

The central reason for Sandoz's self-imposed stay of discovery is the Court's April 3, 2006 partial ruling on defendants' motions to dismiss, which required the State to file an amended complaint. Although the State disagrees with Sandoz about the effect of the order on Sandoz's discovery obligations, it is undisputed that this order was issued several months after the date by which Sandoz promised to answer the State's interrogatories and complete its production of documents. Yet Sandoz offers no explanation for its failure to keep its promise.

Moreover, although Sandoz still proclaims that it seeks only narrow relief, it is in reality asking for an indefinite stay of discovery. And although Sandoz's opening brief requested only a continuance of the State's deposition until after the State filed its amended complaint, Sandoz now seeks to quash the deposition in its entirety. As the State demonstrates below, Sandoz has failed to demonstrate "good cause," as is its burden, for any of the relief it seeks. Accordingly, its motion for protective order should be denied and the State's cross-motion to compel should be granted.

THE STATE IS ENTITLED TO DEPOSE SANDOZ

The State Is Entitled to Depose Sandoz Once it Files its Amended Complaint

In its opening brief, Sandoz argued that the State's deposition should be continued to a date after the State filed its amended complaint. The State pointed out in its opposition brief that a careful reading of Sandoz's motion made clear that it was seeking extraordinary relief – an indefinite continuance until some undefined date in the future after Sandoz has moved to dismiss the State's amended complaint and the Court has ruled on it, and after Sandoz has completed its review and production of documents, which it estimated would take at least six months.² In its reply brief, Sandoz does not dispute the State's observation. In fact, Sandoz confirms it, stating

² See State of Wisconsin's Memorandum in Opposition to Sandoz's Motion for Protective Order and in Support of Plaintiff's Cross-Motion to Compel Production of Documents and Answers to Interrogatories ("Plaintiff's Opp."), at 8-9.

that it seeks to suspend the State's deposition (and indeed, all discovery) "until Plaintiff has - successfully amended its complaint."³ Sandoz argues that its position is supported by the Discovery Master's May 31, 2006 Decision & Report regarding Mylan's motion for protective order ("Mylan Decision").

In its Mylan Decision, the Discovery Master concluded that the State's deposition of Mylan should take place after the State files its amended complaint. The State assumes that the Discovery Master will follow the Mylan decision in considering Sandoz's motion for protective order. And in any event, given the briefing schedule on Sandoz's motion and the State's intention to file its amended complaint on or before June 30, 2006, the State is not likely, as a practical matter, to be able to take the deposition before that date. Moreover, once the State has filed its amended complaint, the main reasons asserted by Sandoz for refusing to produce a designee for deposition, *i.e.*, the alleged "lack of an operative complaint,"⁴ and its uncertainty about the State's claims (neither of which the State believes have merit), will have been cured.

But the Mylan decision does not address whether a further postponement is appropriate to enable a defendant to complete its review and production of documents. However, a recent decision of the Discovery Master does address, and reject, this and other arguments advanced by Sandoz. On June 6, 2006, the day after Sandoz filed its reply brief, the Discovery Master issued an order on the motion for protective order filed by defendant Teva Pharmaceuticals, Inc.⁵ In its motion, Teva asserted "that because it has not been a participant in earlier related federal and state actions, it is 'starting from scratch' and needs more time to gather its own information and

³ See Sandoz Inc.'s Memorandum in Further Support of its Motion for a Protective Order and in Opposition to Plaintiff's Cross-Motion to Compel Production of Documents and Answers to Interrogatories ("Sandoz Reply"), at 1 (emphasis added).

⁴ See Memorandum in Support of Defendant Sandoz Inc.'s Motion for Protective Order ("Sandoz Motion"), at 2; Sandoz Reply, at 6.

⁵ See June 6, 2006 Decision & Report of Discovery Master regarding Teva's Motion for Protective Order ("Teva Decision"), attached hereto as Exhibit 1.

prepare its representative witness.” *Id.* at 3. Furthermore, Teva sought “to postpone any representative deposition for an unstated period of time in order to give it amply opportunity to gather and review documents in its possession that are being sought by the state in other discovery efforts, and until it has had the opportunity to ‘identify and prepare an appropriate representative’ to be deposed.” *Id.* at 5. In addition, Teva argued that “it need[ed] an undefined period of time in which to prepare its witness in order to avoid the ‘potential’ that he or she ‘might’ testify erroneously on some points due to lack of adequate preparation.” *Id.* The Discovery Master properly characterized Teva’s objections as “highly generalized and, in some respects speculative,” *id.* at 4, and concluded that Teva had not shown good cause for issuance of a protective order. *Id.* at 5.

Like Teva, Sandoz argues that the State’s deposition should not take place until Sandoz has completed its document production.⁶ And like Teva, Sandoz advances other objections to the deposition that are “generalized” and “speculative.” For example, Sandoz argues that if the deposition goes forward before Sandoz completes its document review and production, “there is a risk that Sandoz witnesses will have to be deposed twice – once as a designee and then potentially in his or her individual capacity about documents that would be produced afterward.” *Id.*; *see also* Reply, at 7. In addition, Sandoz argues that without additional time to review documents, there is a “possibility that . . . the parties will have disputes whether the designated deponent was adequately prepared.” Sandoz Motion, at 11. For the same reasons that Teva’s arguments were rejected, Sandoz’s arguments, too, should be rejected.⁷

⁶ *See* Sandoz Motion, at 10.

⁷ Sandoz mischaracterizes the record when it asserts that the State believes “no time should be allowed for Sandoz to complete its document review.” Sandoz Reply, at 6. To the contrary, the State contends that: (1) as to some of the subjects, like Subject No. 1, no document review is necessary because Sandoz, like all defendants, have consistently argued in this case and others that AWP is not a price paid by any purchaser and that Sandoz had no duty to report truthful prices; and (2) to the extent document review is required in order to prepare for any of the other subject matters, Sandoz has had more than ample time to complete this review, and certainly as much time as Teva has had.

Accordingly, the State should be permitted to take Sandoz's deposition on a mutually convenient date after the State files its amended complaint.

The State's Deposition Notice is Adequate and Sufficient

Sandoz attacks the sufficiency of the State's notice of deposition with several meritless arguments. First, Sandoz argues that the Pfizer Decision cannot be applied to Sandoz because Sandoz did not join in the motion or otherwise participate in that proceeding. Sandoz Reply, at 16. Sandoz's argument is non-sensical. Pfizer challenged the identical deposition notice which Sandoz challenges here and asserted that it did not describe the subject matters with reasonable particularity. *See* Pfizer Decision, at 3-4. The Discovery Master rejected Pfizer's argument and denied its motion for protective order. Sandoz offers no compelling reason why the same result should not obtain here.⁸

Second, Sandoz asserts that the terms "retail pharmacies," "retail class of trade," and even the term "pharmacy" are vague and ambiguous and "unfairly purport to impose on Sandoz a burden to interpret at its own risk what information the Plaintiff seeks." Sandoz Reply, at 13. This argument cannot be taken seriously. These common terms are well-known to Sandoz, a sophisticated pharmaceutical manufacturer. Indeed, Sandoz's discovery requests to the State use the term "pharmacist."⁹ Moreover, the State intends to ask the Sandoz designee to explain Sandoz's understanding of these terms. And as normally occurs at a deposition, if the witness does not understand a term used by the State, he or she can, as the State will instruct, ask the State to define or clarify the term. In short, this argument amounts to much ado about nothing.

⁸ And it is ironic, to say the least, that Sandoz feels no reluctance in arguing that the Mylan Decision should apply to Sandoz even where Sandoz did not join in that motion or otherwise participate in that proceeding, while arguing that Sandoz should not be bound by the Pfizer Decision.

⁹ *See* Defendants' Second Set of Document Requests Directed to Plaintiff (attached hereto as Exhibit 2), at 1 (Definition of "Actual Acquisition Cost"); Defendants' Second Set of Interrogatories Directed to Plaintiff (attached hereto as Exhibit 3), at 6 (Interrogatory 9) & 10 (Interrogatory 20).

Third, Sandoz argues that all of the subject matters in the deposition notice are unduly burdensome and overly broad because they seek information about fifty-two drugs and therefore require Sandoz to prepare its designee to have knowledge of “multiple thousands of transactions.” This, too, is a red herring. For example, as to Subject No. 1, Sandoz cannot seriously contend that it has to review every sales transaction for each of the fifty-two drugs in order to prepare a witness to testify as to whether any retail pharmacy has ever paid the published AWP for one of these drugs. This is because Sandoz bases its entire defense in this case on the assertion that the term AWP has no relationship to actual market prices, it has never been understood to mean the actual prices charged by wholesalers, and that Sandoz has no legal duty or obligation to report truthful prices. If Sandoz’s lawyers can make this argument (and they have made it on multiple occasions in multiple jurisdictions), surely Sandoz can produce a witness to testify to this under oath. Sandoz complains that subject matters nos. 3 and 4, which seek testimony regarding Sandoz’s communications with pricing compendia, impose an undue burden because the two Sandoz employees who communicated with the compendia between 1998 and 2004 are no longer employed by Sandoz. This is not a proper basis for quashing a corporate designee deposition, which requires the corporation to designate a person to testify, not necessarily from personal knowledge, but “as to matters known or reasonably available to the organization.” *See* Wis. Stat. 804.05(2)(e). Although it is for Sandoz, rather than the State, to identify the appropriate designee, the current Sandoz employee with responsibility for communicating with the pricing compendia is the logical choice for these subject matters.¹⁰

Fourth, Sandoz asserts that the State “has been unable to [provide additional details about the topics] with certainty and has admitted that the topics only set forth some of the information

¹⁰ Moreover, the Discovery Master rejected Teva’s argument that it needed additional time to identify and prepare an appropriate representative to testify at deposition. *See* Teva Decision, at 5.

that Plaintiff seeks.” Sandoz Reply, at 13-14. Sandoz further contends that the State has indicated that it intends to seek information about matters not described in the deposition notice. *Id.* at 14. This is simply false. Although the subject matters are described with sufficient particularity in the deposition notice, the State agreed, at Sandoz’s request, to provide additional information regarding these subject matters. The State did so by letter dated April 25, 2006, describing the subject matters in a full page of single-space text, which is reproduced in the State’s opposition brief. *See* Plaintiff’s Opp., at 12. Although Sandoz cherry-picks the phrases “among other things,” “including, but not limited to,” and “illustrative, not exhaustive,” from the State’s letter, the State felt compelled to use such language in its letter to make clear that the deposition notice itself, rather than the State’s letter, would limit the scope of the deposition.¹¹ For this reason, the cases cited by Sandoz, in which the deposition notices themselves did not limit the subject matters, are inapposite. *See Reed v. Bennett*, 193 F.R.D. 689, 692 (D.Kan. 2000) (quashing deposition where the deposition notice stated that the areas of inquiry will “includ[e], but not [be] limited to” the areas specifically enumerated); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (denying motion for leave to take deposition pursuant to a third-party subpoena where the subpoena sought a deposition about documents “including but not limited to” the areas specified).¹² To be clear, the State does not intend at this deposition to ask about subject matters not identified in the deposition notice. If, however, at deposition, Sandoz believes that the State’s questions are outside of the scope of the deposition

¹¹ The State provided a virtually identical letter to another defendant, Novartis Pharmaceuticals Corporation, which sufficiently satisfied its concerns about “particularity” that it has agreed to appear for deposition on June 23, 2006.

¹² The third case cited by Sandoz, *Shannon v. TAESA Airlines*, No. Civ. A. 2:93-CV-689, 1994 WL 931216, *1-2 (S.D. Ohio, Nov. 10, 1994) is clearly distinguishable from the instant case. In *Shannon*, the Court found that a deposition notice which sought testimony regarding “all aspects of [defendant’s] operations, including but not limited to its operations in employee manuals,” was overbroad. The subject matters identified in State’s deposition notice, by contrast, are narrow and clearly-defined.

notice, it is free to take whatever action it deems appropriate consistent with the Wisconsin rules of civil procedure.

Finally, Sandoz argues that the deposition notice seeks testimony that is protected by the attorney work product doctrine. The sole basis for this strained argument is that three of the subject matters identified in the deposition notice use the term “evidence.” *See Reply*, at 15. However, the use of the term “evidence” does not suggest that the State seeks the mental impressions of Sandoz’s attorneys or any other privileged material. Nor is the State trying to shift the burden to Sandoz to adduce evidence to support the State’s claims. Rather, the word “evidence” is a common term used by lawyers to refer to documents, testimony, or other factual information, which is what the State is entitled to discover through this deposition. So there is no doubt about this matter, the State does not seek attorney work product through this deposition. If, however, Sandoz believes that a question asked by the State seeks privileged information, it is free to instruct the witness not to answer.

For the above reasons, the State’s deposition notice is adequate and sufficient.^{13,14}

SANDOZ SHOULD ANSWER THE STATE’S INTERROGATORIES AND COMPLETE ITS DOCUMENT PRODUCTION

For the same reasons that Sandoz should be ordered to appear for deposition once the State has filed its amended complaint (*see supra*, at 2-5), Sandoz should also be ordered to answer the State’s interrogatories and complete its document production. These discovery

¹³ Sandoz asserts, erroneously, that the State did not comply with its “meet and confer” obligations regarding this issue. To the contrary, it was Sandoz that refused to provide the State with its position regarding this issue (although during one telephone conversation, counsel for Sandoz advised the State that it believed the State’s April 25, 2006 letter, described *supra*, addressed its concerns about the “particularity” of the subject matters), preferring to defer discussion until after the Discovery Master ruled on the timing of the deposition. The State objected to this piecemeal approach to litigating issues relating to the deposition notice. In any event, it is clear from Sandoz’s reply brief that additional consultation would not have bridged the gap between the parties’ positions.

¹⁴ Without waiving its argument that Sandoz “transacts business in person” in Wisconsin within the meaning of Wis. Stat. 805.05(3)(b)1 & 6 with respect to future depositions of Sandoz, the State is willing to take the present deposition in New Jersey, where Sandoz resides.

requests were served on Sandoz more than thirteen months ago (May 2005), and Sandoz promised to provide substantive answers to the interrogatories by November 2005 and to complete its document production by January 2006. Sandoz offers no justification for breaking its promise.

The only argument Sandoz can muster is that the State is not prejudiced by the delay, and will not be prejudiced by an additional delay of at least six months (the time Sandoz estimates it will take to complete its review of documents). Sandoz is improperly shifting the burden. As the party resisting discovery, it is Sandoz's burden to demonstrate "good cause," which Sandoz itself defines as "serious injury." *See* Sandoz Reply, at 9 (citing Moore's Federal Practice, § 26.104(1) (3d ed. 1999)). There is no "serious injury" in holding Sandoz to its word, particularly where the written discovery requests are few in number and focused on the core information relating to the State's claims. And in any event, the State is prejudiced by Sandoz's inexcusable delay.

Furthermore, Sandoz does not offer any rebuttal to the State's showing that the State's discovery requests are narrow, focused, and seek relevant information. Nor does Sandoz directly respond to the State's showing with regard to each individual interrogatory and document request. For example, Sandoz does not dispute that documents referring to "ASP," "3-month Average Price," and "6 Mth Rolling Avg Price" establish that Sandoz has in fact determined "an average sales price or other composite price net of any or all Incentives" for its drugs within the meaning of Interrogatory No. 1.¹⁵ Sandoz should therefore answer the interrogatory, including

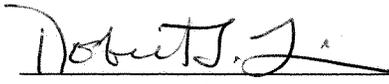
¹⁵ The State is puzzled by Sandoz's complaint that documents produced by Sandoz and attached to the State's opposition brief were "wrongly" introduced into this discovery dispute "in an effort to somehow malign Sandoz." *See* Sandoz Reply, at 10. These documents demonstrate, among other things, that Sandoz has sufficient information to answer the State's interrogatories. It appears that Sandoz feels "maligned" by its own documents because they also support the State's allegation that Sandoz has caused to be published AWP's that not only bear no relationship to the true prices of Sandoz's drugs, but that the AWP's exceed the true prices by, in some instances, quadruple-digit percents.

all of its subparts. Finally, although Sandoz claims that it has prioritized its production in accordance with the State's requests, it is undisputed that Sandoz has not complied with the request contained in the State's November 9, 2005 letter that Sandoz prioritize its search and produce documents similar to the "1/23/03 Geneva Price List WAC to Avg Contract Price Comparison" which shows enormous spreads between Sandoz's (formerly Geneva's) average contract prices and its AWP's.¹⁶

CONCLUSION

For the above reasons, Sandoz's motion for a protective order should be denied and the State's cross-motion to compel should be granted. Sandoz should be ordered to appear for deposition, answer the State's first set of interrogatories, and complete its production of documents responsive to the State's first set of requests for documents promptly after the State files its amended complaint.

Dated this 19th day of June, 2006.



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¹⁶ See Exhibit 17 to the May 17, 2006 Affidavit of Robert S. Libman.

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