STATE OF WISCONSIN
CIRCUIT COURT Branch 7
DANE COUNTY

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

MEMORANDUM IN SUPPORT OF DEFENDANT SANDOZ INC.'S MOTION FOR PROTECTIVE ORDER

PRELIMINARY STATEMENT

For several months, pursuant to a timetable accepted by Plaintiff, Sandoz Inc. has devoted substantial effort to identify, review, and produce documents to Plaintiff in response to its First and Third Requests for Production and to prepare supplemental responses to Plaintiff's First Interrogatories. Simultaneously, also by agreement with Plaintiff, Sandoz has made its IT personnel available for informal interviews by Plaintiff's data consultant to work out arrangements for production of the voluminous transactional data sought by Plaintiff in its First Document Requests.

So far, Sandoz has produced nearly 30,000 pages of documents to Plaintiff, certain requested pricing data on fifty-two Sandoz products dating back to 1993, and, in connection with Plaintiff's interview of Sandoz personnel, data output from two tests Sandoz ran on its data systems to aid Plaintiff in determining the form in which certain transactional data should be produced. Moreover, in addition to the efforts undertaken by Sandoz in responding to Plaintiff's discovery demands in this matter, since October 2005, Plaintiff has had access to some 140,000-

plus pages of Sandoz' documents that the company produced to the state of California in relation to an action now pending in the AWP multidistrict proceedings, In re Pharmaceutical Industry Average Wholesale Price Litigation, MDL No. 1456 (D. Mass.).

While Sandoz was in the midst of efforts to meet its side of the agreement regarding document production, on March 23, Plaintiff served a Notice of Deposition (with its own document requests) demanding that Sandoz produce a corporate representative to testify in regard to multiple topics which, to the extent they are decipherable, cover subject matter duplicative of Plaintiff's discovery to which Sandoz has not yet had time to complete its production.

Thereafter, as Your Honor is aware, on April 3, 2006, the Court issued a Partial Decision and Order regarding Defendants' Motion to Dismiss which, as applicable to the instant motion, dismissed Plaintiff's Amended Complaint and directed Plaintiff to re-plead certain claims. Moreover, the Court's Order can reasonably be viewed to express uncertainty to the viability of Plaintiff's other claims.

Given these three basic facts – one, Plaintiff already has substantial discovery from Sandoz; two, there is no operative complaint; and three, Plaintiff's Notice of Deposition (among other flaws) is premature – Sandoz requested that Plaintiff adjourn the deposition at least until such time as it had filed any amended pleading and the Court issues the remainder of its ruling on the other branches of Defendants' Motion to Dismiss. Plaintiff refused, and has taken the position that despite Sandoz' service of written objections to the Notice of Deposition, if Sandoz declines to produce a designee for deposition on or around Plaintiff's proposed date of May 10, then it is incumbent on Sandoz to seek relief from Your Honor.

Therefore, by the instant motion, given the Court's April 3 order and the abundant discovery already in Plaintiff's hands, Sandoz seeks a short standstill in Plaintiff's discovery to permit Sandoz a reasonable opportunity to assess the viability of Plaintiff's amended pleading, that once filed will also provide the necessary reference point to guide any further discovery.

BACKGROUND

A. The Plan for Sandoz' Response to Plaintiff's Discovery

On May 6, 2005, Sandoz accepted service of Plaintiff's First Requests for Production of Documents To All Defendants (the "First Document Requests") and its First Set of Interrogatories to All Defendants (the "First Interrogatories"). (See Olszowka Aff., Exs. 1 and 2.[1]) Together, these requests seek, among other things, production of transactional sales data, documents relating to pricing and marketing practices, data regarding Average Manufacturer Prices ("AMP") reported to the Centers for Medicaid and Medicare Services, communications with price-reporting compendia, and documents prepared by IMS Health. (See id., Ex. 1 at pp. 3-4).

While this action was pending in federal court, Sandoz served written objections to Plaintiff's First Document Requests and First Interrogatories. (See id., Exs. 4 and 5.) Following the return of the action to state court in September 2005, between October and November, counsel met and conferred and exchanged correspondence concerning Sandoz' objections. This negotiation resulted in Plaintiff's acceptance of Sandoz' proposal to produce responsive documents on a rolling basis in response to most of Plaintiff's requests, supplement its interrogatory responses, and with respect to Plaintiff's request for certain transactional sales data, to engage in an informal process in which Plaintiff's data consultant would be allowed to work

[1] "Olszowka Aff." refers to the Affidavit of Paul Olszowka, counsel for Sandoz, submitted herewith.

directly with Sandoz' IT personnel to make arrangements for the production of the data in a form that would be usable by Plaintiff but would also minimize the burden on Sandoz. (See Olszowka Aff. ¶ 10 and Exs. 6, 7, and 8.) Further, at the request of Plaintiff's counsel, Sandoz agreed to prioritize its review and production of documents responsive to certain of Plaintiff's First Document Requests, including Request No. 2 which seeks so-called "AMP" data reported by Sandoz to the federal Centers for Medicaid and Medicare, Request No. 5 which seeks communication with price-reporting compendia, and Request No. 6 which seeks documents prepared by IMS Health.[2] (See id., Ex. 7 at p. 2.)

B. Sandoz Begins Production

Plaintiff's discovery requests have imposed a significant burden on Sandoz. For example, Sandoz has thus far identified fifteen custodians, including salespersons, sales executives, and marketing personnel, whose files could contain documents responsive to First Document Requests relating to Sandoz' pricing and marketing practices. These files contain approximately 380,000 documents that amount to roughly 1.3 million pages. Although Sandoz' review team of four attorneys have made significant progress, completing the review is estimated to require approximately six additional months. (Olszowka Aff. ¶¶ 29-30.)

Due to this voluminous universe of potentially-responsive documents, Sandoz has retained an outside vendor to collect Sandoz' documents and process the various types of documents into a searchable format, so-called TIFF files, requested by Plaintiff. (See id. at ¶ 5) The costs associated with Sandoz' document processing, excluding attorney review time, have been in excess of $500,000. (Id.)

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[2] On November 8, 2005, Plaintiff served its Written Discovery Requests No. 3 to All Defendants. (Olszowka Aff. Ex. 9). Sandoz served written objections, and as part of the negotiations regarding its response to Plaintiff's prior discovery, agreed to produce documents on a rolling basis. (See Olszowka Aff. ¶ 12.)

On December 9, 2005, Sandoz began its rolling production in accordance with Plaintiff's order of priority. Sandoz started with a tier of approximately 20,000 pages of documents responsive to Requests Nos. 5 and 6 of the First Document Requests. These documents included communications with price-reporting services, marketing and sales data prepared by IMS Health, and reports prepared by IMS Health. A few weeks later, on January 18, 2006, Sandoz produced AMP data for the fifty-two products identified by Plaintiff, which required a search of data for over three-hundred different inventory codes to account for different strengths and package sizes. (See id. ¶14; Ex. 12.) Although Sandoz reserved its objection to the time period of Plaintiff's requests, this data was produced for each quarter for the full period 1993 through 2004. (Id.)

Sandoz has continued its rolling review and production in good faith, producing nearly 10,000 additional pages of responsive documents on January 30, 2006. Further on January 14, 2006 and February 14, 2006, Sandoz made its Chief Information Officer and a Senior Software Engineer available for telephonic interviews by Plaintiff's data consultant to discuss possible arrangements for Sandoz' production of transactional sales data. (Olszowka Aff. ¶ 16-17.) At the requests of Plaintiff's consultant, Sandoz IT personnel ran tests on two of its databases, (Olszowka Aff., Ex. 15), producing the results on February 17, 2006 and March 14, 2006. (Id., Exs. 16 and 17)

C. Plaintiff's Intervening Deposition Notice

Although in discussions counsel for Plaintiff has mentioned that it would eventually seek to take depositions of Sandoz' personnel, the timing of any such deposition never was discussed nor did counsel make mention of any deposition in correspondence. (Olszowka Aff. ¶ 20) Nonetheless, on March 23, 2006, Plaintiff served its Notice of Deposition of Sandoz Inc. (the "Notice of Deposition"). (Olszowka Aff., Ex. 18) Insofar as the topics are decipherable, the

Notice of Deposition requests Sandoz to produce a corporate designee on six different subject matters, including (i) Sandoz' AMP data; (ii) Sandoz' communications and contacts with price-reporting compendia; and (iii) a comparison between the prices at which Sandoz products are purchased by pharmacies and retail pharmacies and the published "AWPs" of these products. (Id., Ex. 18 at ¶ 1-6.)

D. The Court Then Grants, in Part, Defendants' Motion to Dismiss and Directs Plaintiff To Re-Plead Its Claims

On April 3, 2006, the Court issued its partial Decision and Order holding that Plaintiff's allegations did not satisfy Wisconsin's pleading requirements for fraud, reasoning that Plaintiff's allegations "failed . . . to set forth the activities of each defendant and to put everyone on notice for what activities, occurring when and how it wishes to hold each defendant responsible." (Id., Ex. 19 at p. 13.) The Court ordered Plaintiff to re-plead within sixty days. Despite this requirement, Plaintiff continues to insist on deposing Sandoz about claims for which it has no operative pleading.

E. The Parties Meet and Confer Regarding the Deposition Notice and Production Scheduling

In response to the Notice of Deposition, Sandoz prepared written objections, and on April 14, 2006, in advance of serving them, conferred with counsel for Plaintiff on the closely-related issues of whether (i) Sandoz' production should go forward in light of the Court's dismissal of the Complaint in the April 3rd Order, and (ii) the burden that would be imposed on Sandoz should Plaintiff proceed with its deposition. After preliminary discussion, counsel agreed to continue the discussion following Plaintiff's review of Sandoz' specific written objections, which were served later that day. (See Olszowka Aff. ¶¶ 21.)

In its written objections, Sandoz reiterates its position that in the absence of an operative complaint, Sandoz cannot reasonably ascertain whether the testimony and documents sought by the Notice of Deposition are relevant. Consequently, it is unduly burdensome to require Sandoz to undertake significant review and production, and prepare a witness to testify, when Plaintiff's claims, and thus the topics of the deposition, are subject to change. (See id., Ex. 20 (Sandoz' Objections to the Notice) at ¶¶ 1-3.) Among other reasons, Sandoz also objected on the grounds that the deposition topics were not set forth with reasonable particularity. (See Id. at ¶ 4.)

Counsel continued the meet and confer concerning Sandoz' objections on April 25, 2006. (Id. ¶ 22.) During that telephonic conference, counsel for Plaintiff set forth its position that the April 3rd Order did not affect whether discovery should continue, including Sandoz' rolling production and the Notice of Deposition on May 10, 2006. Although Plaintiff was willing to accommodate slight changes in that date to permit additional discussions about specific topics, and to accommodate the schedule of any witness or counsel, Plaintiff rejected Sandoz' request to adjourn its document production or the deposition until the Plaintiff filed its amended complaint and the Court issued the remainder of its decision on Defendants' Motion to Dismiss. (Id., at ¶ 22; Ex. 21 (Letter from R. Libman to P. Olszowka, dated April 25, 2006)). Moreover, counsel stated that Plaintiff's position was that should Sandoz decline to produce a witness, it was Sandoz' obligation to move for a protective order (not Plaintiff's burden to bring a motion to request that Sandoz' written objection be overruled and to compel Sandoz to produce a witness).

It was this conference that precipitated Sandoz' bringing of the instant motion. (Olszowka Aff. ¶ 22).[3]

ARGUMENT

Wisconsin trial courts may make any order that justice requires to "protect a party from discovery that would result in annoyance, embarrassment, oppression, or undue burden or expense." Wis. Stat. § 804.01(3)(a). See 8 WIS. PRAC., CIVIL DISCOVERY § 1.11 (the Court has "broad powers" to "regulate or prevent discovery by issuing a protective order.") This authority includes the discretion to direct that "discovery not be had" or that "certain matters not be inquired into," Wis. Stat. § 804.01(3)(a)(1), (4), as well as to regulate the timing of different types of discovery. Wis. Stat. § 804.01(4); 8 WISC. PRAC., CIVIL DISCOVERY §1:61 (2006) ("Upon a proper showing, a court can make whatever order about the sequence and timing of discovery the necessities of a case require.") As demonstrated below, for several reasons, Your Honor should employ this discretion to grant Sandoz' request for a standstill in Plaintiff's discovery.

A. Plaintiff's Discovery of Sandoz Should Be Held in Abeyance Until the Claims Are Certain

1. The Dismissal of the Existing Complaint Itself Warrants That Plaintiff's Discovery Efforts Be Adjourned

Wisconsin law permits discovery "which is relevant to the subject matter involved in the pending action" or "reasonably calculated to lead to the discovery of admissible evidence." Wis.

[3] During the April 25 meet and confer, counsel for Plaintiff also discussed Sandoz' objections to the substance of the Topics in the Notice of Deposition, including their scope and that they are not reasonably particularized. (Olszowka Aff. ¶¶ 21-22; Ex. 22 at ¶ 4.) While Sandoz reserves its objections, these disputes can only characterized, at worst, to be incipient, and counsel for the parties anticipate that any such objections can be resolved through negotiations once Your Honor resolves the parties' impasse as to the overall timing of discovery that is the subject of the instant motion. (Id., Ex. 22 (Letter from P. Olszowka to R. Libman, dated April 28, 2006)).

Stat. § 804.01(2)(a). Indeed, as Your Honor recently observed, "the linchpin of the relevancy analysis is the claim as the plaintiff has framed it." Decision and Report of Special Discovery Master, Case No. 04 CV 17009, at p. 7 (Dane Cty. May 2, 2006).[4] See also Devlin v. Transportation Comm. Int'l Union, No. 95 Civ 0752 JFK JCF, 2000 WL 28173, *5 (S.D.N.Y. 2000) ("While relevance is broadly construed in the context of discovery, 'it is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken.'') (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352 (1978)).[5]

Presently, there is uncertainty as to sufficiency of the very claims about which Plaintiff seeks to take discovery. The April 3rd Order finds Plaintiff's existing allegations insufficient, and directs Plaintiff to re-plead and identify "which of [each Defendant's] drugs are involved and what (name, publication) of AWP is false, and the actual price that should have been published." (See Olszowka Aff., Ex. 21 (April 3rd Order) at p. 14.) That Plaintiff does not have an operative pleading is alone reason to grant Sandoz' request for a short adjournment of further discovery. See Hernandez v. CIBA-GEIGY Corp. USA, No. Civ. A. B-00-82, 2000 WL 33187524, * 6 (S.D. Tex. 2000) (staying discovery and ordering plaintiff to re-plead its complaint to comply with Rule 9(b) particularity requirements); Crystal v. Foy, No. 80 Civ 446, 1981 WL 1648 (S.D.N.Y. 1981) (staying deposition and denying plaintiff's motion to compel production of documents after granting motion to dismiss with leave to re-plead.)

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[4] It is axiomatic that the Complaint serves as the touchstone to determine whether sought after discovery is part of the "subject matter" of an action. See, e.g., Meredith v. Bear, Stearns & Co., 99 F.R.D. 629, 630 (D. D.C. 1983) ("Relevant to the resolution of the scope of discovery issues as to what is relevant to the subject matter is an examination of the allegations of the complaint and the issues as they now appear in view of the answer thereto, including affirmative defenses.").

[5] Wisconsin courts have recognized that Wisconsin's discovery rule is "substantially identical" to Fed. R. Civ. P. 26 and that "[f]ederal decisions construing the procedural counterparts to [the] Wisconsin rules of civil procedure are persuasive." Meunier v. Ogurek, 140 Wis. 2d 782, 788, 412 N.W.2d 155, 157 (Ct. App. 1987).

B. The Deposition Should Be Stayed Until Sandoz' Document Production Is Complete

Plaintiff's insistence on deposing a company representative before Sandoz has had an opportunity to complete its review and production of responsive documents defies the logical order for conducting discovery. See, e.g., Chambers v. Capital Cities, 159 F.R.D. 429, 431 (S.D.N.Y. 1995) ("It is desirable in minimizing the cost and expenditure of time of all involved if document production relevant to a particular witness is completed prior to deposition of that witness."). Even if such concerns of efficiency are ignored (although they should not be), there are many other reasons to adjourn Plaintiff's deposition:

One, the notice was framed by a pleading that has been dismissed. As shown above, supra pp. 8-9, absent this written documentation, Plaintiff's claims and the allegations supporting them are a moving target, leaving Sandoz without an adequate basis to gauge whether the deposition topics seek relevant information let alone identify and prepare a corporate designee for a deposition.[6]

Two, Plaintiff's insistence that the deposition go forward without its having an operative pleading creates a significant risk that Sandoz would have to prepare for multiple depositions. At no time has Plaintiff represented that regardless of what claims it might choose to include in its Second Amended Complaint, and however the Court rules on the remainder of Defendants' Motion to Dismiss, Sandoz will not have to re-produce any corporate designee. See, e.g.,

[6] Based on discussions during the meet and confer, we understand that Plaintiff might argue that discovery should proceed because the forthcoming Second Amended Complaint will include all the claims in the Amended Complaint and encompass the same Sandoz drugs that are the subject of its current discovery demands. But even if Sandoz were to go ahead on the basis of any such representation, that would not solve the issue presented by the fact that the Court has yet to rule on all branches of Defendants' Motion to Dismiss, which includes a decision as to applicable statute of limitations. See Martin v. El Paso Natural Gas Co., No. EP-79-CA-23, 1981 WL 2348 (W.D. Tex. 1981) ("It is proper to deny discovery as to events occurring before the applicable limitation period unless the party seeking discovery can show the relevance of the information sought to the issues in the case.").

Dietrich v. Bauer, 76 F.Supp. 2d 312, 352 (S.D.N.Y. 1999) (extending stay of discovery as to depositions on the grounds that "the successful repleading of one or more of the claims as to which leave to replead has been granted may bring into the case again defendants as to whom the case has now been dismissed in its entirety, which would then raise the possibility that depositions taken would have to be reopened.").

Three, Plaintiff's attempt to conduct a deposition while Sandoz has not yet time to review the potentially relevant documents unfairly cuts short Sandoz' ability to prepare for any deposition, and creates the possibility that given the unnecessary rush, the parties will have disputes whether the designated deponent was adequately prepared. When viewed in the context of the (now dismissed) Amended Complaint, the topics impose a very significant burden on Sandoz. To illustrate, Topics Nos. 1 and 2 provide as follows:

> The evidence or information, if any, about which it is aware, which shows that any of the drugs listed on Exhibit A to this notice of deposition ("targeted drugs") were purchased by retail pharmacies at a price equal to or greater than the current Average Wholesale Price ("AWP") published by either First DataBank or the Red Book in any year from 1993 to the present.
>
> The evidence or information, if any, about which it is aware, which shows, or which Sandoz 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.

(See Olszowka Aff., Ex. 18 (Notice of Deposition) at ¶ 1-2.) These topics appear to Sandoz to at least require the company to gather and review data and documents relating to sales of fifty-two different drugs since 1993, the very transactional sales data responsive to Document Request No. 1. (Olszowka Aff. ¶ 27.) In addition, Sandoz also understands this request for "all evidence and information" to require a search of company documents that refer to either the prices at which Sandoz drugs have been sold since 1993 or a "published AWP" for a Sandoz drug since

1993. This request is substantially similar to Plaintiff's Document Requests Nos. 3 and 4 which seek documents that "discuss or comment on the difference (or Spread) between any Average Wholesale Price. . . and the list or actual sales price (to any purchaser)" of Sandoz' products or that "contain[ ] an average or composite prices identified by you in response to Interrogatory No. 1." (See Olszowka Aff. ¶ 28-29; Ex. 1 (First Document Requests) at p. 3).

Four, the Notice of Deposition appears to be an unfair attempt at an end run around Plaintiff's prior agreement with Sandoz to allow it adequate time to undertake an extremely burdensome review and production process. In an apparent breach of the parties' understanding about the production schedule, however, Plaintiff is suddenly insisting to proceed right away with a deposition on the same subject matter of documents that Sandoz has yet to review. The Court should not countenance Plaintiff's attempt to avoid its agreement.[7]

C. An Adjournment Until Pending The Filing Of An Amended Pleading Will Not Unduly Prejudice Plaintiff

Plaintiff will not experience any apparent prejudice by the standstill Sandoz seeks. In addition to the nearly 30,000 pages of responsive documents and data produced by Sandoz to date, Plaintiff also has received a bounty of over 140,000 pages of documents the company produced to the state of California in a related matter.

With other defendants, Plaintiff has taken the position that discovery should proceed because Plaintiff needs the results to prepare its amended pleading. But that puts the cart before

[7] Sandoz agrees to be bound by the ruling on Merck's Motion for Protective Order, dated April 27, 2006, regarding the location of any deposition of a Sandoz designee to the extent that ruling is not appealed and is otherwise applicable to Sandoz. For example, Your Honor's April 27th ruling does not preclude the possibility that discretionary factors, such as the need to produce multiple witnesses, might warrant a change in the location of the deposition. Sandoz thus hereby preserves it objection, as set forth in its written objections to the Notice of Deposition, to producing a deponent to appear at the office of the Attorney General of the State of Wisconsin in Madison, Wisconsin. Nonetheless, as the meet and confer process regarding Sandoz' specific objections to the Notice of Deposition is not yet complete, the issue is not ripe for resolution at this time.

the horse. Courts have recognized that a plaintiff cannot take discovery in order to prepare a complaint. See Doe 67C v. Archdiocese of Milwaukee, 284 Wis. 2d 307, ¶ 36, 700 N.W.2d 180, 190-91 (Wis. 2005) (Complaints, even under the notice pleading rule, must set forth "'a statement of circumstances, occurrences and events in support of the claim presented'. . . it is not enough for the plaintiff to contend that the requisite facts will be 'supplied by the discovery process.'") (citations omitted). And although the Court mentioned in its April 3rd Order that "discovery is ongoing," which Plaintiff might interpret as a general dispensation to proceed with its discovery even though it lacks a complaint, that statement is not applicable here as Plaintiff already has abundant materials from Sandoz from which to attempt to prepare any amended pleading. (See Olszowka Aff. ¶¶ 18-19.)[8]

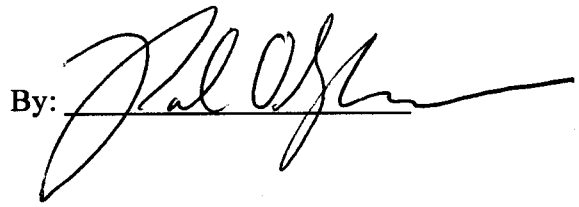
* * *

[8] Plaintiff might argue that Sandoz is merely renewing the motion for a stay of discovery and that has been denied by the Court in May 2005. To the extent that this order is relevant, it is wholly distinguishable. At that time, Defendants' Motion to Dismiss was just on file. Now, the Court has issued a partial ruling, and has ruled in Defendants' favor, striking the existing complaint. Moreover, at that time, Plaintiff had just served its written discovery. At this point, Sandoz has progressed substantially in its production.

CONCLUSION

For the foregoing reasons, Defendant Sandoz respectfully respects that Your Honor grant its motion for an order staying Plaintiff's discovery until at least six weeks after Plaintiff files an amended complaint that successfully cures the deficiencies in the Amended Complaint and the Court renders its decision on the remainder of Defendants' Motion to Dismiss, and such other and further relief as Your Honor deems just and proper.

Dated: New York, New York
May 4, 2006

By: 

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