

STATE OF WISCONSIN	CIRCUIT COURT Branch 7	DANE COUNTY
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STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
AMGEN INC., et al.,)	
)	
Defendants.)	
)	
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Plaintiff's Response To Defendant Johnson & Johnson's Request For A Protective Order and Affidavit of Charles Barnhill to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20th, 2005.

I also certify that I caused a true and correct copy of these documents to be delivered via e-mail and U.S. Mail upon the Honorable William F. Eich, weich@charter.net, 840 Farwell Drive, Madison WI 53704.

Dated this 15th day of May, 2006.



 Charles Barnhill

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,)	
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Plaintiff,)	
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v.)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
AMGEN INC., et al.,)	
)	
Defendants.)	

AFFIDAVIT OF CHARLES BARNHILL

State of Wisconsin)
) ss
County of Dane)

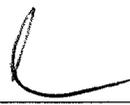
1. As a Special Assistant Attorney General I am one of the attorneys representing the State of Wisconsin in this case.

2. I have reviewed Wisconsin’s response to defendant Johnson & Johnson’s request for a protective order and the facts relating to my interactions with opposing counsel contained therein are true and correct to my knowledge and belief.

3. All the documents attached to Plaintiff’s Response To Defendant Johnson & Johnson’s Request For A Protective Order are true and correct copies of original documents.

4. The document relating to Ortho Biotech was filed in the MDL by plaintiffs.

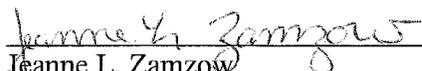
Dated this 15th day of May, 2006.



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Subscribed and sworn to before me
this 15th day of May, 2006.



Jeanne L. Zamzow
Notary Public, State of Wisconsin
My Commission expires 06/14/09.

substitute document dumps in the MDL for any real response to plaintiff's more targeted discovery. Thus, J&J has not answered a single interrogatory and has simply produced the documents it has produced in the MDL. This is unacceptable for a variety of reasons. As Judge Eich has held, the MDL litigation differs significantly from the instant case. The MDL is a nationwide class action seeking relief for private individuals on only a limited class of drugs, those utilized by Medicare Part B recipients. This different setting has led to different discovery strategies (much of the discovery in the MDL concerned class certification issues which are not present here) and different legal theories being relied upon by the MDL plaintiffs. For example, plaintiffs in the MDL have abandoned any claim of a violation of Wis. Stat. 100.18(10)(b) which specifically bars a seller from representing a price as a wholesale price when retailers are actually paying less because this statute is not applicable nationwide. Plaintiffs in the MDL also do not assert, for obvious reasons, Wisconsin's statutory claim of Medicaid fraud. In sum, this case and the MDL are two very different cases demanding very different discovery approaches, a fact defendants have tried to obfuscate. J&J is no less guilty in this regard than the other defendants.

A. Background Facts

On July 15, 2005, J&J responded to plaintiff's initial interrogatories and request to produce with nothing more than a series of objections. (See J&J's responses to Plaintiff's Document Requests Nos. 1 and 3, and its responses to Plaintiff's interrogatories, attached hereto as Exhibits 1, 2 and 3.) The case was removed at virtually the same time and discovery halted. After the case was returned to state court plaintiff sought real answers from J&J through a series of letters and phone calls including a letter threatening a motion to compel on October 13, 2005. (Exhibit 4) The upshot of these discussions and letters was that J&J essentially said it would

only produce materials it had produced in the MDL on the ground that a motion to dismiss was pending (an argument with which the Special Master is familiar), and on the basis that J&J did not have enough information about the claims Wisconsin was asserting. The nadir of these communications occurred on November 2, 2005 when counsel for J&J refused plaintiff's request for discovery on the grounds that his client was unaware of any inflated wholesale prices in connection with its drugs and suggested that Wisconsin provide such evidence to J&J before J&J would participate in further discovery. (Exhibit 5) Since all—100%—of J&J's drugs are listed at inflated wholesale prices ranging from 20% upwards this reason for not responding to discovery was more than plaintiff's counsel could bear and he replied saying so. (The "intemperate letter.") (In retrospect, Plaintiffs' counsel agrees that the tenor of this letter was over the top and apologizes for it.) In any event, this letter and/or the notice of deposition following on its heels, did have one salutary effect. Shortly thereafter plaintiff received a letter from J&J's lawyer finally acknowledging J&J's inflated markups (Exhibit 6) and promising a deponent.

Thereafter J&J produced its AMPs (the average manufacturer's price it reports to the Federal Government). But J&J's counsel asked that the deposition be postponed to await the Special Master's ruling on plaintiff's motion to compel with regard to Pfizer; plaintiff's counsel agreed to the delay. Mr. Schau, J&J's New York counsel, promised in the interim to begin producing discovery in the MDL which he has done.

Once the motion to compel was decided, plaintiff, in early February, approached J&J about the outstanding deposition notice, and the parties discussed the possibility of stipulating to the information requested in the notice. Mr. Schau asked that he be given until March 15 to respond to plaintiff's proposed stipulation because he was in the middle of briefing an important

motion in the MDL. Plaintiff's counsel agreed to this postponement but only if Mr. Schau promised to immediately turn to Wisconsin's outstanding discovery thereafter. And on March 15, or shortly thereafter, plaintiff's counsel called Mr. Schau and reminded him of his promise. Almost two weeks later plaintiff had still heard nothing substantive from Mr. Schau who was busy again.

Plaintiff then rescheduled the deposition because, among other reasons, information had come into its hands which cast doubt on whether a stipulation was an adequate substitute for a deposition; indeed whether the representations made by J&J about its markups and about its knowledge of the actual wholesale prices of its drugs was accurate. Instead of agreeing to produce a deponent as required, Mr. Schau thereafter sent plaintiff a letter pointing to deposition testimony and documents produced in the MDL which he said made a deposition unnecessary. This proffer does not come close to meeting plaintiff's legitimate discovery needs for a number of reasons and, indeed, it reinforces the need for a deposition, given the inconsistent discovery record in the MDL.

B. Plaintiff is Seeking Both Discovery and Trial Evidence Through The Use of Corporate Depositions.

Before turning specifically to what is wrong with J&J's response to plaintiff's discovery, it is useful to outline exactly what plaintiff is trying to achieve through these notices of depositions. Plaintiff is working toward two goals. It seeks to have the defendant identify its employees who are knowledgeable about the issues in this case from whom plaintiff can obtain discovery and simultaneously it seeks to have these persons provide a single deposition for use at trial. These are legitimate goals and the surest way to simplify this case.

Indeed, in many respects this case is a simple one. Plaintiff alleges that defendants inflated their published average wholesale prices and hid the true prices of their drugs, contrary

to Wisconsin statutes explicitly prohibiting such conduct. Defendants claim that they did not know the prices at which wholesalers were selling their drugs (the defense used in the West Virginia trial to which defendant adverted) and that, in any event, plaintiff should have known defendants were inflating their prices and done something about it.

Plaintiff says that it did not know of defendants' fraud and that the "should have known" defense is inapplicable against the State. *See, e.g., Heckler v. Community Health Services*, 467 U.S.51, 63 (1984):

Justice Holmes wrote: "Men must turn square corners when they deal with the Government." *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920). This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.

To prove its case, Wisconsin seeks evidence of the actual prices defendants charged for their drugs, evidence that it communicated fraudulent prices to the Medical compendiums upon which Wisconsin relied (or that it knew that the prices it communicated were being misrepresented in the compendiums relied on by Wisconsin), evidence that defendants sought to conceal the true prices of their drugs, and evidence that defendants knew exactly what they were doing all along.

Because of the vast size of the various defendants there is no way that plaintiff can specifically identify those persons employed by each defendant who have the requisite knowledge plaintiff is seeking. That is why Wisconsin needs to rely on corporate designations which let defendants select their witnesses on the subject matters at issue. Additionally, plaintiff does not intend to take depositions solely to discover facts and then later examine the same

witness at trial or in a subsequent deposition. Instead, Wisconsin wants to take one deposition which can then be used at trial and move on. This is not simply a way of streamlining the case; it is a necessity because Wisconsin lacks the power to compel the knowledgeable witnesses to come here for trial.

In this context the problems with defendants' demand that Wisconsin accept depositions from the MDL instead of taking its own discovery are manifold.

C. Defendant's Reliance On Depositions In a Different Case to Satisfy Its Discovery Obligations Is Inappropriate and Impractical.

Defendant's attempt to limit Wisconsin's discovery to that taken in a different case is improper and unworkable. It is improper to treat Wisconsin's case as a poor relative of the MDL case. First, as Judge Eich stated, the MDL litigation is significantly different than this case:

I agree with the State that the MDL litigation differs significantly from the instant case. It is a private class action involving Medicare Part B issues, and no party to that case appears to be asserting the type of Medicaid claim being advanced by the State here.... Additionally, the State points out that the time periods in the MDL litigation and the instant case are different.

(January 31, 2006 Decision, Plaintiff's Motion to Compel AstraZeneca)

Second, Wisconsin is entitled to present the best case it can within the confines of its own discovery rules. This principle applies even if defendant has spent large sums of money defending its conduct in the MDL, something which is not Wisconsin's fault. And Wisconsin has decided that the best way to put its case together is, in part, through the use of corporate designee depositions which can be used at trial. This is a perfectly legitimate, indeed necessary, tool to litigate this case and in the end will save all parties a great deal of time and money. By arguing its motion as if all plaintiff is seeking is just another discovery deposition, defendant glosses over the fact that plaintiff is seeking trial testimony as well as discovery.

Moreover, Judge Krueger has made it clear in her decision on document sharing that it is improper to tie this case to cases outside her jurisdiction for discovery purposes. She wants it to proceed on its own and to move ahead expeditiously. To tie this case to the MDL will simply lead to endless disputes over whether the discovery in the MDL was adequate for plaintiff here as this motion makes evident.

Moreover, substituting discovery in other cases for actual depositions in this case is simply unworkable.

First, plaintiff's ability to use the MDL depositions at trial is very doubtful. Indeed, defendant does not offer any coherent picture of how they can be used at trial. Evidential problems with these depositions abound. For example, if one of the deponents, whose testimony defendant now proffers, dies or leaves the employ of defendant, of what value is his deposition, particularly in the context presented here where Wisconsin has no power to subpoena persons residing outside of the state to appear at trial? (The position of at least one defendant in this case is that the deposition becomes hearsay.) Also the defendants in this case are not identical with those in the MDL. Can a defendant named in this case object to the introduction of deposition testimony from the MDL at trial here on the grounds that it was not a party in the MDL and was, hence, unable to cross examine the deponent? Also the drugs in the MDL are much different than the drugs involved in Wisconsin's case. Can a witness's testimony about J&J's practices with respect to a limited class of drugs bind J&J or other defendants on other drugs?

Second, and consistent with Wisconsin's right to try its best case, the snippets of depositions defendant points to will be incomprehensible to a jury. These were truly discovery depositions and the examinations wander all over the lot. Further, there is no linkage whatsoever

between the deposition testimony and Wisconsin's case. Wisconsin is entitled to present evidence of defendants' pricing practices before the jury in an orderly and informative way.

In truth, defendants recognize the many problems with the use of prior depositions at trial. For example, defendant Schering has noticed the deposition of Harry Weintraub, the former CEO of its subsidiary, Warrick, for use at trial here in Wisconsin. (Exhibit 7) Schering has done so even though Mr. Weintraub has been deposed multiple times in other cases. Plaintiff has no objection to Schering doing this. It only illustrates what everyone knows; that is if you are going to put on a convincing case you cannot do it through depositions taken in other cases.

D. Defendant's Objections To Plaintiff's Deposition Topics Are Without Merit.

J&J makes a number of specific objections to each of plaintiff's requests aside from arguing that plaintiff ought to be confined to the depositions taken in the MDL. We take these seriatim.

Request No. 1 seeks a deponent to testify about, and bring information regarding the following: "The evidence or information, if any, about which it is aware, which shows that any of the drugs listed on the attached sheet ("targeted drugs") were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price (AWP) published by First Data Bank or the Red Book in any year from 1993 to the present."

J&J objects to this request because the answer to this request is "known and undisputed."

The answer that J&J says is known appears to be that J&J has no evidence that any of its drugs were ever sold to retailers at a price equal to or greater than J&J's published wholesale price. That is a fine answer but it needs to be memorialized in a deposition so the jury can hear this from an authoritative witness at trial. Letters from opposing counsel saying this are not sufficient. Moreover, it is hardly unduly burdensome to have a live witness so testify.

Request No. 2 seeks the following testimony: "The evidence or information about which it is aware which shows, or which defendant believes may tend to

show, that the published AWP was higher than the price pharmacies were actually paying for any of the targeted drugs in each year from 1993 to the present.”

Defendant tosses this off as virtually the same request as number 1, but it is not. This request seeks the information in defendant’s hands which shows that it knew that the published wholesale prices of its drugs were phony and inflated. This is important information for it rebuts a defense, namely, that the jury cannot hold a particular company responsible for the inflated AWP’s because it really did not know what wholesalers were charging. Defendant has quite a bit of information on this score which has not been explored in any depth in the proffered MDL depositions. Moreover J&J’s current position on what it knew about its inflated prices is apparently different than the position J&J employees took under oath in the MDL earlier.

J&J employees initially took the position that they had no idea at what price wholesalers were selling J&J’s drugs to retailers. As J&J pointed out in its opposing brief, MDL plaintiffs’ attorneys stated before Magistrate Bowler (reproduced at page 11 of J&J’s memorandum):

Net acquisition cost is apparently what doctors ultimately pay to acquire the drug. We don’t know what that is. It’s completely irrelevant to our claims. Every J&J witness we asked, do you know what doctors pay to acquire your drug, the answer is no. We know what we sell to the wholesaler for. We have no idea what the wholesaler’s mark-up is. To answer this we would need to know the information that J&J disclaims any knowledge of. (Emphasis added.)

This earlier position that J&J had no idea what the wholesaler’s markup was has now changed. In J&J’s memorandum, counsel for J&J now concedes that “It is common knowledge that wholesaler mark-ups on the pharmaceutical products sold to retail pharmacies are very thin due to intense price competition and economies of scale at the wholesaler level.” (Def.Br. at pg. 6)

And the memorandum also states that “AWP is not the price normally paid to wholesalers by the retail class of trade.” (Id.) This is an even stronger representation than that contained in

the letter to plaintiff's counsel preceding this motion where J&J's counsel simply stated that there is "anecdotal information that wholesaler margins are extremely thin."

Even this, apparently, is not all of J&J's knowledge on this score. Attached hereto (Exhibit 8) is a declaration of a former J&J employee at Ortho Biotech, a J&J subsidiary, Mark Duxbury, who testifies, *inter alia*, that "in the early days of the battle for market share, OBI conducted 'fire sales' which offered steep discounts to large volume dialysis customers to create a larger spread between acquisition cost and reimbursement for Procrit." Para. 14. "OBI instructed its sales representatives that after offering a lower price to customers, to ask whether the price differential was enough to motivate the purchaser to switch from Epogen to Procrit." Para. 16. This declaration makes it clear that J&J took an active interest in what retailers were actually paying for at least some of their drugs.

Finally, plaintiff has information that leads Wisconsin to believe that J&J has negotiated agreements with retail customers, such as chains and long term care pharmacies, for many of its drugs (even though the drugs themselves are supplied by wholesalers) that set a particular price for these drugs and further show J&J's awareness of what the market price is for their drugs. And we believe that J&J may possess more global information on the price of their drugs from outside vendors such as IMS, a service selling market data to all the drug companies. The most expeditious way to determine defendant's knowledge is to ask a knowledgeable J&J spokesperson under oath.

In truth, it is hard to believe that a major drug company is entirely ignorant of the price at which its drugs were selling to retailers. Such knowledge is obviously necessary to determine whether its drugs are competitive in the market place. In any event, this is not an area that has been explored adequately. Indeed, apparently the depositions taken earlier on this subject in the

MDL in which J&J employees denied knowledge of wholesalers' markups cannot be relied on. Nor are the letters from counsel explaining J&J's most recent position on this issue of any use in a trial for obvious reasons. Wisconsin should be permitted to proceed on its deposition to get to the bottom of this issue in a way the jury will understand.

Request No. 3 asks for a deponent to testify about the "contacts Johnson & Johnson, or its subsidiaries have had with First Data Bank or the Red Book about any of the targeted drugs."

The documents requested were communications between J&J and the Red Book about or concerning any of the targeted drugs.

Defendant responds that this subject was already fully explored in the MDL discovery record. This is simply not true. Because the drugs in the MDL relate only to Medicare Part B participants and, hence, only concern physician administered drugs, they do not encompass the full scope of Wisconsin's claim. Hence, in connection with the documents defendant is offering to produce with respect to this Request, J&J has hardly scratched the surface.

There is testimony in some of the depositions to the effect that J&J has a practice of marking up its wholesale price to compendiums by 20%. And there is also a suggestion in Mr. Schau's letter that at some time, for some drugs, First Data Bank began marking up J&J's wholesale prices by 25% on its own. But this is hardly well developed. Indeed, plaintiff does not even know if it is true that First Data Bank acted on its own. Moreover, the information plaintiff has secured from the wholesalers themselves show that J&J's inflation of its AWP's often exceeds the 25% figure Mr. Schau represents. Plaintiff cannot be bound by Mr. Schau's version of such contradictory evidence.

Request No. 4. This request seeks the following information: "Whether Johnson & Johnson, or any of its subsidiaries, ever communicated to either First Data Bank or the Red Book that the published Average Wholesale Prices of their drugs were neither a price that was actually an average of wholesale prices, nor a price

that was actually paid by the retail classes of trade and, if so, when such communications took place and of what they consisted.”

No documents other than those connected with request number 3 are required. J&J’s response is semantical contending that it cannot produce such a witness because the AWP does not purport to be the price actually paid the retail class of trade. Defendant is dead wrong on this. For years the medical compendiums represented that the AWP was an accurate average wholesale price of drugs. And in 2003, the House Committee on Ways and Means acknowledged that “AWP is intended to represent the average price used by wholesalers to sell drugs to their customers.” H.R. Rep. 108-178(II), 108th Cong. (July 15, 2003) at 197.¹

In any event, plaintiff is not asking that defendant agree with it on this score. Plaintiff is simply trying to find out if J&J ever sought to correct the AWP’s published in the medical compendiums given what J&J knew about the wholesale prices of its drugs which, as noted above, was and is considerable. This inquiry has special relevance for J&J who maintains that the AWP on their drugs was marked up without its permission.

Finally, giving testimony on this issue is hardly burdensome since it appears from J&J’s motion that J&J never sought to correct or comment on a published price of its drugs. If this is so, little testimony will be needed.

Request No. 5 requests testimony on the following: “The Average Manufacturer’s Price (AMP) reported to the federal government of each of the targeted drugs in each year since 1993.”

J&J has turned over its average manufacturer prices or AMPs to plaintiff. Wisconsin now simply wants to find out how these were calculated including, but not limited to, whether they include sales to long term care facilities and chain drug stores who appear to be obtaining larger discounts than retail pharmacies yet who are also paid off the published AWP.

¹ What AWP represents is an important aspect of all AWP cases as the Reply Memorandum of plaintiffs in the MDL makes clear. (Exhibit 9)

The AMP is a very useful number for two reasons. First, because wholesalers have thin markups—as J&J now concedes—the price to the wholesaler or AMP is going to be very close to the actual acquisition cost of a drug—exactly what plaintiff should have been paying but for defendant’s unlawful conduct. Thus, this figure will be helpful in determining damages. Second, the AMP, coupled with J&J’s industry knowledge that wholesaler markups are thin, is further proof that J&J knew that the prices published in the medical compendiums did not come close to reflecting the actual wholesale prices at which its drugs were being sold.

Because of the importance of AMPs in this case plaintiff should be permitted to find out how defendant calculated them.

Request No. 6 requests the following information: “Any evidence which shows that the actual average wholesale price at which any of the targeted drugs sold in any given year was greater than the AMP.”

This request seeks J&J’s knowledge that its drugs were being sold to retailers at prices not greater than the AMPs. It is not intended to bind J&J to the actual price for which retailers purchase its drugs unless, of course, J&J knows that (which it undoubtedly does in cases of direct sales to chains, and rebate deals with long term care pharmacies). But the fact of the matter is that if defendant fully answers Request Number 2 this request may be redundant. Accordingly, plaintiff is willing to suspend this part of the notice of deposition pending defendant’s response to Request Number 2.

E. Plaintiff’s Deposition Notice Is Not Burdensome.

Plaintiff has tendered a deposition notice to J&J that goes right to the heart of the case. It has six parts, one of which plaintiff is willing to suspend. This is a deposition notice which Judge Eich has already refused to quash with respect to Pfizer. As the Special Master has repeatedly found in seeking a protective order terminating the deposition before it begins,

defendant bears the burden of showing good cause. Defendant has not met its burden. Indeed, the only claim of burdensomeness emanates from defendant's contention that these depositions are duplicative. This position is more than slightly hypocritical, and it is certainly without any factual basis. It was plaintiff, after all, who proposed sharing discovery with other states to reduce costs and streamline document discovery. Defendants vehemently opposed such sharing and Judge Krueger agreed. Now, apparently, defendants want to share discovery with another case but only the one they choose and only the part they choose. This is indefensible.

In any event, the only rationale defendant articulates for its burdensomeness objection is that plaintiff's discovery is needlessly duplicative. As plaintiff has shown, its deposition request does not duplicate the discovery in the MDL. Indeed, it seeks to straighten out a confusing and conflicting MDL record and pursue matters otherwise undeveloped. Moreover, plaintiff is not simply taking discovery. Plaintiff is seeking actual trial testimony in a form which will expedite the trial and be understood by the jury. The discovery in the MDL does not come close to meeting this objective.

Finally, defendant's position—that it doesn't have to appear for discovery in Wisconsin if it can show that some sort of related discovery has been conducted in the MDL—is an impossible standard to administer. One defendant after another will gladly jump on board any such ruling and the Special Master will have to comb through endless motions like this one, and their accompanying depositions and documents, to determine if the discovery is, in fact, duplicative and unnecessary. Wisconsin's case is entitled to more respect than that. Wisconsin should be permitted to proceed unencumbered by other litigation which is not of its making and over which it has no control. That being said the Special Master obviously has the power to halt

discovery abuses but Wisconsin's discovery plans do not come close to meeting this standard—indeed, just the opposite.

CONCLUSION

For all the foregoing reasons, defendant Johnson & Johnson's Motion For A Protective Order should be Denied.

Dated this 15th day of May, 2006.



One of Plaintiff's Attorneys

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