

STATE OF WISCONSIN
CIRCUIT COURT – BRANCH 7 – DANE COUNTY

STATE OF WISCONSIN,

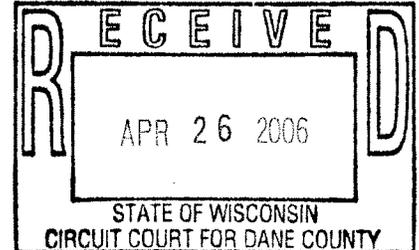
Plaintiff,

v.

AMGEN INC., *et al.*,

Defendants.

Case No. 04-CV-1709



**MYLAN'S REPLY MEMORANDUM IN FURTHER SUPPORT
OF ITS MOTION FOR A PROTECTIVE ORDER**

Defendants Mylan Laboratories Inc. and Mylan Pharmaceuticals Inc.

(collectively, "Mylan"), by counsel, submit this memorandum in further support of their motion for a protective order. Plaintiff State of Wisconsin ("Plaintiff" or the "State") has failed to show why Mylan should not be granted a limited adjournment of the § 804.05(2)(e) deposition of a Mylan representative to a date after the State has cured the defects in its First Amended Complaint (the "Complaint"), as directed by the April 3, 2006 Partial Order and Decision (the "April 3 Order") of this Court. The State's position, that it is entitled to a § 804.05(2)(e) deposition without having a proper complaint in place, is inherently unreasonable. Mylan has met its burden of showing good cause for the protection it seeks from discovery that would result in oppression and undue burden. *Vincent & Vincent, Inc. v. Spacek*, 102 Wis.2d 266, 271-72 (Wis. Ct. App. 1981).

ARGUMENT

POINT I.

THE STATE IS NOT ENTITLED TO A § 804.05(2)(E) DEPOSITION UNTIL IT ADEQUATELY RE-PLEADS ITS FRAUD-BASED CLAIMS

The special pleading requirements that apply to causes of action based in fraud are “designed to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude, to minimize ‘strike suits,’ and to discourage the filing of suits in the hope of turning up relevant information during discovery.” *Friends of Kenwood*, 239 Wis.2d 78, 87, 619 N.W.2d 271, 276 (Wis. Ct. App. 2000) (citation omitted). Judge Krueger found that this precise reasoning applied here because a defendant “in a consumer protection case may likely be a business or a company dependent for its success on a positive public perception [and therefore] the need for particularity in pleading seems at least as compelling as in any other fraud case.” (April 3 Order, at 12.) The Court, therefore, held:

While Plaintiff has done a masterful job of describing a ‘dauntingly complex’ drug sale and reimbursement system, it has failed . . . to set forth the activities of each defendant and to put everyone on notice for what activities, occurring when and how it wishes to hold each defendant responsible. . . . Plaintiff seems as though it wants to put the burden on each company to come forward with an explanation for each and every AWP listing since 1992. This is not permissible.

(April 3 Order, at 13 (emphasis added).) The Court emphasized that “[e]ach Defendant is entitled to know, with as much detail as Plaintiff can provide, **which** of its drugs are involved and **what** (name, date) publication of AWP is false, and the **actual** price that should have been published.” (April 3 Order, at 13 (emphasis in the original).)

Thus, the Court has specifically ruled that it is not permissible for the State to force Defendants to explain their pricing without a properly pleaded Complaint in place. The State’s position is directly at odds with this clear language. The State asserts it is entitled to

depose representatives of Mylan on the precise topic the Court ruled were impermissible – *i.e.*, the basis for the WAC and AWP prices. The State actually admits that it intends to treat the § 804.05(2)(e) deposition as a tool to gather the “kind of evidence that Judge Krueger requests Plaintiff to assemble and plead.” (Plaintiff’s Opp., at 3-4.) Using the deposition to salvage a defective fraud claim violates the plain meaning and intent of the special pleading requirements of fraud-based claims, as held in the April 3 Order. *See Friends of Kenwood*, 619 N.W.2d at 276.

At the same time as it makes this meritless argument, the State, referring to Exhibit F to Plaintiff’s Opposition, argues that it already has evidence of Mylan’s alleged fraud. (Plaintiff’s Opp., at 5.) The solution, then, is obvious. If the State already has the information that it claims it needs, it should use it to amend the Complaint. The State will not be prejudiced by the short delay while it repleads. The State cannot penalize Mylan for the State’s inability to meet its pleading burden simply because it believes it would be the easier for the State that way. (Plaintiff’s Opp., at 4.) The special pleadings requirement for fraud would have no meaning if a party were permitted to take full blown discovery after the court found the claim deficient.¹

Notably, the State does not argue that it will be prejudiced in its prosecution of this case (apart from not being able to shift the burden to the Defendant prior to amending the Complaint) if the Court grants Mylan the relief it requests. This is because the State recognizes

¹ Exhibit F to Plaintiff’s Opposition, which is an assorted collection of unrelated documents containing different prices for different drugs at different points in time, coupled with the inflammatory language the State uses about Mylan’s alleged fraud – *e.g.*, “Mylan is one of the great abusers of the Medicaid reimbursement system” (Plaintiff’s Opp., at 5) – demonstrate why these special pleading requirements are so important. The State here has irresponsibly made bald assertions without a proper pleading in place. The documents themselves show nothing of the sort. Such “lightly made charges of wrongdoing” are impermissible without meeting the pleading burden. *See Friends of Kenwood*, 619 N.W.2d at 276. The State should be compelled to plead its theory substantiating these irresponsible charges before Mylan is required to produce a company spokesperson to be deposed.

that the timing of the adjournment Mylan seeks is entirely in its hands. As soon as the State corrects its pleading deficiencies, Mylan is willing to produce a witness for the § 804.05(2)(e) deposition.

POINT II.

MYLAN WILL BE PREJUDICED IF THE STATE IS PERMITTED TO TAKE THE § 804.05(2)(E) DEPOSITION

A. Discovery Will Not Be Mutual

Mylan is not able to take a § 804.05(2)(e) deposition of the State to learn the basis of the State's claims because the State does not have a proper Complaint with respect to the fraud-based claims. Mylan does not know what the amended Complaint will contain and would essentially be forced to guess what the allegations will be in order to take the deposition. The State, on the other hand, will not be limited in this way because it has the benefit of knowing what allegations it will make in the amended Complaint.

Discovery must be mutual. *See State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis.2d 559, 600, 150 N.W.2d 387, 409 (Wis. 1967) ("The keystone of discovery is its reciprocity. When the parties are in a similar position, discovery should be encouraged; when they are not so situated, discovery should be conditioned or limited so that the parties may equally obtain the advantages discovery was designed to achieve.") (citation omitted). Where, as here, one party is not able to proceed with discovery, the other party should likewise be limited. *Id.* Fairness dictates that the State not be permitted to proceed with the § 804.05(2)(e) deposition of Mylan until it cures the deficiencies in its Complaint and Mylan is thereby able to conduct its § 804.05(2)(e) deposition of the State.

B. Mylan Should Not Be Bound By the Testimony of a Witness Who is Not Adequately Informed of the Claims Against Mylan

As discussed in Mylan's moving papers, a § 804.05(2)(e) deposition is different from other depositions and other forms of discovery because the company is required to designate and prepare a witness to testify on its behalf.² This is not simply a witness who shows up to testify to facts he or she observed, based entirely on his or her personal knowledge. Rather, "[t]he designated witness is 'speaking for the corporation.'" *United States v. J.M. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996). The designee "presents the corporation's 'position' on the topic" and must testify not only about "facts within the corporation's knowledge, but also its subjective beliefs and opinions." *Id.* It would be inherently unreasonable, burdensome and unfairly oppressive to require a defendant to produce a witness to speak on its behalf when the plaintiff has not yet spoken on its own behalf or presented a plain statement of its position to enable the defendant to fairly answer the charges against it.

Without knowing what allegations the State is going to make against Mylan, Mylan cannot adequately prepare a witness to speak on its behalf. Under these circumstances, proceeding with the deposition would be unfairly oppressive because Mylan would be, in part, deprived of its right to defend itself. Mylan will be highly prejudiced if it is forced to produce a § 804.05(2)(e) witness without the benefit of knowing the particulars of the claims made against it. It is precisely this kind of prejudice that the special pleading requirements for fraud are meant to prevent.

² A § 804.05(2)(e) deposition is the state equivalent of a F.R.C.P. 30(b)(6) witness, and Wisconsin courts look to federal authorities on 30(b)(6) to interpret and analyze the state equivalent. *See, e.g., State v. Beloit Concrete Sonte Co.*, 103 Wis.2d 506, 509-12, 309 N.W.2d 28, 29-31 (Wis. Ct. App. 1981).

POINT III.

THE RELIEF MYLAN SEEKS IS LIMITED AND NARROW

The State attempts to portray Mylan's reasonable request for an adjournment as an attempt on Mylan's part to evade its discovery obligations and to prevent the State from getting the information that it needs to amend the Complaint. The State cannot support either assertion.

A. Mylan Is Complying With Its Discovery Obligations

Mylan is seeking limited relief. As stated in its moving papers, Mylan has already produced more than ten thousand (10,000) pages of documents. Thus, the State's position that Mylan is evading or attempting to evade its discovery obligations is unfounded.

What Mylan does seek is a very limited exception to discovery in this action for a deposition that will be highly prejudicial to Mylan if allowed to go forward before the claims here are adequately pled. The State correctly points out that Mylan did agree to produce the § 804.05(2)(e) witness. That was before the Court had ruled that the Complaint was insufficient. Mylan continues to agree to produce the § 804.05(2)(e) witness, but only once the State has complied with the Court order to correct the deficiencies in the Complaint.

B. The State Will Not Be Prejudiced By An Adjournment

The State will not be prejudiced by this adjournment. The only basis for prejudice that the State articulates is that it needs the deposition in order to amend the Complaint. As discussed in Point I, *supra*, the April 3 Order does not permit this kind of expansive discovery in advance of an adequate pleading. As Judge Krueger recognized, one purpose of the particularity requirement for fraud-based claims is "to discourage the filing of suits in the hope of turning up relevant information during discovery." April 3 Order, at 12 (*citing Friends of Kenwood v. Green*, 619 N.W.2d at 276). The State, moreover, contends that it already has the

evidence it needs to amend the Complaint. If what the State says is true, it will not be prejudiced by a brief delay while it meets its pleading obligation. The State should be taken at its word, and required to give Mylan notice of its claim before Mylan is forced to designate a spokesperson.

POINT IV.

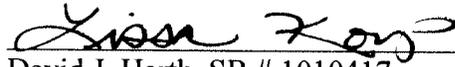
THE STATE IS NOW TRYING TO EXPAND DISCOVERY

Finally, the State attempts to use its opposition to the instant Motion for a Protective Order as a way to expand the discovery limitations set by this Court. Judge Eich has already ordered that a § 804.05(2)(e) deposition be limited substantively to 15 drugs. (*See* Exhibit B to Merkl Aff., at 2.) The State, however, thinks it should be entitled to question the Mylan designee on no less than the 58 drugs that comprise its “list of targeted drugs,” which list was attached to the original § 804.05(2)(e) deposition notice. (*See* Exhibit A to Plaintiff’s Opp.) The State has no basis for this unilateral expansion of discovery – particularly in light of the parties’ agreement that the deposition would be limited to the 15 drugs. (*See* Exhibits D and E to Merkl Aff.) Accordingly, and pursuant to Judge Eich’s prior ruling, the State should not be permitted to question the § 804.05(2)(e) witness on any more than 15 drugs, which are agreed to in advance of the deposition, regardless of when the deposition takes place.

CONCLUSION

For the foregoing reasons, Defendant Mylan respectfully requests that this Court grant (1) its motion for an order adjourning the § 804.05(2)(e) deposition of a Mylan representative to a date after the State has amended its Complaint to cure the defects identified in the Court’s April 3, 2006 Order and (2) such other and further relief as this Court deems just and proper.

DATED: April 26, 2006



David J. Harth, SB # 1010417
David E. Jones, SB # 1026694
Lissa R. Koop, SB # 1050597
Heller Ehrman LLP
One East Main Street
Madison, Wisconsin 53703
(608) 663-7460
Fax: (608) 663-7499

Of Counsel:

William A. Escobar (*pro hac vice*)
Neil Merkl (*pro hac vice*)
Christopher C. Palermo (*pro hac vice*)
Elizabeth A. Quinlan (*pro hac vice*)
Kelley Drye & Warren LLP
101 Park Avenue
New York, New York 10178
(212) 808-7725
Fax: (212) 808-7897

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 04-CV-1709

Unclassified Civil: 30703

v.

AMGEN INC., et al.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Mylan's Reply Memorandum In Further Support Of Its Motion For A Protective Order to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20, 2005.

I also certify that I caused a true and correct copy of these documents to be delivered via e-mail and U.S. Mail upon the Honorable William F. Eich, weich@charter.net, 840 Farwell Drive, Madison, WI 53704.

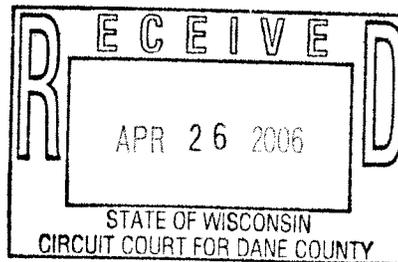
Dated this 26th day of April, 2006.



HellerEhrman_{LLP}

April 26, 2006

Via Hand Delivery



Lissa R. Koop
Lissa.Koop@hellerehman.com
Direct +1.608.663.7489
Main +1.608.663.7460
Fax +1.608.663.7499

Judge Moria Krueger
Dane County Circuit Court Branch 7
215 South Hamilton St.
Madison, WI 53703

Re: *State of Wisconsin v. Amgen Inc., et al.*
Case No. 04-CV-1709 (Br. 7)

Dear Judge Krueger:

Enclosed please find Mylan's Reply Memorandum In Further Support Of Its Motion For A Protective Order and a Certificate of Service.

By copy of this letter these documents are being served on counsel of record by transmission to LNFS, and on the Honorable William F. Eich via e-mail and U.S. Mail.

Very truly yours,

A handwritten signature in cursive script that reads "Lissa R. Koop".

Lissa R. Koop

Enclosure

cc: Honorable William F. Eich
Counsel of Record