

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 7

DANE COUNTY

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STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	Case No. 04-CV-1709
	)	
v.	)	
	)	
AMGEN INC., <i>et al.</i>	)	
	)	
Defendants.	)	

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**DEFENDANT MERCK & CO., INC.’S REPLY IN FURTHER SUPPORT OF ITS EXCEPTION TO THE APRIL 27, 2006 DECISION AND REPORT OF DISCOVERY MASTER**

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Defendant Merck & Co., Inc. (“Merck”) submits this memorandum to reply to the State of Wisconsin’s Response (“Plaintiff’s Response” or “Pl. Resp.”) to Merck’s Exception to the April 27, 2006 Decision and Report of the Discovery Master.

The narrow issue presented by Merck’s Exception is whether the provisions of Wis. Stat. § 804.05(3)(b)(1) and (6) require a non-resident corporation that transacts business in Wisconsin to produce for deposition in Wisconsin a witness designated under § 804.05(2)(e), where it is uncontested that the designated witness does not reside in Wisconsin, is not employed in Wisconsin, and does not transact business in person within 100 miles of Wisconsin. The answer is “no” under the most straightforward reading of the statute.

That straightforward reading also accords with the result that Plaintiff concedes (Pl. Resp. 4) would apply under the 1976 version of the statute, is consistent with the contemporaneous interpretation of the provision in a Marquette Law Review article, and would comport with federal court interpretations of the “transacts business in person” language in Fed. R. Civ. P. 45. By contrast, Plaintiff provides no basis for its contention that the amendment to

Wis. Stat. § 804.05 was intended to enact a significant departure from prior law in Wisconsin and from procedure under the Federal Rules and other state courts.

1. There Is No Basis For Plaintiff's Waiver Argument.

Plaintiff begins by asserting that Merck's interpretation of Wis. Stat. § 804.05(3)(b)(6) is a "new argument" that has been "waived" by failure to assert it below. Both assertions are wrong.

From the outset of this dispute, the parties acknowledged that their disagreement derived from different interpretations of the statute. Merck repeatedly raised the witness's residence and place of employment in objecting to the Notice. *See* Affidavit of Michael P. Crooks (sworn to May 11, 2006) ("Crooks Aff.") Ex. B, April 18, 2006 Letter R. Funkhouser to J. Archibald ("The person or persons Merck will designate for the noticed topics work and reside in Pennsylvania, not Wisconsin. Under Wis. Stat. § 804.05, the depositions therefore must proceed in Pennsylvania."); Crooks Aff. Ex. C, April 19, 2006 Letter M. Crooks to Judge Eich (stating Merck will produce witnesses in Philadelphia near "where the employees of Merck most knowledgeable on the noticed topics work and reside" and that "The parties agree that Wisconsin Stat. § 804.05 provides the relevant authority on this issue."); Crooks Aff. Ex. E, April 24, 2006 Letter R. Funkhouser to Judge Eich at 2-3; Crooks Aff. Ex. F, April 25, 2006 Transcript at 17. The Marquette Law Review article simply provides additional legal support for Merck's interpretation of the statute.

In any event, the parties stipulated and the Court ordered that: "The Court has full authority to modify or set aside the ruling of the SDM if the ruling is based on an erroneous exercise of discretion *or other error of law.*" Stipulation and Order of Reference to Special

Discovery Master ¶ 5 (emphasis added). There can thus be no “waiver” with respect to issues of law, on which the Court’s review is *de novo*.<sup>1</sup>

2. Plaintiff’s Statutory Interpretation Does Not Withstand Analysis.

The statutory provision that the parties and Judge Eich understood to be central to the resolution of the dispute states:

If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2)(e), the place of examination shall be determined **as if the deponent’s place of residence, employment or transacting business in person were that of the party.**

Wis. Stat. § 804.05(3)(b)(6) (emphasis added). Plaintiff interprets this provision to substitute the “place of residence, employment, or transacting business in person” of a party for that of the individual witness designated by the party pursuant to Section 804.05(2)(e). Pl. Resp. 4-5. The more natural and direct reading of the provision, one that accords with the other provisions of Wisconsin statutes, federal court interpretations, and the convenience of the witnesses, is precisely the opposite: In determining the place of deposition of a witness designated pursuant to a Section 804.05(2)(e) deposition notice to a party, the place of residence, employment or transacting business in person of *the witness* is substituted for that of the corporate party. This avoids the incongruity of Plaintiff’s interpretation that requires, for example, determining “the

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<sup>1</sup> Plaintiff invokes *Piczkowski v. Milwaukee County*, 2004 WI App 171, ¶ 32, 275 Wis. 2d 520, 540-41, 687 N.W.2d 791, which addresses waiver of arguments which are first presented to the Wisconsin Court of Appeals. That rule prevents the appellate court from “blindsid[ing] trial courts with reversals based on theories which did not originate in their forum.” *State v. Rogers*, 196 Wis. 2d 817, 828, 539 N.W.2d 897 (Ct. App. 1995) (cited by *Piczkowski*, 2004 WI App 171 ¶ 32). The concern for allowing trial courts to fully consider a *case* has no application to the narrow focus of the discovery master on specific discovery disputes. In any event, statutory interpretation is subject to *de novo* review. *Garcia v. Mazda Motor of Am.*, 2004 WI 93, ¶ 7, 273 Wis.2d 612, 682 N.W.2d 365.

place of employment” of a corporation. Cf. Pl. Resp. 8 (interpreting this phrase to mean “where it employs people”).

Plaintiff attacks Merck’s citation to Patricia Graczyk, *The New Wisconsin Rules of Civil Procedure: Chapter 804*, 59 Marq. L. Rev. 463, 495 (1976), because the article addresses an earlier version of the deposition statute that did not include the “place of employment” and “transacts business in person” alternatives included in the present statute. But Plaintiff does not dispute that the prior version of the statute used the exact same structure as the present statute: “The place of examination shall be determined as if the residence of the deponent were the residence of the party.” Pl. Resp. 6 (quoting Wis. Stat. § 804.05(3)(b)6 (1975-76 version)). If the article correctly interpreted the 1975-76 statute to focus on the witness’s residence, rather than the party’s residence, then the current version even more clearly requires that the location of the designated witness’s deposition is determined by the witness’s place of residence, employment or transacting business in person, rather than that of the party. And contrary to Plaintiff’s dismissive reference to this interpretation as a “student’s backwards reading” Wisconsin courts interpreting other provisions of Chapter 804 have found this very article to be persuasive authority.<sup>2</sup>

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<sup>2</sup> Wisconsin courts have cited the Graczyk article as authority in at least five published decisions. *Peeples v. Sargent*, 77 Wis. 2d 612, 633 n.6, 253 N.W. 459, 467 n.6 (1977); *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 148, 502 N.W.2d 918, 922 (Ct. App. 1993); *Hoberg v. Berth*, 157 Wis. 2d 717, 722, 460 N.W.2d 436, 438 (Ct. App. 1990); *B&B Invs. v. Mirro Corp.*, 147 Wis. 2d 675, 684, 434 N.W.2d 104, 108 (Ct. App. 1988); *Jenzake v. Brookfield*, 108 Wis. 2d 537, 540, 322 N.W.2d 516, 519 (Ct. App. 1982). Moreover, in more than 30 other opinions, Wisconsin courts have cited other articles by the same author in the same 1976 series on the new Wisconsin Rules of Civil Procedure. Indeed, the Supreme Court has relied on analysis in those articles and has “quoted with approval Attorney Patricia Graczyk’s interpretation[s]” of provisions of the Rules of Civil Procedure. *Air Wisconsin, Inc. v. North Cent. Airlines, Inc.*, 98 Wis. 2d 301, 316 n.10, 296 N.W.2d 749, 755 n.10 (1980) (citing *Gyldenvand v. Schroeder*, 90 Wis. 2d 690, 280 N.W.2d 235 (1979)).

Plaintiff mistakenly contends that the Judicial Council Committee Note “clearly states that the residence of the deponent is *irrelevant*.” Pl. Resp. 7. But the Note states no such thing. Instead, the Note simply mirrors the use of the conditional in the statutory language, that “the residence of the deponent is to be considered *as if it were* the residence of the party.” Judicial Council Committee’s Note, *quoted in* Pl. Resp. 7 (emphasis added). In Plaintiff’s illogical interpretation, the Committee’s Note that the “residence of the deponent is to be considered” means that the residence of the deponent is ignored. Logically, the Note indicates that the residence of the deponent is to be considered in place of – “as if it were” – the residence of the party.

Plaintiff claims that under Merck’s interpretation “the amendments to the statutes would be gutted” and mistakenly suggests that the “non-resident corporate defendants would be exempt” from the “transacts business in person” provision. Pl. Resp. 4. This again reflects Plaintiff’s failure to recognize the purpose of Section 804.05(3)(b)(6): the “transacts business in person” amendment *does* expand the circumstances under which a designee (or officer, director, or managing agent) may be deposed in Wisconsin. Prior to the amendment, such designees could be deposed in Wisconsin only if they resided in Wisconsin. After the amendment, a designee who did not reside in Wisconsin but was employed or transacted business in person there could be deposed in Wisconsin. The rule for witnesses designated by non-resident corporate defendants is thus co-extensive with the rule for non-resident individual defendants.

Plaintiff asserts that complying with Section 804.05(3)(b)(6)’s requirement that the deposition for a Section 804.05(2)(e) designee’s take place where he resides, is employed or transacts business in person would be “unworkable,” because the noticing party would not know the place to specify in the notice. Pl. Resp. 8 n.4. This objection ignores the usual procedure

followed when parties cooperate in discovery. *Cf.* 2 R. Haig, *Business and Commercial Litigation in Federal Courts* § 19.6 at 304 (ABA Lit. Section 1998). Typically, a party notices the deposition for a particular time and place; the responding party identifies its designees and their location, and the parties agree on a date, time, and place. Here, Merck promptly stated that the witnesses knowledgeable on the Notice topics “work and reside in Pennsylvania” and offered to make the witness available on the date specified and to provide a location in Philadelphia. Crooks Aff. Ex. B. Had Plaintiff chosen to accept that offer the deposition would be concluded by now.

3. Federal Law Interpreting “Transacts Business In Person” Confirms This Interpretation.

Plaintiff is unable to suggest any source for the “transacts business in person” language of Wis. Stat. § 804.05(3)(b), other than Fed. R. Civ. P. 45, and previously conceded that “the Wisconsin deposition location provision borrowed language from the Federal Rule governing subpoenas for non party witnesses . . .” April 25, 2006 Letter from B. Eberle to Judge Eich at 2; Crooks Aff. Ex. F. Federal courts interpreting Fed. R. Civ. P. 45(c)(3)(a) have rejected the argument that the “regularly transacts business in person” provision is equivalent to the determination of whether there is general jurisdiction over a corporate party, and have held that a Rule 30(b)(6) designee could not be required to travel outside the limits imposed by Rule 45(d)(2).

Thus, even if Section 804.05(3)(b)(6) could be inverted to substitute the corporate party’s place of transacting business in person for that of the witness, Merck’s designee could not, without good cause, be compelled to appear for deposition in Wisconsin. Although Plaintiff argues that Merck “transacts business in person in Madison through its sales force,” Pl. Resp. 3, a corporation could only be deemed to do something “in person” through natural persons who

might be considered to stand in its shoes. For purposes of subsection 804.05(3)(b), the definitions of “defendant” and “plaintiff” include “officers, directors and managing agents of corporate [parties] . . . or other persons designated under sub. (2)(e), as appropriate.”

804.05(3)(b)(5). Because no Merck officer, director, managing agent, or person designated under sub. (2)(e) transacts business in person in Wisconsin, Merck does not do so and cannot, even on Plaintiff’s reading, be made to produce its designee in Wisconsin.

Plaintiff accuses Merck of having “misled” Judge Eich into thinking Merck’s “headquarters” were in Pennsylvania, rather than New Jersey, and concludes this renders the federal case law irrelevant. Pl. Resp. at 11. But Merck’s headquarters address is specified in the First Amended Complaint (¶ 16), and Merck’s communications to Plaintiff and Judge Eich clearly conveyed that its objection to the Notice was based on where the particular witness works and resides, which is in Pennsylvania. Crooks Aff. Exs. B, C, E, G. This focus on the convenience of the witnesses accords with the federal case law, customary litigation practice, and common courtesy. *See* 2 R. Haig, *supra*, § 19.6 at 305-306 (“[T]he customary practice of conducting depositions within commuting distance of the residence of the witness is consistent with genuine business and personal needs.”).

4. The Grounds For A Protective Order Are Not In Dispute.

The parties agreed at the outset of this dispute that the outcome hinged on the Court’s interpretation of Section 804.05 and other applicable law. Plaintiff agreed to resolution of this dispute by teleconference with Judge Eich, rather than by a formal protective order motion with affidavits. There was no dispute that the location of the deposition would inevitably inconvenience one side or the other: If the deposition proceeds in Wisconsin, Merck’s witness will be inconvenienced and Merck will bear additional costs and business disruption; if the

deposition proceeds in Pennsylvania, Plaintiff's attorneys will be inconvenienced and Plaintiff will bear additional travel costs. The suggestion that Merck's failure to submit an affidavit forecloses good cause for a protective order is a red herring.

5. The Court Should Quash The Subpoena, Rather Than Allowing Plaintiff To Default And Relitigate the Subpoena Issue Plaintiff Injected Into This Dispute.

While Merck and Plaintiff were briefing for Judge Eich the deposition location issue for a party deposition noticed under Section 804.05, Plaintiff sought to moot the issue by serving a deposition subpoena on Merck's registered agent, seeking the same deposition and documents that were the subject of the noticed deposition. Crooks Aff. ¶ 9 and Ex. F. Judge Eich did not resolve the enforceability of the subpoena due to his interpretation of Section 804.05(3)(b)6. Merck demonstrated in its Exception brief that, like Section 804.05, the subpoena statutes distinguish between the witness (the corporation's officer, director, or designee) and the corporation. Accordingly, the *designee* is the "witness" who must be served under Section 885.03, and Plaintiff's deposition subpoena to Merck cannot compel its designee to appear in Wisconsin. This consistency in the distinction drawn by Wisconsin statutes between the corporation and its designee, officer, director or managing agent strongly supports Merck's interpretation of Section 804.05(3)(b)(6).

Dated: May 18, 2006

Respectfully submitted,

By: \_\_\_\_\_  
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