludes that the subpoena may also be served effectively upon Merck's designated agent. (Pl.'s Letter Brief, at 4.)

Plaintiff also relies on Wis. Stat. § 804.05(3)(b)(3) as a basis for the subpoena of Merck's designee. (Pl.'s Letter Brief, at 3.) Sub. 804.05(3)(b)(3) states that "[a] defendant who is not a resident of this state may be compelled by subpoena served within this state to give a deposition at any place within 100 miles from the place where that defendant is served." Under Plaintiff's theory, any out-of-state corporation with a registered agent for service of process in Wisconsin could routinely be compelled to produce witnesses in Wisconsin merely by serving a subpoena on the corporate agent. Under Wis. Stat. § 804.05(3)(b)(4), Plaintiff's overreaching interpretation necessarily would also apply to any nonparty out-of-state corporation.

Plaintiff's argument conflates the language of this provision, that a non-resident defendant may "be compelled to give a deposition," with the language of sub. (2)(e), which authorizes a party to notice a corporate defendant to "designate . . . a person who will testify on its behalf." Plainly, the person who will be giving a deposition is the designee. Plaintiff claims that it may serve a subpoena upon the *corporation* in Wisconsin, and thus compel the *designee* to give a deposition there. But the provision's language clearly indicates that the defendant upon whom the subpoena is served must be the same entity compelled to testify: "[a] defendant... may be compelled to testify... within 100 miles from the place where *that* defendant is served." Wis. Stat. § 804.05(3)(b)(3) (emphasis added).

Plaintiff's arguments confuse the "witness" who must be served under Wis. Stat. § 885.03 with the corporate party. Although Plaintiff has noticed the deposition of Merck, this does not mean that the Merck is the "witness" for purposes of Wis. Stat. § 885.03. A deposition subpoena thus cannot be served upon a corporate party; it must be served upon the individual witness who will testify. Indeed, the Circuit Court of Dane County has held that a corporation,

by definition, cannot be the “witness” for the purposes of section 885.03 subpoena service:

Sec. 885.03 requires service by exhibiting and reading it to the witness, or giving him a copy, or leaving a copy at his place of abode. A corporation cannot be a witness because it is inanimate and the statutes do not contemplate that anyone shall be a witness except a live individual who can be sworn and answer questions.

Wisconsin ex rel. Atlantic Richfield Co. v. Morris, No. 140-181, 1973 WL 14450, at *3 (Wis. Cir. Ct. Sep. 29, 1974) (unpublished disposition). This outcome under the subpoena statutes is consistent with Wis. Stat. § 804.05(3)(b)(6), which likewise clearly differentiates between a corporate party and that party’s designee. The *designee* is the “witness” who must be served under section 885.03, and Plaintiff’s subpoena to Merck cannot compel its designee to appear in Wisconsin.

The distinction also is apparent in the provisions of Wis. Stat. § 805.07(5), which permits substitute service of a subpoena on a corporate officer, director or managing agent in his official capacity only pursuant to Wis. Stat § 801.11(5)(a) – by personal service on an officer, director or managing agent or with the person in charge of the office – not by service under Wis. Stat. § 801.11(5)(c), which includes service on “an agent authorized by appointment or by law to accept service of the summons by appointment or by law to accept service of the summons for the defendant.” Indeed, under Plaintiff’s interpretation, § 801.11(5)(a) is wholly superfluous; any litigant could compel the deposition of the non-resident officer, director or managing agent by serving a subpoena on the corporation’s registered agent. If the Wisconsin legislature intended to allow corporations to be required to produce out of state witnesses in Wisconsin by service of a subpoena on the corporation’s registered agent, subsection (c) would have been cross-referenced under Wis. Stat. § 805.07(5) as well.

Conclusion

For the foregoing reasons, the Court should enter a protective order (1) directing that Plaintiff's deposition of Merck take place in Pennsylvania, (2) quashing the subpoena, and (3) providing such other relief, including costs of this motion, as the Court deems appropriate.

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Respectfully submitted,



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