

high stakes and the fact that after four years of litigation the State has taken only three depositions of Pfizer,¹ Pfizer seeks a protective order based on its assertion that although it is willing to provide the information via interrogatory responses, it is burdensome to attend a deposition.

As this Court has already held in response to Pfizer's previous motion to quash a corporate designee deposition, "Section 804.01(3)(a), Stats., allows the court, for 'good cause' shown, to enter any order that justice may require to protect a party from 'annoyance, embarrassment, oppression or undue burden or expense'—including orders precluding, limiting or deferring discovery. The burden is, of course, on the moving party to establish good cause." January 31, 2006 Decision & Report of Discovery Special Master: Pfizer's Motion for Protective Order at 3 (citing *Earl v. Gulf & Western Mfg. Co.*, 123 Wis.2d 200, 208 (Ct. App. 1985)). As with Pfizer's previous motion, "Pfizer has not ... presented any direct evidence that an order is necessary to protect it from annoyance, embarrassment, oppression or undue burden or expense." *Id.*

I. THE DEPOSITION NOTICE SEEKS INFORMATION REGARDING THE RELATION BETWEEN PFIZER AND PHARMACIA IN RESPONSE TO PFIZER'S MOTION FOR SEPARATE TRIALS.

The deposition at issue asks for a Pfizer corporate designee to testify regarding the relationship between Pfizer and Pharmacia and between Pfizer and other subsidiaries, such as Greenstone, which were previously part of Pharmacia. See Engels dep. at 10, 33; Notice of Deposition of Deposition of Defendant Pfizer (attached as Ex. 2 to Archibald Aff.). The following are examples of the areas of inquiry:

2. The formal corporate relationship between Pfizer and Pharmacia and each of its subsidiaries including Greenstone, LTD.

¹ Archibald Aff., ¶3.

3. Identification of whether any of the directors, officers or employees of Pfizer also serve on the board of, act as officer for, or are employed by, any of [the enumerated Pfizer's subsidiaries].
4. The types of documents regularly exchanged between each of [the enumerated Pfizer's subsidiaries] and its employees.
17. Identification of whether Pfizer assumed liability for the drugs previously manufactured, marketed or sold by [the enumerated Pfizer's subsidiaries] upon acquisition of the entity by Pfizer.

The deposition at issue was noticed on February 1, 2008, the same date that the State notified the Court in its proposed trial plan that it intended to try Pfizer and its subsidiary Pharmacia together.² In response to the State's trial plan, Pfizer objected, asserting various facts regarding the relationship between the companies, including that even after the acquisition, "Pharmacia has maintained its own corporate identity as a subsidiary of Pfizer."³

The State has evidence that the separate corporate "identity" is meaningless for purposes of this litigation. As Pharmacia corporate designee Mark Engels testified, "Pharmacia was totally disbanded upon the acquisition of Pfizer" Engels dep. at 14. Further, Pfizer and Pharmacia have acted jointly in this case. In Pfizer's previous motion to quash a deposition, Pfizer, who shares the same counsel as Pharmacia in this litigation, acted on behalf of Pharmacia. *See Pfizer Inc's Reply in Support of its Motion for a Protective Order* at 4 ("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.")⁴ Not only has Pfizer failed to establish that the deposition is unduly burdensome—which is its burden, but Pfizer's proffered facts in objection

² Plaintiff State of Wisconsin's Trial Plan for 2009, filed on February 1, 2008 (attached as Ex. 3 to Archibald. Aff.)

³ Pfizer Inc.'s Response and Objection to Plaintiff State of Wisconsin's Proposed Trial Plan at 3, filed February 19, 2008 (attached as Ex. 4 to Archibald Aff.)

⁴ Pfizer Inc.'s Reply in Support of its Motion for a Protective Order, filed January 3, 2006.

to the State's trial plan make the deposition regarding the relationship between Pfizer and Pharmacia imperative.

II. PFIZER IS AN APPROPRIATE PARTY FROM WHICH TO REQUEST INFORMATION REGARDING THE RELATIONSHIP BETWEEN PFIZER AND PHARMACIA.

Pfizer contends that it is the “wrong party” to depose. Pfizer Mem. at 1, 3. However, this assertion is only supported by Pfizer's misrepresentation that the notice contains “eighteen subject matters dealing with the corporate structure and business practices of Pharmacia.” Id. at 1. A simple glance at the list of subjects shows that is incorrect. As discussed above, the purpose of the deposition is to discover the relationship between the two the companies (and the other subsidiaries) and the deposition subjects reflect this. See the examples, *supra* and Notice of Deposition of Deposition of Defendant Pfizer, Archibald Aff., Ex. 1.

Of the 18 subjects, only five (paragraphs 6-8, 13-14) deal exclusively with Pharmacia. Regarding those few subjects, if Pfizer does not, in fact, have information regarding those topics, it need only state so. The Wisconsin statute governing corporate designee depositions states that the deponent “shall testify as to matters *known or reasonably available* to the organization. Wis. Stats. § 804.05 (2)(e) (emphasis added). The deposition notice does not obligate Pfizer to seek out information that it does not have, but simply to answer questions regarding the topics if the corporation has the information. A corporation's lack of information on *some* points is not a basis to quash a deposition.

If, on the other hand, Pharmacia is disbanded and completely controlled by Pfizer—as the evidence so far indicates—Pfizer will have the necessary information regarding Pharmacia. Pfizer has never stated that it does not have the requested information. Nor has it stated that it would be burdensome to collect the information. In fact, Pfizer offers to provide information—“to the extent known, [Pfizer] would be willing to respond to written interrogatories regarding

the subject matters detailed in the Notice of Deposition” McCall Aff., ¶4. Thus, Pfizer’s objection is not that providing the information would be burdensome, but simply that it would rather do so by interrogatory than deposition.⁵

III. A DEPOSITION IS AN APPROPRIATE DISCOVERY METHOD TO OBTAIN INFORMATION REGARDING THE RELATIONSHIP BETWEEN PFIZER AND PHARMACIA.

Pfizer makes the nonsensical assertion that a deposition is the “wrong” method of obtaining information regarding the relationship between Pfizer and Pharmacia because the State would be subjecting Pfizer’s deponent to a “memory test.” Pfizer Mem. at 2-3. Pfizer insists that the State must instead use interrogatories to obtain this information. *Id.* at 1-2, 4.

A. A Corporate Designee Is Required By Statute To Testify Beyond His/Her Personal Knowledge And This Is Not A Basis To Quash The Deposition.

Pfizer’s assertion that it would be burdensome for its deponent to testify regarding information of which the deponent does not have personal knowledge is meaningless because it could apply to any corporate designee deposition; such a deposition is always seeking knowledge of the organization, not of the witness. The Wisconsin statute governing such depositions states that the “persons ... designated shall testify as to matters *known* or reasonably available *to the organization*.” Wis. Stats. § 804.05 (2)(e) (emphasis added). Thus, the “corporation must not only

⁵ Pfizer incorrectly asserts that the relevant time period for discovery ends June 3, 2004, and claims this is relevant because Pfizer did not acquire Pharmacia until a year before that date—on April 2003. Pfizer Mem. at 3. However, the time period for discovery asserted in the notice is January 1993 through January 31, 2008. Notice of Deposition at 3. Both parties—the State and defendants—have used this time period as the relevant time period of their discovery requests. In fact, for defendants’ discovery request issued just over a month ago, defendants use “January 1993 through the present” as the relevant discovery time period. See Defendants’ 6th Set of Interrogatories and Requests for Production Directed to Plaintiff - 2/25/2008 at 2 (attached as Ex. 5 to Archibald Aff.). Pfizer’s unilateral declaration that the relevant discovery time period ends on June 3, 2004, the date the State’s complaint was filed, is completely unsupported. Regardless, whether the Pfizer’s acquisition of Pharmacia occurred a year before the end of the time period or five years before is irrelevant.

produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give completely knowledgeable and binding answers on behalf of the corporation.” *Alloc, Inc. v. Unilin Decor N.V.*, No. 02-C-1266, 2006 WL 2527656, *1 (E.D. Wis., Aug. 29, 2006).

As with any corporate designee deposition, if the corporation possesses information on a specific subject matter area on which the deponent is not able to testify from memory, the deponent can and should bring documents to assist him or her. That the Pfizer deponent may need documentary help for several questions does not entitle Pfizer to quash the entire deposition.

B. Pfizer Has No Support For Its Assertion That It Is Entitled To Dictate The Discovery Method The State Uses.

As Pfizer argued in its previous motion for a protective order, it again argues that there are “less burdensome” means of acquiring the desired information and states that it is “willing” to respond to written interrogatories. McCall Aff., ¶4. However, Pfizer is not entitled to dictate the discovery method the State uses.

Pfizer relies on *Vincent & Vincent, Inc. v. Spacek*, 102 Wis.2d 266, 306 N.W.2d 85 (Wis. App. 1981), for the proposition that the courts must weigh the burden and expense of producing information against the value of information sought. Pfizer Mem. at 2, 3. However, as the court in *Vincent & Vincent* made clear, it is the burden of the party seeking the protective order to establish the cost of producing the information. 102 Wis.2d at 272, 306 N.W.2d at 88 (emphasis added) (“*When the burden and expense are determined*, courts must weigh this burden and expense against the value of the information sought.”); *id* (granting a protective order when claim for damage was \$2,200 and expenses in answering the interrogatories would be \$5,000 to \$10,000). Pfizer has not even attempted to meet its burden in this regard. Given that the State’s

claims against Pfizer are potentially in the hundreds of millions of dollars, *see supra* at 1, such an effort would futile.

Pfizer also relies on *SmithKline Beecham Corp. v. Apotex Corp.*, No. 99-CV-4304, 2004 WL 739959, *2 (E.D. Pa., Mar. 23, 2004), for the proposition that the relevant question is “which device would yield most reliably and in the most cost-effective, least burdensome manner information that is sufficiently complete to meet the needs of the parties and the court.” Pfizer Mem. at 4. However, that statement was made in *SmithKline Beecham* in the context of determining whether “contention interrogatories [were] more appropriate than Rule 30(b)(6) depositions” when a party requested the “legal position” of its opponent.⁶ 2004 WL 739959, at *3. Accordingly, the court in *SmithKline Beecham* ordered the party to obtain information with contention interrogatories for those questions that sought the party’s legal position, and ordered the corporate designee deposition to go forward for those questions that sought facts. 2004 WL 739959, at *3-4. Pfizer does not (and indeed could not) contend that the State is seeking Pfizer’s legal position on any issue. Thus, the holding in *SmithKline Beecham* on which Pfizer relies dictates that the deposition go forward.

CONCLUSION

Pfizer is an appropriate party to depose regarding the relationship between Pfizer and Pharmacia. Surely, if the State had directed this deposition at Pharmacia, Pharmacia would have similarly objected that the State should be deposing Pfizer. Further, a deposition is an appropriate method to obtain the information. Pfizer’s statement that it “doubtless has been apparent to the Court how extraordinarily expensive and burdensome this litigation has been” is

⁶ *See also Alloc, Inc. v. Unilin Decor N.V.*, 2006 WL 2527656, *1 (E.D. Wis. 2006) (emphasis added) (“A party may properly resist a Rule 30(b)(6) deposition on the ground that the information sought is more properly sought through *contention* interrogatories.”).

unavailing. Pfizer Mem. at 2. It is Pfizer's burden to establish that the deposition is *unduly* burdensome, not merely burdensome:

The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.

Alloc, Inc. v. Unilin Decor N.V., No. 02-C-1266, 2006 WL 2527656, *2 (E.D. Wis., Aug. 29, 2006) (Randa, J.). As this Court ruled in response to Pfizer's previous motion, Pfizer does not meet the "undue burden" provisions of § 804.01(3)(a), Stats" and thus is not "entitled to an order quashing the Notice of Deposition and directing the State to accept [its] offer" of an alternative means of discovery.

Dated this 7th day of April, 2008.



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