

STATE OF WISCONSIN
CIRCUIT COURT – BRANCH 7 - DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., *et al.*,

Defendants.

Case No. 04-CV-1709

**REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT TEVA
PHARMACEUTICALS USA, INC.'S MOTION FOR PROTECTIVE ORDER**

INTRODUCTION

The State of Wisconsin's ("State" or "Plaintiff") Response to Teva's Motion for Protective Order ("Response") does not address the core issue raised by Teva Pharmaceuticals USA Inc. ("Teva") in its Motion for a Protective Order; namely, whether it is fair, just, and reasonable to require Teva to produce a representative deponent to testify on a broad, wide-ranging variety of topics covering the past 13 years before Teva has had an adequate chance to investigate and analyze the factual background of the case.

Instead, Plaintiff takes issue with Teva's pace of production of documents in this case. But Plaintiff completely ignores the fact that it has consistently refused to provide Teva with clarifying information that Teva must have before it can begin to produce documents to Plaintiff; namely, the exact universe of which 15 Teva drugs Plaintiff is pursuing in discovery. Without this basic information, which should not be difficult for Plaintiff to provide, Teva is not in a position to provide Plaintiff with any documents. Thus, any problems Plaintiff complains about with respect to Teva's pace of production are to a large extent of Plaintiff's own making.

Moreover, each defendant, and its own factual circumstances, must be considered separately to determine what is fair and just. One key distinction between Teva and the other defendants relevant to discovery is that Teva is not a defendant in the MDL AWP Litigation, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456 (D. Mass.). As has been previously established through the motion practice of Plaintiff and other defendants common to the instant matter, many MDL defendants have spent years producing millions of pages of responsive documents in those consolidated matters. Teva has not. Teva's ability to respond to Plaintiff's discovery requests, thus, lags justifiably behind certain of these defendants.

Plaintiff's Response assumes that the parties' discovery dispute relates solely to the document production. But Plaintiff flatly rejected Teva's suggestion that discovery in this case be conducted in a sequence which would allow Teva the necessary time to investigate fully the subjects of the Deposition Notice and to produce relevant documents to Plaintiff prior to the representative deposition. Plaintiff's counsel stated that he felt he needed to take the deposition so as to gain admissions by which Plaintiff could amend its complaint with respect to Teva in conformance with the Court's April 3, 2006 Order.

The sequence of events proposed by Teva in compromise is not only more constructive and efficient for both parties and, therefore, the Court, but is also necessary to avoid undue prejudice to Teva.

ARGUMENT

A. PLAINTIFF'S RIGID DEMANDS COULD SUBSTANTIALLY PREJUDICE TEVA

Plaintiff's Response fails to explain its "need" for a representative deposition prior to either Plaintiff's filing of a entirely valid complaint pursuant to the Court's April 3, 2006 Order or Teva's production of responsive documents. Further, Plaintiff's only purported purpose for

taking Teva's representative deposition is to attempt to gain admissions by which Plaintiff could amend its complaint with respect to Teva in conformance with the Court's April 3, 2006 Order. (Aff. of Lester A. Pines, Teva's Mem. in Support of Mot. for Prot. Order ("Teva Mem."), Ex. B, ¶ 11.)

Plaintiff's plan for curing its defective complaint is not a proper purpose for discovery. *State ex rel. Dudek v. Circuit Ct. for Milwaukee Co.*, 34 Wis. 2d 559, 576 (1967) ("Pretrial discovery is designed to formulate, define and narrow the issues to be tried, increase the chances for settlement, and give each party opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial."). Standing alone, Plaintiff's attempt to use the discovery process for an improper purpose is sufficient reason to grant Teva's motion for protective order. Additional cause exists.

A deeper problem with Plaintiff's position and Response is Plaintiff's refusal to acknowledge the distinction between producing responsive documents on the one hand and producing a representative deponent, knowledgeable as to Plaintiff's targeted "topics" on the other. Plaintiff's implicit position is that if Teva can locate any documents on a particular topic, then that is all that would be required for Teva adequately to identify and prepare its deponent.

Plaintiff discounts, by not even addressing in its response, the undue burden Plaintiff seeks to impose in forcing Teva to respond to Plaintiff's multitude of targeted deposition "topics" in such short order. Teva cannot reasonably prepare any witness to testify knowledgably in the time frame proposed by Plaintiff. As Teva stated in its Memorandum in Support of its Motion for Protective Order, to prepare adequately one or more representative deponents just for Plaintiff's first topic, "[t]he evidence or information, if any, about which it is aware, which shows that any of the [16] 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 in either First Data Bank or the Red Book in any year from 1993 to the present” (Teva Mem., Ex. C at 1), would require not only a complete review of approximately 180,000 documents already gathered, but also a review of 13 years of business records and interviews of Teva current and former employees whose tenure intersected the proposed 13 year time period to identify such specific evidence.

Plaintiff has not stated in its Response or otherwise that it will restrict itself to one representative deposition per defendant and is, instead, reserving itself the opportunity to demand multiple bites at the apple. The potential prejudicial effect on Teva of presenting an inadequately prepared deponent is clear and should not be sanctioned.¹

B. PLAINTIFF’S CARELESSLY DRAFTED DISCOVERY HAS NEEDLESSLY COMPLICATED AND DELAYED TEVA’S ABILITY TO RESPOND

Plaintiff spends a bulk of its response brief complaining about Teva’s lack of production to date. Yet Plaintiff ignores the fact that Teva’s demonstrably great progress in identifying potentially responsive documents for production has been in spite of the needless subject matter ambiguity and confusion sown by Plaintiff’s carelessly drafted discovery.

Plaintiff initially sought production of documents relating to all of Teva’s products over a 13 year period. The Special Master has set a limit on Plaintiff’s discovery to a universe of 15 drugs per defendant. (Special Master Jan. 31, 2006 Decisions.) It was not until March 16, 2006, that Plaintiff sent Teva a list identifying the universe of drugs - and even then, Plaintiff impermissibly identified 16 drugs, not 15. (Teva Mem., Ex. C.)² In addition, Plaintiff failed to

¹ Moreover, Plaintiff has conceded that Madison, Wisconsin, is not a proper location for a representative deposition of Teva. Therefore, whenever the deposition occurs, Madison, Wisconsin, should be stricken as the location of the deposition.

² While Teva was willing to provide certain documents to Plaintiff in 2005, (7/13/05 Letter from Elizabeth I Hack, Esq., to Charles Barnhill, Esq., Attachment to Resp. Ex. 3), Teva’s willingness

provide the complete names of Teva's drugs, needlessly complicating Teva's ability to identify which drugs were at issue. For example, the second drug in Plaintiff's list is "Amoxicilli." (*Id.*) Plaintiff forces Teva to guess whether Plaintiff is referring to either amoxicillin or amoxicillin trihydrate. Elsewhere on its list, Plaintiff identified "Nifedipine." (*Id.*) Teva does not manufacture a drug by this name, but it does manufacture both; 1) nifediac cc; *and* 2) nifedical xl. Similar clearly avoidable ambiguities exist with respect to other drugs on Plaintiff's list.

Plaintiff has not yet rectified the problems created by it despite the effort of Teva counsel to obtain clarification during the parties' consultation regarding the Deposition Notice. During that conference, when Teva sought to clarify these ambiguities, Plaintiff's counsel indicated that he would provide that clarification, but only on the condition that Teva waive its objection to conducting the deposition at the end of a short one or two week extension from May 3, 2006. (Pines Aff., Teva Mem., Ex. B, ¶¶ 12-13.)

Although Teva has previously attempted to produce readily available responsive documents to Plaintiff, Plaintiff has made clear that it will only be satisfied at this stage with documents that are, in fact, not readily available to Teva. Plaintiff flatly refused Teva's offer, made nearly one year ago, to provide Plaintiff with documents Teva produced in connection with another investigation into drug pricing issues. Since Plaintiff purports to set the bar itself as to what documents are responsive, Teva cannot produce any documents to Plaintiff without knowing (1) exactly which 15 Teva drugs Plaintiff is pursuing and (2) what allegations against Teva Plaintiff will include in its forthcoming Amended Complaint.

to do so was contingent on Plaintiff substantially narrowing its identified universe of 50+ drugs and clarifying what Plaintiff meant by the term "substantial usage." Plaintiff never provided such a narrowed list until March 16, 2006, with its Deposition Notice, when it identified 16 drugs -- still in excess of the Special Master's specifications.

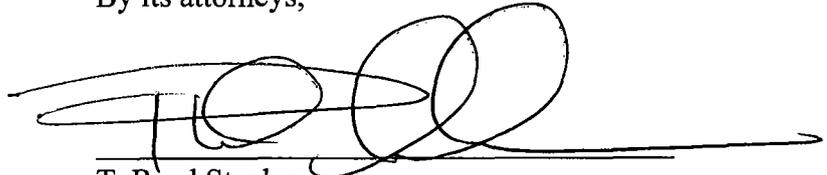
CONCLUSION

For all of the foregoing reasons and the reasons set forth in Teva's opening brief, Teva's motion for a protective order should be granted.

Dated: May 26, 2006

TEVA PHARMACEUTICALS USA, INC.

By its attorneys,

A handwritten signature in black ink, appearing to be 'T. Reed Stephens', written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

T. Reed Stephens
Elizabeth I. Hack
Philip F. Ackerman
SONNENSCHN NATH & ROSENTHAL LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
(202) 408-6400

Lester A. Pines
CULLEN, WESTON, PINES & BACH
22 W. Washington Avenue, #900
Madison, WI 53703-2718
(608) 251-0101 telephone
(608) 251-2883 facsimile

STATE OF WISCONSIN
CIRCUIT COURT – BRANCH 7 - DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., *et al.*,

Defendants.

Case No. 04-CV-1709

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Defendant Teva Pharmaceuticals USA Inc.'s **REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT TEVA PHARMACEUTICALS USA, INC.'S MOTION FOR PROTECTIVE ORDER** to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20th, 2005, on this 26th day of May, 2006.

Dated this 26th day of May, 2006.

/s/ Philip F. Ackerman

Philip F. Ackerman