

STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

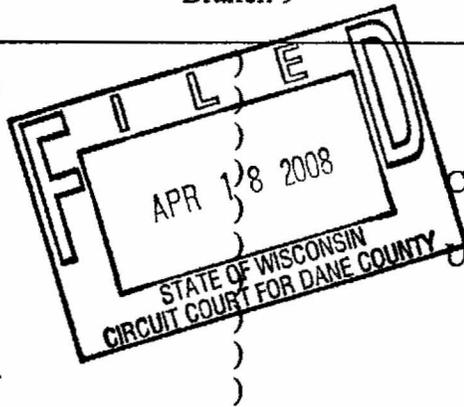
STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., et al.,

Defendants.



Case No. 04-CV-1709

Unclassified - Civil: 30703

**THE JOHNSON & JOHNSON DEFENDANTS' NOTICE OF MOTION AND
MOTION FOR A PROTECTIVE ORDER**

PLEASE TAKE NOTICE that Defendants Johnson & Johnson, Janssen L.P. (f/k/a Janssen Pharmaceutica Products, L.P.), Ortho-McNeil Pharmaceutical, Inc., Ortho Biotech Products, L.P., and McNeil-PPC, Inc. (collectively, the "J&J Defendants"), will bring the following motion at a date and time to be determined by the Special Master.

MOTION

Pursuant to WIS. STATS. § 804.01(3)(a), the J&J Defendants, by counsel, respectfully move the Court for an order barring the State from proceeding with the § 804.05(2)(e) depositions of J&J Company representatives currently noticed for April 29, 2008. The J&J Defendants have conferred with plaintiff's counsel to attempt to resolve the issues raised herein but were unable to resolve them.

PRELIMINARY STATEMENT

This Court previously ruled that Merck & Co.'s corporate representative was required to travel to Wisconsin for deposition. Other jurisdictions require counsel to travel to the witness, not the reverse. See 8A Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice & Procedure* § 2112 (1994) ("The deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business.").

Guided by the Court's ruling with respect to Merck, a J&J Defendant corporate representative traveled from New Jersey to Wisconsin to be deposed on issues relevant to Wisconsin's case. Now, however, plaintiff's counsel, Charles Barnhill, contends that the Court's prior ruling gives him *carte blanche* to demand that other J&J Defendant witnesses must also travel to Wisconsin to be deposed. His sole justification is that he does not wish to be inconvenienced by having to travel to locations that he considers inconvenient.

What is worse, the witnesses whose testimony he seeks were first noticed by him in an AWP case pending in the Commonwealth of Kentucky. Upon learning that the J&J Defendants intended to produce their witnesses in New York and Washington D.C., Attorney Barnhill withdrew the Kentucky notices and filed substantially the same notices under the Wisconsin caption. His stated purpose was to avoid the expense and inconvenience of having to travel to the East coast, as he would be required to do under Kentucky's discovery rules. See 6 Kurt A. Phillips, Jr., David W. Kramer, and David W. Burleigh, *Kentucky Practice* 22 (2006 pocket part) ("An out-of-state deponent, even if a defendant in the case, is under no obligation to travel to the location where the case was filed for deposition.")

This tactic is an abuse of Your Honor's ruling with respect to Merck. The deposition notice in Wisconsin should be quashed. Based on the facts and circumstances before

the Court, if the witnesses are to be deposed at all, they should be deposed at locations convenient to the witnesses, not Attorney Barnhill.

QUESTION PRESENTED

May Wisconsin's counsel circumvent the discovery rules applicable in other states by requiring witnesses to travel to Wisconsin for their depositions, notwithstanding that the depositions are being taken for use in cases outside Wisconsin?

STATEMENT OF FACTS

A. This Court's Ruling that Corporate Representative Depositions May Take Place In Wisconsin

In 2006, the plaintiff litigated with Merck over whether the appropriate location for a corporate representative deposition was Wisconsin or the location of the witness. When negotiations failed, Merck filed a motion for a protective order. In April 2006, Special Discovery Master Judge Eich ruled that Wisconsin's rules permitted plaintiff to require Merck to produce its corporate representative for deposition in Wisconsin. (See Affidavit of Andrew D. Schau ("Schau Aff.") Ex. 1). In making that ruling, which involved a corporate designee based in Pennsylvania, Judge Eich noted that he had weighed the convenience of the parties on the facts before him (*id.* at fn 4):

It may be assumed, I am sure, that travel from Pennsylvania to Madison – which undoubtedly would involve an overnight stay – will carry some inconvenience to the designee (as would locating the deposition in Pennsylvania inconvenience the State, at least to some degree – recognizing, of course, that the choice of the forum, and the election to join more than 35 defendants in a single action, was the State's). On this record, however, I am not persuaded that the inconvenience is so great as to warrant exercising my discretion to re-locate the deposition.

Judge Eich's ruling was upheld on appeal. (Schau Aff. Ex. 2).

**B. The J&J Defendants Previously Produced
A Corporate Representative In Wisconsin**

Soon thereafter, in the summer of 2006, the State sought deposition testimony from the J&J Defendants. The State sought that discovery without regard to the fact that the J&J Defendants had already produced dozens of deposition transcripts on similar topics from the AWP multi-district litigation then pending in Boston. (J&J subsequently prevailed at trial in Boston and all claims against it were dismissed). (Schau Aff. ¶ 4, Ex. 3). J&J moved for a protective order on the grounds that the deposition topics were duplicative of topics previously covered in depositions in the MDL.

In responding to that motion, the State argued it needed the deposition in part because its goal was to have J&J “identify its employees who are knowledgeable about the issues in this case [who can also] provide a single deposition for use at trial.” (Schau Aff. Ex. 3 at 6). In July 2006, Judge Eich quashed the State’s Notice of Deposition, without prejudice to renewal as a means of supplementing, rather than replacing, the MDL depositions. Judge Eich noted (*Id.* at 10):

In framing the order that follows, I am mindful of the continuing possibility of differences and disputes between the parties. As may be seen by the result reached herein – and as I mentioned earlier in the discussion – discovery in a case of this nature and size works best, if it is to work at all, when all parties accept the fact that the process is, at bottom, one of accommodation and reasonable cooperation. It is not always easy to keep the end in mind in litigation of this nature, but doing so can provide welcome efficiencies and, sometimes, surprising results.

In September 2006, in accordance with the Court’s rulings and the State’s willingness to narrow its requests, the J&J Defendants produced a corporate representative for deposition in Wisconsin. The witness traveled to Madison from his location in New Jersey.

After that deposition, the State did not press for further depositions from the J&J Defendants, until now. (Schau Aff. ¶ 5).

C. Attorney Barnhill's Decision To Take Kentucky Discovery Through The Wisconsin Case To Avoid Traveling

Wisconsin is not the only State that is pursuing AWP claims, and it is not the only State that has retained Attorney Barnhill as its counsel. One of those other states is Kentucky.

The Kentucky case had an original discovery cut-off of May 15, 2008. In February and March 2008, Kentucky served a host of new discovery demands including new demands for depositions and corporate witnesses. (Schau Aff. ¶¶ 6-14; Exs. 4-6).

Kentucky's demand for testimony from defendants' corporate representatives were initially set forth in a letter to all defendants dated February 27, 2008. That letter was supplemented on March 5, 2006 by an email from Attorney Barnhill, attaching a draft deposition notice. (Schau Aff. Exs. 5-6). The email indicated that, given the number of J&J deposition transcripts in Kentucky's position, the Commonwealth did not need new corporate designees on 23 of the 43 topics listed in the draft notice. (Schau Aff. Ex. 6).

On March 17, 2008 counsel for the J&J Defendants wrote to counsel in the Kentucky Attorney General's Office stating that the J&J Defendants would be making supplemental productions and producing witnesses before the May 15 discovery cut-off. (Schau Aff. Ex. 7). On March 18, 2008 Kentucky formally served its deposition notice on the J&J Defendants. It was identical to the notice that Attorney Barnhill has previously emailed to J&J's counsel in draft form. The notice called for the depositions to take place on April 30, 2008 at a location "to be agreed upon with counsel." (Schau Aff. Ex. 8). The J&J defendants responded by letter on March 27, 2008, agreeing to produce witnesses on most of the topics requested by the State and objecting to the remainder. (Schau Aff. Ex. 9). Meanwhile, the J&J Defendants

began producing the documents Kentucky requested for use at the noticed depositions. (*E.g.* Schau Aff. Ex. 10).

On April 1, 2008 counsel for the J&J Defendants wrote to the Kentucky Attorney General providing dates on which four witnesses would be made available to testify regarding the noticed deposition topics. (Schau Aff. Ex. 11). Counsel indicated that the witnesses would be produced on April 18, 23, 29 and May 2 in New York and Washington, D.C. Attorney Barnhill was copied on the letter.

Within minutes of receiving the letter, Attorney Barnhill faxed the following demand (Schau Aff. Ex. 12):

Please schedule the New York witnesses back to back so I only have to make one trip. There is no excuse for stretching the schedule out this way. If you refuse to do so I will send out a notice of deposition doing so.

A few hours later, without waiting for the J&J Defendants to respond to his demand, Attorney Barnhill emailed J&J's counsel stating that he was withdrawing the Kentucky notice, and would be re-noticing the depositions in Wisconsin (Schau Aff. Ex. 13):

I am withdrawing the Kentucky notice of deposition and I will be filing a new one in Wisconsin. This way I will be able to accommodate the different days you wish to have your spokesman testify without the expense and inconvenience of traveling.

After receipt of Attorney Barnhill's email, counsel for the J&J Defendants pointed out that adding two days travel time to each witnesses' schedule would exacerbate rather than resolve the scheduling problems and added: "I will respond to your fax tomorrow. Perhaps you should wait for my response before you do anything." (*Id.*). Attorney Barnhill did not wait for a response. He wrote back: "Please see the Wisconsin notice which I will be filing in a minute – I think that answers your questions." (Schau Aff. Ex. 13).

Later that afternoon, Attorney Barnhill served a Wisconsin deposition notice calling for the J&J Defendant witnesses to appear for depositions in Madison on April 29, 2008. The topics listed in the Wisconsin deposition notice were identical in substance to those listed in the Kentucky deposition notice on which Attorney Barnhill had pressed for testimony, except that Attorney Barnhill replaced specific references to Kentucky with more general language relating to “the State.” (Schau Aff. ¶ 17). For example, instead of asking for a witness who could testify about whether J&J employees had ever communicated certain information to “anyone in the Commonwealth of Kentucky Medicaid program,” the new notice was amended to ask for a witness who could testify about whether J&J employees ever communicated that information to “any State employees.” (Compare Schau Aff. Ex. 8 ¶ 29 and Ex. 14 ¶ 10). If there was any doubt about Attorney Barnhill’s intention to use the Wisconsin notice to take discovery in Kentucky, such doubts were dispelled by the fact that the Wisconsin notice seeks testimony from Centocor, Inc., a J&J company that was sued in Kentucky but not in Wisconsin.

ARGUMENT

Pretrial discovery is designed to formulate, define and narrow the issue to be tried, increase the chances for settlement, and give each party the opportunity to fully inform himself of facts of case and evidence that may come out at trial. *See Crawford ex rel. Good year v. Care Concepts, Inc.*, 625 N.W.2d 876, 881, 243 Wis.2d 119, 127 (2001) *citing State ex rel. Dudek v. Circuit Court for Milwaukee County*, 150 N.W.2d 387, 34 Wis.2d 559 (1967). If this process is abused, the Court may upon motion make any order that justice requires to protect a party or person from annoyance, oppression, or undue burden or expense. *See WIS. STATS. § 804.01(3)(a)*.

The Court's exercise of its statutory authority to limit discovery should be informed by the particular facts and issues in the case, the relative positions of the parties, the necessity of mutual discovery and overall fairness to the parties. *See ex rel. Dudek*, 150 N.W.2d 387, 34 Wis.2d 559 (1967); *State v. Beloit Concrete Stone Co.*, 309 N.W.2d 29, 103 Wis. 2d 506 (App. 1981). *See also* 8 Wis. Prac., Civil Discovery § 1.11 (the Court has "broad powers" to "regulate or prevent discovery" by issuing a protective order).

Here, Attorney Barnhill is exploiting this Court's Merck ruling by seeking to turn the Wisconsin case into a clearing house for discovery for use in other AWP cases. His admitted reason for pursuing the discovery in Wisconsin, rather than elsewhere, is to avoid the time and expense of traveling to states other than Wisconsin, as he would be required to do under the rules of those other states. This was clearly not the Court's intention when it denied Merck's motion for a protective order.

The J&J Defendants assume that Attorney Barnhill will respond that he is entitled to take discovery in Wisconsin, so long as it is relevant in Wisconsin. This argument is unavailing on the facts currently before the Court. It is painfully clear that these depositions are being sought for use in Kentucky, not Wisconsin. Indeed, Attorney Barnhill freely admits he withdrew the Kentucky notice and reissued it in Wisconsin simply so that he would not have to travel. His purpose is confirmed by the fact that the Kentucky and Wisconsin notices are virtually identical. And, as noted, the Wisconsin notice seeks testimony from Centocor, a J&J company that is a defendant in Kentucky but not in Wisconsin.

The Court's ruling against Merck should not be used as bludgeon to harass witnesses in ways that other jurisdictions do not permit. Attorney Barnhill's convenience is not the only consideration. The convenience of the witnesses (and their counsel) must also be

considered. All four of the noticed witnesses have submitted affidavits here explaining why traveling to Wisconsin would be at best very inconvenient and at worst impossible. (Schau Aff. Exs. 15-18). For example, one witness has to travel from Washington D.C. to Puerto Rico with his immediate superior early in the morning of April 30. (Schau Aff. Ex. 17). Another has meetings on April 29 that cannot be rescheduled. (Schau Aff. Ex. 15). All of them are senior executives and all of them would prefer to be deposed closer to where they work. (Schau Aff. Exs. 15-18).

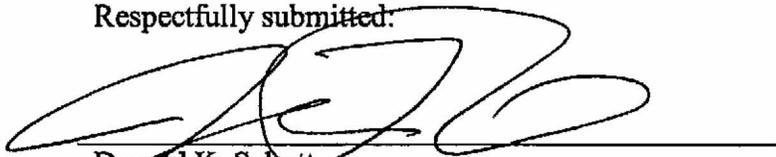
Judge Eich admonished all parties to “accept the fact that the [discovery] process is, at bottom, one of accommodation and reasonable cooperation.” Wisconsin’s counsel has failed to heed that advice. The depositions noticed in Wisconsin should be quashed.

CONCLUSION

The J&J Defendants respectfully request that their motion for a protective order be granted.

Dated: April 18, 2008

Respectfully submitted:



Donald K. Schott
State Bar No. 1010075
James W. Richgels
State Bar No. 1046173
QUARLES & BRADY LLP
33 East Main Street, Suite 900
Madison, WI 53703
(608) 283-2426

William F. Cavanaugh, Jr.
Andrew D. Schau
Adeel A. Mangi
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

Attorneys for Johnson & Johnson, Janssen L.P.,
McNeil-PPC, Ortho Biotech Products L.P. and
Ortho McNeil Pharmaceutical, Inc.