

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,)

Plaintiff,)

v.)

AMGEN INC., et al.,)

Defendants.)

Case No.: 04 CV 1709

**PFIZER INC.'S REPLY IN SUPPORT OF ITS
MOTION FOR A PROTECTIVE ORDER**

INTRODUCTION

Plaintiff's Opposition to Pfizer Inc.'s Motion for Protective Order largely bypasses the single issue that is presently before the Court — whether Pfizer should be required to comply with plaintiff's November 4, 2005 Notice of Deposition — in favor of issues and arguments that are not before the Court. This is not surprising in light of the circumstances behind this dispute, which expose the deposition notice as nothing more than an abusive litigation tactic.

On October 5, 2005, plaintiff filed a Status Report in which it represented to the Court that it "has evidence that defendants caused phony and inflated wholesale prices to be published with respect to" hundreds of drugs identified on a list attached to the Status Report. On October 19, 2005, Pfizer served a single interrogatory and a single document request seeking production of this alleged evidence. Despite having the burden of proving the fraud alleged in the Complaint and representing to the Court that it has the evidence to meet that burden, plaintiff responded by serving Pfizer with a deposition notice demanding, in essence, that Pfizer prove a

negative: that it did not commit the alleged, unsubstantiated fraud. Thereafter, plaintiff rejected any suggestion of compromise or alternatives to the requested deposition, and threatened to move for sanctions if Pfizer did not comply.¹

Rather than squarely address this situation, plaintiff argues that Pfizer is asking the Court “to halt discovery until Judge Krueger decides the defendants’ motion to dismiss.” (Pl’s Opp. at 1). This mischaracterizes the issue before the Court. Pfizer’s motion does not request a stay of discovery. Rather, Pfizer opposes a deposition notice that would place on Pfizer the burden of proving that it did not commit the alleged fraud when: (a) plaintiff has not produced the evidence that it claims to possess; and (b) the Court has not decided whether plaintiff may proceed with any claims as to Pfizer and, if so, the scope of those claims.

In her November 29, 2005 Decision and Order regarding the Protective Order in this case (the “November 29 Decision”), Judge Krueger described the significant, unnecessary burdens that follow from plaintiff’s decision to combine “three dozen major pharmaceutical companies in this one lawsuit.” (November 29 Decision at 3). The type of litigation tactic represented by plaintiff’s Notice of Deposition does nothing but exacerbate the “administrative challenge of managing this case” that Judge Krueger noted. (*Id.* at 1). For this reason, and those described below, Pfizer’s Motion for a Protective Order should be granted.

¹ In contrast, even though plaintiff should readily have been able to produce its alleged evidence, defendants agreed to plaintiff’s request for an extension of time to respond to defendants’ request for the production of that evidence. Plaintiff recently served objections to this request, but to date, none of the alleged evidence has been produced. The parties’ meet-and-confer discussions have stalled due to holiday schedules.

ARGUMENT

A. **PLAINTIFF MISCHARACTERIZES THE STATUS OF DISCOVERY, THE ISSUE PRESENTLY BEFORE THE COURT, AND THE CIRCUMSTANCES UNDER WHICH IT AROSE.**

Plaintiff's opposition to Pfizer's motion is at odds with itself. On one hand, as it did in its Status Report, plaintiff again claims to have "evidence that Pfizer inflates its AWP's for all of its drugs." (Pl's Opp. at 4). On the other, plaintiff argues that its deposition notice "seek[s] testimony to establish two facts -- (1) that the published AWP's are not prices at which drugs are sold at the wholesale level, and that Pfizer had knowledge thereof; and (2) that Pfizer caused to be published and never corrected the inflated AWP's" (Pl's Opp. at 6-7). Thus, plaintiff seeks to subject Pfizer to the burden of presenting witnesses to provide detailed testimony on pricing, sales and reporting practices on eighty-eight (88) different drugs over a twelve-year period, all to establish facts that plaintiff says it can already prove, and before Judge Krueger has decided whether plaintiff may even proceed as to Pfizer.

Because it cannot justify this position, plaintiff attempts to divert attention from the issue by arguing that Pfizer has "almost completely stonewalled discovery" (Pl's Opp. at 5), and by complaining about Pfizer's responses to written discovery requests that are not at issue before the Court. Even on this point, plaintiff provides an incomplete explanation of the status of negotiations regarding that discovery. Plaintiff claims that "Pfizer's written responses contain nothing more than objections, and to date, nothing has been produced" (Pl's Opp. at p. 12). However, plaintiff neglects to tell the full story. While Pfizer served objections to the plaintiff's written discovery requests, Pfizer also tried to negotiate a compromise with plaintiff that would allow for the production of reasonable discovery while the motions to dismiss were pending. Plaintiff seeks discovery regarding 88 different drugs, even though the Complaint makes specific

allegations regarding only two drugs — Adriamycin and Solu-Medrol (*see* Compl. ¶¶ 39, 42) — which are manufactured and sold by defendant Pharmacia Corporation rather than by Pfizer.² On behalf of Pharmacia, counsel has offered to produce discovery regarding these two drugs as a starting point while the motions to dismiss are decided. On behalf of Pfizer, even though the Complaint contains absolutely no specific allegations regarding any Pfizer drug (and Pfizer has moved to dismiss on this basis), counsel offered as a starting point to provide transactional data — which would include information that plaintiff is seeking — about two Pfizer drugs of plaintiff's choice. Pfizer requested that plaintiff agree to meet with Pfizer's counsel after reviewing this information to discuss the validity of the case against Pfizer because, as counsel for Pfizer explained, the transactional data would show that there is no support for plaintiff's claims against Pfizer.³ Plaintiff rejected these offers and refused to compromise on discovery in any way.

B. PFIZER HAS SHOWN GOOD CAUSE FOR THE COURT TO ISSUE A PROTECTIVE ORDER REGARDING THE DEPOSITION NOTICE.

Pursuant to WIS. STATS. § 804.01 (3)(a), the Court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Such orders may preclude, limit or defer discovery. *See Swan Sale Corp. v.*

² Plaintiff notes that Pfizer acquired Pharmacia in April 2003 (Pl's Opp. at 11), shortly before this lawsuit was filed. However, Pfizer and Pharmacia remain separate corporate entities, and plaintiff has sued them separately. (*See* Compl. ¶¶ 19, 20). Nonetheless, in its Opposition, plaintiff seeks to attribute alleged Pharmacia actions to Pfizer. This is consistent with plaintiff's practice in the Complaint, where it seeks to attribute stock, industry-wide allegations to all defendants. This tactic reinforces the need for plaintiff to produce its alleged evidence before Pfizer or Pharmacia are subjected to any significant discovery burdens.

³ As counsel for Pfizer explained, contrary to plaintiff's allegations, Pfizer does not set AWP's or provide the price compendia with AWP's for any of its products.

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). The Court should enter a protective order regarding the deposition notice here.

Presenting a witness (or more likely, several witnesses) to testify on behalf of Pfizer would be time consuming and expensive, and quite possibly unnecessary. As mentioned above, plaintiff's notice seeks testimony that would require gathering and presenting detailed information about 88 separate drugs over a span of 12 years. The burden posed by the notice is exacerbated by the ambiguous, unclear and overly broad nature of the deposition notice and the fact that it will take time to track down much of the information requested because it is in the possession of others. (See ¶¶ 7 through 10 of Heuer affidavit, attached to Pfizer's Motion for Protective Order). Rather than trying to require Pfizer to bear a burden that has no legitimate purpose, plaintiff should simply produce the evidence it has repeatedly claimed to have — particularly where it has not been determined that plaintiff may proceed against Pfizer at all. Plaintiff will not be prejudiced by an order relieving Pfizer of this burden.

CONCLUSION

Plaintiff's deposition notice should be seen for what it is: not a legitimate discovery device designed to obtain evidence necessary to plaintiff's case, but strategic gamesmanship in direct response to Pfizer's request that the plaintiff produce the evidence it claims to have against Pfizer. In her November 29 Decision, Judge Krueger noted the "time-honored precept favoring the efficient administration of justice that guides the work of the trial Courts." (November 29 Decision at 4). Where, as here, plaintiff relies on nothing more than broad, conclusory

allegations that may well not survive motions for dismiss, this precept dictates that Pfizer's motion for a protective order be granted.

Dated this 3rd day of January 2006.

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