

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., et al.,

Defendants.

CASE NO. 04-CV-1709
Unclassified – Civil: 30703

**THE JOHNSON & JOHNSON DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER**

The specific issue raised by J&J's motion is whether the State should be allowed to depose multiple J&J witnesses on issues that are not in dispute when there are equally effective but less burdensome alternatives. The State side-steps this question, essentially treating the J&J Defendants' motion as though they were asking for a ruling that the State cannot take depositions of any J&J witness who was deposed in MDL.

J&J is not asking for such a ruling. The J&J Defendants agree that there may be situations where the State has a legitimate need to depose previously deposed witnesses because the subjects the State wishes to explore are new, unclear or disputed, and less burdensome alternatives are not available. But this is not one of those situations. The J&J defendants have offered to *stipulate* to the very facts the State says it wants to establish by deposition.

The State's refusal even to consider less burdensome alternatives brings to mind the proverbial negotiator who refuses to take "yes" for an answer. The J&J Defendants will stipulate that (1) they do not sell their medicines to wholesalers at AWP, (2) they do not believe

that wholesalers typically charge AWP to retail pharmacies, and (3) they are not aware of any instance where one of their employees told First Data Bank or the Redbook that AWP was not an “actual wholesale price.” Such a stipulation would be admissible and binding, certainly no less so than a deposition.

The State does not explain (or even address) why a stipulation would be inadequate. Instead, and without even a hint of irony, the State says that it is the “defendants” who have “bitterly resisted” the State’s effort to “streamline discovery.” Remarkably, J&J is singled out for allegedly substituting “document dumps in the MDL for any real response to plaintiff’s more targeted discovery.” Plaintiff’s Response to Defendant Johnson & Johnson’s Request for a Protective Order (“Pl.’s Resp.”) at 1-2.

Plaintiff’s characterization of J&J’s discovery response is inaccurate. The J&J Defendants have not given the State more documents than it asked for.¹ Moreover, J&J’s offer to stipulate to undisputed facts is even more “streamlined” than the State’s more burdensome proposal to take multiple witnesses away from their work and families in order to travel to Wisconsin to answer questions they have already answered, under oath, in the MDL.

A. The State’s Discovery-Related Complaints About Other Companies Have No Bearing on J&J’s Motion.

Much of the State’s opposition focuses on alleged foot-dragging by other defendants. Allegations about other companies are irrelevant to J&J’s motion. Even so, the fact that the State has resorted to this type of argument raises a larger point that undoubtedly will come up again and again as this matter proceeds forward. We address this issue briefly.

¹ The State mistakenly asserts that J&J unloaded its entire MDL production. Pl.’s Resp. at 2. In fact, J&J offered its MDL document production, but that offer was rejected. J&J did produce all of the MDL deposition transcripts and exhibits, but only because the State asked for this material. Pl.’s Resp., Ex. 3 at 7 (Request No. 10).

There are 37 defendants in this case. They are not monolithic, their interests differ, and the arguments made by one defendant should not be attributed to another. To be sure, the State, for its own convenience, has lumped all defendants together in a single Complaint. But the State makes no claim that the defendants engaged in a conspiracy or any other form of collusion. To the contrary, each company is alleged to have inflated its AWP for the purpose of gaining market share *at the expense of its competitors*. See Amended Complaint, ¶ 32 (“The larger the ‘spread’ that can be created for a particular drug, the greater the incentive the provider has for choosing, or influencing the choice of, that drug rather than a drug of a competing manufacturer.”) Thus, in reality, the state is pursuing 37 separate cases against 37 separate defendants, many of whom have adverse competitive interests.

The State’s decision to bundle multiple cases together under one caption creates welcome opportunities for pretrial efficiencies, but it can have no bearing on the merits of the any one party’s positions, claims and defenses. At every stage of the proceedings, each company will defend its interests in the way it believes is most appropriate to its own situation. The arguments will differ, because the situations defendants’ face are not the same. From any one defendant’s perspective, this case is mainly about its own pricing practices, not the pricing practices of others.

Moreover, the defendants in this case occupy different positions in the overall AWP litigation landscape. This too has implications for Your Honor’s management of the discovery process. For example, Teva Pharmaceuticals has moved for a protective order based, in part, on the fact that it “has not been involved in other related drug pricing litigation,” so that discovery of Teva is starting “from scratch.” Teva’s Motion for a Protective Order (April 26, 2006) at 2 (emphasis added). J&J, on the other hand, has undergone extensive discovery in

MDL litigation, and J&J's motion reflects that different history. Teva and J&J make different arguments, but both are entitled to have their motions decided on their individual merits.

B. The J&J Defendants Have Been Forthcoming in Discovery and Have Offered to Stipulate to the Facts the State Say It Needs to Establish by Deposition

The State seems unable to decide whether the J&J Defendants have offered too much discovery or too little. On the one hand, the State complains that the J&J Defendants objected to discovery while the case was being removed to federal court (where coordinated discovery would have yielded even greater opportunities for efficiency). Pl. Resp. at 2-3. On the other hand, it criticizes J&J for suggesting that the MDL discovery record provides an opportunity to streamline discovery by avoiding duplicative depositions on issues that are not in dispute. *Id.*

The State refuses to agree that the MDL discovery is even partly sufficient for its purposes. It thus argues that this case is different from the MDL without mentioning that the cases also have important similarities. *Id.* at 2, 6. For example, like the MDL plaintiffs, the State alleges that the AWP's published in First Data Bank and the Redbook are knowingly "inflated" or "fictitious" AWP's. *See* Pl. Resp., Ex. 9 (MDL Reply Memo) at 1. Both plaintiffs allege that drug manufacturers are legally responsible for the published AWP's. *Id.* And both claim that drug reimbursement payments were excessive because AWP was supposed to reflect or relate to actual acquisition costs. *Id.* at 2.

Given this overlap in the claims, it is not surprising that discovery in the MDL fully addresses the issues identified in the State's deposition notice. *See* J&J's Notice of Motion and Motion for a Protective Order, Ex. 7. The MDL record establishes, beyond question, that the J&J Defendants sell their medicines to wholesalers at or about the WAC price (not AWP), that the AWP figures submitted by the J&J Defendants to First Data Bank and the Red Book were

120% of the WAC price, and that AWP, as used by the J&J Defendants and other manufacturers, does not represent, or purport to represent, an actual selling price. *See id.*, Ex. 5.

The State does not deny the relevance of the MDL discovery record in case. In fact, rather than start the discovery in this case from scratch, the State demanded and received all of the MDL deposition transcripts and related exhibits. Presumably, the State asked for this material because it wanted to reap the benefit of the work done by the plaintiffs in the MDL. From the State's vantage point, asking for this discovery was more efficient than starting over.

But the efficiencies should not be one-sided. Having asked for and received 28 deposition transcripts from J&J witnesses, the State should at least be required to tailor its discovery in a way that avoids needless duplication. It would be one thing for the State to review the MDL discovery, identify any pertinent gaps in the record, and then seek the discovery it thinks it needs to fill in those gaps. This strategy, which seemed to be where the State was headed when it asked for the MDL depositions, would minimize undue burden on defendants without compromising the State's interests in the least.

It appears now, however, that the State has rejected this strategy, preferring instead a "one size fits all" discovery plan that ignores the MDL record altogether. Thus, the State's deposition notices are essentially the same for each defendant. The State makes no accommodation to the fact that the defendants are not similarly situated or that discovery that may be appropriate in one situation may be unduly burdensome in another. In other words, the State refuses to "streamline" its discovery where individual circumstances warrant.

C. The State Has No Legitimate Reasons for Refusing to Pursue Less Burdensome Alternatives with Respect to the J&J Defendants

The State dedicates several pages of its opposition to the task of explaining and justifying its overall discovery program as applied to the defendants generally. Pl.'s Resp. at 1-

2, 4-6. The State's overall plan is not at issue. As noted, the State's discovery plan may be appropriate in some circumstances but not others. Given the J&J Defendants' offer to stipulate to the facts the State wishes to pursue through depositions, the States' program is unduly burdensome as to J&J.

The State's defense of its plan are not persuasive as to the J&J Defendants.

1. The State Does Not Need the New Depositions for Trial

The State argues that it needs the depositions for trial. This argument overlooks the fact that trials are supposed to be about disputed facts, not undisputed facts. The State will not need to prove to a jury that the J&J Defendants do not sell their medicines at AWP, or that the J&J Defendants understand that pharmacies do not purchase at AWP. The J&J Defendants do not dispute these facts. If there is a trial in this case, it will focus on other issues, such as the State's reasons for embracing AWP as a reimbursement benchmark (States that use AWP typically set their reimbursement rates at levels that are generous enough to ensure that the retail pharmacies are willing to serve the State's Medicaid population). In other words, the trial will focus on whether AWP is a "fraud," not on whether AWP is an "actual selling price."

2. The Admissibility of the MDL Deposition Testimony Is Not An Issue

The State contends that its ability to use the MDL depositions at trial in Wisconsin is "very doubtful." Pl.'s Resp. at 7. This concern is baseless. The J&J Defendants agree that the MDL deposition testimony should be treated as though it had been taken in this proceeding. The State also notes that other defendants who were not parties in the MDL may object on the grounds that they did not have a right to cross-examine J&J's witnesses. *Id.* No defendant has made that argument in response to J&J's motion. If that becomes an issue at trial,

the Court can admit the testimony as to J&J, but instruct the jury not to consider it as to an objecting defendant.

In any event, the State does not argue, and cannot argue, that a stipulation would be inadmissible.

3. The MDL Deposition Testimony is Usable and Coherent

The State argues it cannot cite the “snippets of depositions defendants point to.” *Id.* This is a red herring. The State has copies of the entire deposition transcripts and it can rely on whatever portions it wants.

The State argues that the MDL depositions “wander all over the lot.” *Id.* If the State believes that, it was incumbent on the State to provide examples. That is certainly not a characterization that the J&J Defendants or the MDL plaintiffs would agree with.

The State argues that it is entitled to present evidence in an “orderly and informative way.” *Id.* at 8. This is another red herring. The State can present its evidence in whatever order it wants.

The State notes that another defendant, Schering-Plough, has noticed the deposition of one of its own witnesses because he is in poor health and may be unavailable for trial. Although J&J cannot speak for Schering, it seems unlikely that Schering would have noticed the deposition if the State had been willing to stipulate that the points Schering seeks to establish through the witnesses’ testimony was true.

4. The J&J Defendants’ Specific Objections to the Proposed Deposition Topics Are Legitimate

The State attacks several straw men in discussing the J&J Defendants’ specific objections to the designated deposition topics. In so doing, the State misconstrues the objections.

Request 1 asks for deponents who can testify about evidence known to the various J&J companies that retail pharmacies pay prices equal to or greater than AWP. The J&J Defendants properly objected that they do not sell direct to retail pharmacies and hence cannot provide authoritative testimony about the specific prices that retail pharmacies pay for drugs. Nevertheless, it is common knowledge in the industry that wholesaler margins are quite thin, so it is reasonable to believe (and the J&J Defendants do believe) that the prices paid by retail pharmacies are close to the prices at which the J&J Defendants sell to wholesalers. The J&J Defendants have not objected to producing their wholesaler prices. Nor have they objected to producing their rebate and chargeback files showing that certain customers, including the State of Wisconsin, pay less than the wholesaler list price.

Request 2 is essentially the same as Request 1. It seeks deponents to testify about the evidence known to the J&J Defendants that AWP is higher than the price pharmacies usually pay. Again, the objection is that J&J typically sells to wholesalers, not pharmacies, so they cannot testify about the specific prices that pharmacies pay. This does not mean, as the State would have it, that the J&J Defendants claim to “entirely ignorant of the price at which [their] drugs were selling to retailers.” *Id.* at 10. As noted above, it is common knowledge that wholesalers sell to retailers at very thin margins.

Request 3 seeks witnesses who can testify about their contacts with First Data Bank and the Redbook. This topic was fully covered in the MDL. The State says this topic could not have been covered because “the MDL relate[d] only to Medicare Part B participants and, hence, only concern[ed] physician administered drugs.” *Id.* at 11. This statement suggests that counsel has not read the MDL Complaint or looked at the documents that the J&J Defendants already provided. The J&J Defendants produced documents in the MDL on 36

drugs, only four of which are administered by physicians. The MDL plaintiffs took discovery on all 36 drugs.

Request 4 asks for witnesses who can testify about whether the J&J Defendants ever told First Data Bank and the Red Book that AWP was not an “actual” price. The J&J Defendants do not claim that its employees ever told the publishers that AWP was not an actual price. Accordingly, this topic, like the others, can be addressed more efficiently by stipulation.²

Request 5 seeks witnesses knowledgeable about AMP prices. The J&J Defendants have already produced AMP figures to the State. The States now says it wants to know more how AMP is calculated. *Id.* at 13.

This is something the parties should be able to work out. The J&J Defendants are willing to explain how AMP is calculated. Since AMP is calculated pursuant to a published, statutory formula, however, it would be helpful if the State could explain in more detail exactly what it wants to learn at the deposition. The parties’ began a dialogue on that score but it was cut short when it became apparent that this motion needed to be filed to address the other issues.

The State has “suspended” its request for witnesses who could address topic no. 6, so that request need not be addressed.

Conclusion

The J&J Defendants’ motion poses important questions for the efficient administration of discovery this case. It asks Your Honor to consider whether the discovery record in the MDL creates opportunities to streamline discovery in this case and avoid needless duplication. It also asks Your Honor to consider whether depositions are necessary and

² The publishers knew that AWP was not an actual price. A report published in 1992 by the Department of Health and Human Services Office of Inspector General states that “AWP is not a reliable indicator of physician cost; indeed, *Red Book officials confirmed that AWP is not designed to reflect physicians’ costs.*” Physicians’ Costs for Chemotherapy Drugs, Dept. of Health and Human Serv. Office of Inspector General, Nov. 1992, p. 5 (emphasis added).

appropriate where the facts are not disputed and can be established by stipulation or other less burdensome means.

The J&J Defendants submit that, as in many other legal situations, Your Honor should answer these based on a balancing of the interests at stake. The State surely has legitimate discovery needs. Just as surely, the defendants have a legitimate interest in avoiding undue burden and expense. Where to draw the line in a particular case will vary depending upon individual facts and circumstance. One size does not fit all.

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

Dated: May 25, 2006

Respectfully submitted,

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