

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., et al.,

Defendants.

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Case No. 04-CV-1709

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO BE
PERMITTED TO PURSUE DISCOVERY OF ITS ENTIRE CASE**

Plaintiff requests that it be permitted to pursue discovery in connection with the entirety of its case for two reasons: First, because it has satisfied the predicate for so doing by filing its amended complaint and, second, because it is significantly more efficient to permit it to do so.

I. Background of Motion.

In January of this year some of the defendants asked the Special Master to limit plaintiff's discovery on the grounds that a motion to dismiss was pending and because the plaintiff's complaint was too vague for them to know what Wisconsin was alleging they did wrong. Plaintiff opposed any limitation on discovery on the grounds that similar motions in a number of states had been rejected and that the defendants, who were being sued by many different states for virtually the same conduct, fully understood the claims against them.

The Special Master ruled in connection with one such motion that discovery could proceed, but only on a limited basis. Plaintiff was limited to discovery of no more than 15 drugs. After this decision Wisconsin acceded to requests by a number of defendants for a similar 15 drug limitation pending the outcome of the motion to dismiss. Now the motion to dismiss has been decided. Two counts have been found fully viable and plaintiff has supported the other

counts as Judge Krueger required with a detailed recitation of the false prices defendants caused to be published and the true prices at which these drugs were sold. It is a fact that no complaint in any of the 20 or so states that have filed complaints, nor any complaint in the MDL, approaches the level of detail contained in Wisconsin's complaint.

Depositions are just beginning in Wisconsin and document discovery is just starting to expand beyond the borders of the documents produced in the MDL. In such a context now is the appropriate time to permit plaintiff to engage in full scale discovery on all the issues raised in its case for several reasons.

II. Reasons For Granting Plaintiff's Motion.

The first and most obvious reason for granting plaintiff's motion is that plaintiff has a right to develop all the facts necessary to prove its case under its complaint (subject to the Court's power to order discovery to curb any obvious inequities). This proposition is indisputable.

Second, dividing up discovery by drug segments is inefficient and leads to extra, unnecessary work and additional discovery disputes.

It is inefficient because it leads to unnecessary duplication. Many of the witnesses plaintiff will be deposing possess information on all the drugs identified for a particular defendant in plaintiff's second amended complaint. If plaintiff is only allowed to ask about 15 of these drugs the same witness will have to be redeposed later whenever the Special Master permits full discovery. This is not just plaintiff's problem. At least one defendant earlier gave this as a reason for opposing all discovery while the motion to dismiss was pending.

The 15 drug limitation also gives rise to wholly unnecessary, duplicative work in connection with document production. Currently defendants are producing responses to

plaintiff's document requests that redact information about drugs which are identified in the Second Amended Complaint but not includable on a more limited list of 15 drugs. (See Exhibits A-1, A-2, for example.) Not only is this requiring the defendants the time and effort of redacting this material—which for reasons of their own they seem happy to do—but it is causing significant problems with plaintiff's document review. Many of these same documents will have to be produced again without the redaction, and reviewed again, and indexed again. There is no good reason for requiring plaintiff to do this extra work.

There is another problem altogether with defendants' practice of redacting documents because the drugs on those documents are not on the 15 drug list—it is improper even given the Special Master's prior order. Plaintiff's complaint alleges—and it is a fact—that defendants inflated the wholesale prices of all their drugs. Even if the drugs defendants' have redacted are not on a limited 15 drug list, or identified in the Second Amended Complaint, they still provide evidence supporting the allegations of plaintiff's complaint. Redacting references to these drugs on documents otherwise being turned over to plaintiff is contrary to the whole point of the Special Master's order. The purpose of the order was to limit the discovery burden on defendants while a motion to dismiss was pending. Redacting documents that are being turned over in any event does not reduce defendants' burden—it adds to it. Thus, the only purpose of such redactions is to unjustifiably deprive plaintiff of relevant information.

Third, the outstanding limitation on plaintiff's discovery gives rise to unnecessary disputes over the definition of a drug. Is it the NDC number? Is it an individual drug, for example amoxicillin, or does it include the amoxicillin family? Haggling over these definitions makes no sense now that the complaint lays out a complete list of those drugs plaintiff is currently targeting.

In light of plaintiff's filing of its Second Amended Complaint there is literally nothing to be gained by limiting plaintiff's discovery or attempting to channel it based on a 15 drug limitation and there is real harm to plaintiff in so doing. On the other hand, defendants have no good argument for continuing to curtail plaintiff's discovery now that the status of the complaint has changed. Since defendants continue to bear the burden of justifying restrictions on plaintiff's relevant discovery, and they cannot do so in the present context, plaintiff should be permitted to pursue discovery over the entirety of its case. That is not to say that plaintiff will refuse to organize discovery in a reasonable manner, or refuse to discuss individual exceptions to this rule. But it is important to remove the 15 drug limit as a barrier which defendants can erect to bar more comprehensive discussions.

Plaintiff sought permission of the defendants to expand discovery (Exhibit B) but the response, to the extent there has been one (most of the defendants did not even bother to reply), has been generally negative or unresponsive. (See Exhibits C – G)

CONCLUSION

For all these reasons Wisconsin asks the special master to permit it to pursue discovery in connection with the entirety of its complaint. Such a ruling would be consistent with the Court's very recent decision in connection with the Sandoz motions.

Dated this 27th day of July, 2006.



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