

STATE OF WISCONSIN,)

Plaintiff,)

v.)

ABBOTT LABORATORIES, INC., et. al.,)

Defendants.)

Case No.: 04 CV 1709

**NOVARTIS PHARMACEUTICALS CORPORATION'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION TO BE PERMITTED TO PURSUE
DISCOVERY OF ITS ENTIRE CASE**

Defendant Novartis Pharmaceuticals Corporation ("NPC") joins in Defendant Amgen Inc.'s Opposition to Plaintiff's Motion to Be Permitted to Pursue Discovery of Its Entire Case, and respectfully submits this additional memorandum explaining why Plaintiff's motion with respect to NPC should be denied as moot.

PRELIMINARY STATEMENT

In pursuing this motion against NPC, the State of Wisconsin ("Plaintiff") completely disregards the fact that the underlying issue regarding the scope of discovery was already resolved -- and this motion was rendered moot -- through meet and confer discussions in which NPC agreed to produce data and documents, responsive to Plaintiff's currently pending document requests, for all NPC drugs identified in the Second Amended Complaint.

During discussions with NPC's counsel, Plaintiff's counsel indicated that it would withdraw its motion as to NPC if the parties could resolve the issue through the

meet and confer process. Nonetheless, despite the fact that NPC has agreed to provide Plaintiff with the discovery sought by this motion, Plaintiff has not withdrawn the motion as to NPC.

Moreover, to the extent Plaintiff purports to bring this motion against NPC in anticipation of future discovery disputes, the motion is not yet ripe for resolution. Accordingly, Plaintiff's motion to expand discovery as to NPC should be denied as moot.

RELEVANT BACKGROUND

On July 18, 2006, NPC's counsel received a letter raising several discovery issues from Plaintiff's counsel, Robert Libman, in which Plaintiff took the position that it was entitled to discovery regarding all NPC drugs identified in its Second Amended Complaint ("Target Drugs"), and was not limited to the 16 drugs for which NPC already had been producing documents and data prior to Plaintiff's identification of the Target Drugs. (See Exh. A to the Affidavit of Christine A. Neagle, dated Aug. 22, 2006 ("Neagle Aff."), submitted herewith.) Specifically, Mr. Libman requested that NPC produce national sales data and AMP data for all 64 Target Drugs, which includes more than 250 NDC codes that Plaintiff attributes to NPC.¹ (*Id.*) Plaintiff's July 18 letter requested that NPC's counsel provide Mr. Libman with possible dates for a meet and confer discussion about the discovery issues identified in the letter. (*Id.*)

The next day, Mr. Libman's colleague, Charles Barnhill, served a letter on all defense counsel regarding some of the same discovery issues that were raised in Mr. Libman's July 18 letter to NPC's counsel, including the expansion of discovery to

¹ See Neagle Aff. at ¶ 4.

encompass all of the drugs named in the Second Amended Complaint. (*See* Exh. B to the Neagle Aff.) Mr. Barnhill's letter requested that any objections from Defendants to Plaintiff's position that it was entitled to discovery of all drugs identified in the Second Amended Complaint be made within five business days of the date of the letter and indicated that if any objections were made, Plaintiff would seek a ruling from the Court. (*Id.*)

On July 20 and July 21, counsel for NPC, Christine A. Neagle, exchanged e-mails with Mr. Libman, with whom NPC has been dealing since discovery began, scheduling a meet and confer call for July 28 to discuss, among other things, Plaintiff's position that it is entitled to discovery on all Target Drugs. (Neagle Aff. at ¶ 7; *see also* Exh. C. to Neagle Aff.) On July 24, NPC's counsel responded to Mr. Barnhill's July 19 letter stating that it had received a similar letter from Mr. Libman and informing Mr. Barnhill that it had scheduled a meet and confer call with Mr. Libman for July 28. (Exh. D to Neagle Aff.) In its July 24 letter, NPC's counsel expressed the view that it would be "unnecessary -- and, indeed, it would be duplicative -- for NPC to respond to the substance of [Mr. Barnhill's] letter," stated her intention to "raise any objections or concerns regarding the State's proposed expansion of discovery during our call with Mr. Libman," and expressed hope "that, through the meet and confer process, we will be able to resolve any disagreements amicably, without seeking Judge Eich's assistance." (*Id.*) NPC also emphasized that discovery issues are best resolved through individual negotiations because "each defendant is unique and situated differently in the lawsuit." (*Id.*)

During the July 28 meet and confer call, and in Mr. Libman's July 28 letter to NPC memorializing that call, Mr. Libman stated that Plaintiff's motion to expand discovery, which had been filed a day earlier on July 27, was intended for those Defendants with whom Plaintiff could not reach agreement through the meet and confer process and indicated that Plaintiff would withdraw its motion as to NPC if it agreed to produce responsive data and documents for all Target Drugs: "*If we cannot reach agreement through these discussions, our pending motion will be the forum for resolution of this issue.*" (Exh. E to Neagle Aff. (emphasis added).)

By letter dated August 3, counsel for NPC informed Plaintiff's counsel that NPC would agree to produce the additional data and documents sought by Plaintiff for all Target Drugs. (Neagle Aff. at ¶ 11; Exh. F to Neagle Aff.) Specifically:

NPC agrees to produce information for all of Target Drugs that is not overly burdensome to obtain. Accordingly, we will produce commercial sales data . . . and AMP data for all of the Target Drugs. In addition, to the extent the State's document requests are not product-specific, NPC will not limit its production in response to the State's first and third sets of requests for production of documents to documents that specifically name one of the 16 MDL overlap drugs. (Exh. F to Neagle Aff.)

NPC's letter further stated NPC's belief that "to the extent product-specific information is sought, discovery ought to be focused on products for which Wisconsin has significant utilization, in order to justify the cost and burden of the discovery." (*Id.*) It also reserved the right to object to future discovery requests "that would require the burdensome search for and review of drug-specific documents for all Target Drugs." (*Id.*) Nevertheless, because the requested supplementation of the data would not be burdensome to NPC, and because none of Plaintiff's pending document requests to NPC would require the search

and review of drug-specific files, NPC agreed to expand its production of data and documents in response to Plaintiff's currently pending requests to include all Target Drugs. (Neagle Aff. at ¶ 11.)

In light of this agreement, NPC informed Plaintiff, by voicemail and letter, that this motion is now moot as to NPC and requested that Plaintiff withdraw the motion as to NPC. (Neagle Aff. at ¶ 12; Exh. G to Neagle Aff.) On August 22, Plaintiff's counsel, Mr. Libman, informed NPC's counsel by phone that he had just returned from vacation, and therefore he was not yet in a position to make a decision about whether Plaintiff would withdraw the motion as to NPC. (Neagle Aff. at ¶ 13.) He advised NPC's counsel that he would make that determination after reviewing NPC's opposition to the motion. (*Id.*)

ARGUMENT

I. THIS MOTION IS MOOT BECAUSE NPC HAS ALREADY AGREED TO PRODUCE THE INFORMATION PLAINTIFF SEEKS AND BECAUSE PLAINTIFF HAS STATED THAT ITS MOTION IS NOT INTENDED TO CIRCUMVENT AGREEMENTS REACHED THROUGH THE MEET AND CONFER PROCESS

Because NPC has already agreed to produce the additional discovery requested by Plaintiff, this motion is moot. *See, e.g., Williams v. Wellborn*, 53 F.3d 334 (7th Cir. 1995) (affirming district court's determination that motion to compel was "mooted by appellee's statement of compliance with discovery orders"); *Static Control Components, Inc. v. Lexmark Int'l*, No. Civ.A. 04-84-KSF, 2006 WL 897184, at *8 (E.D. Ky. Mar. 31, 2006) (denying motion to compel as moot where plaintiff had already produced information responsive to defendant's document requests and agreed to supplement its production with additional responsive information); *Briggs v. Wash.*

Metro. Area Transit Auth., No. Civ.A. 01-1876RJLJMF, 2005 WL 357190, at *3 (D.D.C. Feb. 15, 2005) (denying motion to compel as moot based on counsel's representations that its client had produced all responsive documents).

Plaintiff has expressly acknowledged in meet and confer communications with NPC that this motion was brought by Plaintiff "because many defendants either did not respond to Chuck Barnhill's July 19 letter regarding this issue, or took the position that they would not agree to discovery as to all drugs identified in the second amended complaint." (Exh. E to Neagle Aff.) However, counsel for NPC *did* respond to Mr. Barnhill's letter, advising him that it was scheduled to meet and confer with Mr. Libman regarding the issues he raised and expressing hope that any disagreements could be resolved amicably. (Exh. D to Neagle Aff.) Through the meet and confer process, counsel agreed to supplement its production with commercial sales data (pertaining to NPC sales made to customers located within Wisconsin and to wholesalers who may resell NPC products to purchasers in Wisconsin) and AMPs for all Target Drugs, and to produce documents pertaining to all Target Drugs in response to currently pending document requests.² (Neagle Aff. at ¶ 11; Exh. F. to Neagle Aff.) Accordingly, by

² Plaintiff's Memorandum in Support of Plaintiff's Motion to Be Permitted to Pursue Discovery of Its Entire Case also argues that Plaintiff ought to be permitted to take deposition discovery regarding all Target Drugs. (Pl. Mem. at 2.) There is no current dispute on this issue between NPC and Plaintiff. (Neagle Aff. at ¶ 12.) NPC's corporate designee was deposed on June 23, 2006 on a number of topics identified in Plaintiff's March 23, 2006 deposition notice to NPC. (*Id.*) Because the noticed topics did not call for drug-specific testimony, NPC did not limit its testimony to certain drugs. (*Id.*) The topic for the additional upcoming deposition of NPC, scheduled for September 20, 2006, is again not drug-specific, and therefore NPC has not sought to place any drug-related limitations on that testimony. (*Id.*)

Plaintiff's own admission, this motion is not directed at NPC, and Plaintiff's failure to withdraw the motion as to NPC is inexplicable.

II. TO THE EXTENT PLAINTIFF PURPORTS TO BRING THIS MOTION IN ANTICIPATION OF FUTURE DISCOVERY DISPUTES, IT IS NOT RIPE FOR RESOLUTION

NPC and Plaintiff have fully resolved the issue raised by this motion through their meet and confer communications. Specifically, NPC has reached agreement with Plaintiff regarding the scope of its production regarding all currently pending discovery requests. Although NPC has expressly reserved its right "to object to future discovery requests that would require the burdensome search for and review of drug-specific documents for the Target Drugs," (Exh. F to Neagle Aff.), any future disputes arising from drug-specific discovery requests that have not yet been made (and may never be made) are not ripe for review. As demonstrated by NPC's agreement to produce the additional discovery requested by Plaintiff, NPC has not asserted a blanket objection to producing information for all of the Target Drugs. However, NPC cannot agree now to produce information responsive to future unknown requests involving unknown costs and benefits, which may be overly burdensome to produce and yield *de minimis* or no benefit to Plaintiff (such as drug-specific requests for documents relating solely to drugs with low utilization in Wisconsin). Indeed, such fact-specific issues must be decided in context, as they arise. *See, e.g., Haas v. City of Milwaukee*, No. 05-C-785, 2006 WL 1049624, *5 (E.D. Wis. Apr. 18, 2006) (denying motion to compel in absence of previously propounded discovery request); *Oleson v. United States*, No. 05-C-33-C, 2005 WL 3149557, at *1 (W.D. Wis. Nov. 8, 2005) (denying motion to compel as premature because plaintiff had not submitted interrogatories pursuant to Fed. R. Civ. P.

33); *see also* Wis. Stat. § 804.12(1)(a) (only authorizing motion to compel upon failure to respond to specific discovery requests). Accordingly, unless and until Plaintiff propounds specific discovery requests requiring the resolution of these issues, it is premature for the Court to resolve them in the abstract.

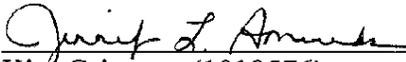
CONCLUSION

For the foregoing reasons, NPC respectfully asks this Court to deny, as to NPC, Plaintiff's Motion to be Permitted To Pursue Discovery of Its Entire Case.

Dated: August 22, 2006

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