



2. On October 5, 2005, the Plaintiff filed an unauthorized Status Report with the Court. Therein the plaintiff stated: "Plaintiff has evidence that defendants caused phony and inflated wholesale prices to be published with respect to each of the listed drugs . . ." The Plaintiff did not plead any of the evidence in the Complaint, and in fact did not plead any specific evidence as to Pfizer or any Pfizer drug. Plaintiff alleges that all 36+ defendants in this case — that is, 36+ different pharmaceutical manufacturers, many of which sell in different markets and do not compete with the majority of other defendants, all engaged in the same fraudulent conduct with respect to hundreds of prescription drugs. On October 19, 2005 Pfizer served discovery requests on Plaintiff (one interrogatory and one document request) on behalf of all defendants asking for the "evidence" Plaintiff alleged to have for each drug of each defendant on the list attached to the status report. Defendants granted Plaintiff's request for an extension of time to respond. Those responses are now due on December 19, 2004.

3. On November 4, 2005, the Plaintiff served on Pfizer's counsel a notice of deposition of a corporate designee (Heuer Aff., Exhibit B).<sup>1</sup> The topics listed in the notice essentially seek evidence that Pfizer does not engage in the conduct that Plaintiff alleges. Thus, although Plaintiff has filed a signed pleading with this Court stating that it "has evidence" that Pfizer caused "phony and inflated" AWP's to be published, it asks Pfizer to offer up a corporate designee to prove a negative rather than provide the affirmative evidence that it claims to have.

4. Although Pfizer is based in New York, the notice purports to require the witness to appear in Madison, Wisconsin. Further, although Pharmacia Corporation ("Pharmacia") and Pfizer are separate defendants, the deposition notice demands that Pfizer produce a witness to testify about drugs that are, or were, manufactured and sold by both companies.

5. Depositions should not proceed until Judge Krueger determines whether Plaintiff even has stated claims on which relief can be granted. All Defendants have moved to dismiss

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<sup>1</sup> The Heuer Affidavit is Exhibit A to this Motion.

this case and that motion is fully briefed. The motion is based on a number of grounds, including the following:

- A. Plaintiff has failed to allege fraud with the particularity required by WIS. STATS. § 802.03(2). This is particularly important because Judge Krueger previously dismissed a complaint based on exactly the deficiencies that characterize the Amended Complaint in this case (*K-S Pharmacies, Inc. v. Abbott Laboratories*, No. 94-CV-2384).
- B. Plaintiff lacks authority to pursue some of the claims it seeks to assert.
- C. The Amended Complaint fails to state a claim for false advertising and a recent decision from the Wisconsin Supreme Court confirms that no claim can be based on allegations such as those presented here. *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶¶ 39-48, 270 Wis. 2d 146, 677 N.W. 2d 233.
- D. The Amended Complaint fails to state a claim for "secret rebates."
- E. The Amended Complaint fails to state a claim for unjust enrichment.
- F. Many of the claims in the Amended Complaint are barred by the statute of limitations.

6. Pfizer also separately asked the Court to dismiss it because the Amended Complaint contains no allegations about any drug manufactured or sold by Pfizer. Plaintiff attached a list of over 76 drugs — some of which were manufactured and/or sold by Pharmacia, another Defendant — to its prior discovery requests and its recent deposition notice and seeks information about those drugs even though the Amended Complaint contains no allegations about any Pfizer drug. To permit Plaintiff to proceed with a deposition relating to 76 drugs before Judge Krueger has decided whether this case can go forward with respect to any drugs, if at all, would permit the Plaintiff to take discovery on issues that are not a part of this case — the classic "fishing expedition."

7. It is unreasonable for the Plaintiff to put Pfizer through the burden and expense of extensive discovery — much less a deposition — until dispositive motions are resolved. There is no prejudice to the Plaintiff from permitting Judge Krueger to determine what, if any, claims may proceed before conducting this discovery. See *Swan Sale Corp. v. Joseph Schlitz Brewing*

*Co.*, 126 Wis. 2d 16, 29-30, 374 N.W.2d 640 (Ct. App. 1985) (court has discretion to defer discovery until after dispositive motions are resolved).

8. Even if dispositive motions were not pending, the deposition notice would be improper. First, WIS. STATS. § 804.05(2)(e) requires a party that notices the deposition of a corporate designee to "designate with reasonable particularity the matters on which examination is requested." The Pfizer deposition notice is ambiguous, unclear, and overly broad — the antithesis of what is required by statute. While Pfizer has tried to narrow the scope of issues that Plaintiff seeks to address in the deposition, Plaintiff's counsel has refused to cooperate.

9. The deposition notice also improperly seeks to force the designee to bring documents to the deposition. Under WIS. STATS. § 804.05(2)(d), any request for documents must comply with WIS. STATS. § 804.09. This means that a party may respond by objecting to the requests and the tactic of noticing a deposition may not deprive the party of that right.

10. There is no reason to force a Pfizer designee to travel to Madison, Wisconsin. Under WIS. STATS. § 804.05(3), the deposition of a defendant is to be within 100 miles from where it transacts business and does not permit Plaintiff to force that deposition to be held where it wishes.

11. While discovery should be deferred until Judge Krueger has resolved the pending dispositive motions, Pfizer has responded to written discovery requests. It has also personally met with Plaintiff's counsel to explain its objections to discovery and to attempt to reach a compromise in an effort to move this matter along. Pfizer has also attempted to discuss with Plaintiff's counsel a way to resolve questions about the deposition notice in order to avoid motion practice. In contrast, Plaintiff has been unwilling to compromise in any way, and has instead threatened sanctions if a Pfizer designee does not show up in Madison at the time arbitrarily appointed by Plaintiff. Particularly where the Plaintiff is unwilling to discuss

questions or alternatives to holding a deposition at this stage in the case, it is improper for it to try to force a deposition on a Defendant at this time.

12. If the Special Master believes that any further discovery is appropriate at this time, there are less burdensome ways to conduct it. Plaintiff has been completely unwilling to discuss any alternatives to the deposition notice.

13. This Motion is supported by the Affidavit of Kimberly Heuer. No separate brief is filed.

Dated this 5th day of December, 2005.



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