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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	Case No.: 04-CV-1709
)	
v.)	
)	
ABBOTT LABORATORIES, et. al.,)	
)	
Defendants.)	

**PFIZER, INC.’S REPLY TO PLAINTIFF’S OPPOSITION TO
MOTION FOR A PROTECTIVE ORDER**

Defendant Pfizer, Inc. (“Pfizer”) respectfully submits this reply to Plaintiff’s Response to Pfizer’s Motion for a Protective Order (“Opposition”). As Plaintiff’s Opposition now illustrates, Plaintiff’s Notice of Deposition of Defendant Pfizer is but another attempt by Plaintiff to bolster a trial plan that improperly assumes the state may consolidate the trials of Pfizer and Pharmacia Corporation (“Pharmacia”) while ignoring this Court’s directive that it file a motion to do so. In so doing, Plaintiff misstates the discovery record already taken of Pfizer in this matter and ignores the unnecessary burden that would be imposed on Pfizer by providing the requested deposition. This is one of those rare occasions in which other discovery methods are available to plaintiff and superior for eliciting the evidence it seeks. For these reasons, Pfizer requests that the Court grant its motion for a protective order under Wis. Stats. § 804.01(3)(a).

I. PLAINTIFF'S DEPOSITION NOTICE IS SIMPLY A BELATED—AND MOOT—ATTEMPT TO FIND SUPPORT FOR A MOTION IT NEVER FILED.

In its opposition, Plaintiff asserts that this deposition is necessary to support its trial plan and “seeks information . . . in response to Pfizer’s motion for separate trials.” Plaintiff’s Opposition at 2 (emphasis supplied). As an initial matter, Plaintiff inaccurately describes the procedural status of this matter. Pfizer did not move for separate trials in this action, nor was it required to do so. This Court has already stated that “pending further order of the court, each defendant will be accorded a separate trial on plaintiff’s claim against it...” See Pfizer’s Response and Objection to Plaintiff State of Wisconsin’s Proposed Trial Plan, attached as Ex. 4 to Archibald Aff.

Despite this presumption against consolidated actions, Plaintiff never moved to consolidate Pfizer and Pharmacia for trial. Instead, on February 1, 2008, Plaintiff simply submitted a proposed trial plan that presumed Pfizer and Pharmacia would be tried together. Pfizer and Pharmacia are legally separate corporations, of course, and for almost the entire time period in issue in this suit they had no corporate relationship whatsoever. Apparently realizing that these facts are inconvenient to its proposed trial plan, Plaintiff served the contested deposition notice on Pfizer.

II. PLAINTIFF MISSTATES THE DISCOVERY TAKEN OF PFIZER.

In its Opposition, Plaintiff complains that it has taken only three depositions of Pfizer. Opposition at 2. Again, Plaintiff misstates the record. Plaintiff has in fact either deposed or been given – and some cases has declined – the opportunity to depose nine (9) Pfizer employees, and possesses the transcripts of all nine depositions.¹

Plaintiff’s counsel represents at least five other states in these AWP lawsuits in addition to Wisconsin, and coordinates closely on discovery matters with counsel for an additional state, Alabama (with which it is co-counsel in Hawaii). In that guise, and pursuant to a Stipulation

¹ In addition, Plaintiff has taken the depositions of a Pharmacia corporate representative, and a corporate representative of Pharmacia’s subsidiary, Greenstone Ltd. Plaintiff has also been provided copies of deposition transcripts of 18 additional Pharmacia witnesses. Smith-Klocek Aff. at ¶¶ 4-5.

between Pfizer and Wisconsin, Illinois, Alaska, Hawaii, Kentucky, and Alabama, Plaintiff's counsel is obligated "to make a *good faith effort* to coordinate, through cross-noticing or otherwise, . . . depositions of Pfizer witnesses." Stipulation Concerning the Use of Documents and Data Produced by Pfizer Inc., to the State of Wisconsin for Use in Alabama, Alaska, Hawaii, Illinois, Kentucky, and Wisconsin Pharmaceutical Pricing Actions ("Stipulation") at ¶ 8, attached as Ex. A of Erica Smith-Klocek Reply Affidavit, dated April 18, 2007 ("Smith-Klocek Reply Affidavit") (emphasis supplied). It is under the terms of this Stipulation that Plaintiff's counsel has been fully consulted in the scheduling and location of every Pfizer deposition taken anywhere in the country, in any AWP action, has been provided every opportunity to attend and participate in every such deposition, and in some cases, has simply chosen not to participate, relying on other plaintiffs' counsel with which it is coordinating discovery efforts to carry the water.² See Smith-Klocek Reply Affidavit at ¶¶ 2-3.

III. THE BURDEN AND EXPENSE UPON PFIZER OF THE DEPOSITION SOUGHT IS NOT JUSTIFIED UNDER THE CIRCUMSTANCES.

Plaintiff seeks by its deposition notice of Pfizer to test the corporate "separateness" of Pfizer and Pharmacia—prior to April 2003, a completely independent company. Among other objectives, Plaintiff seeks by its notice to depose a **Pfizer** employee with detailed and complicated questions concerning **14 years** of **Pharmacia's** corporate structure, business and operations. On its face, this objective is senseless and abusive. Not all discovery lends itself to deposition. This is one of those cases in which interrogatories or a deposition upon written questions is the superior method for providing Plaintiff the information it seeks. At a minimum, Plaintiff should be directed to attempt

² Plaintiff's counsel took the deposition of William Kennally on October 2, 2007 in New York, New York at the law offices of Morgan, Lewis & Bockius LLP. On October 1, 2007—the previous day and at the same location—Pfizer employees Sandra Beatty and Byron Bond were deposed by Alabama's counsel. On October 3, 2007 – the very next day and at the same location—two more Pfizer witnesses, Richard Vastola and Walt Slijepceovich, were deposed. Plaintiff's counsel elected not to participate in these depositions, but instead deferred to counsel for the State of Alabama, with whom Plaintiff's counsel had been coordinating all depositions of Pfizer, and with whom he is co-counsel for plaintiffs in other AWP actions.

such methods in the first instance, and be permitted to take the requested deposition only if those methods prove unsatisfactory.

By definition, there is no Pfizer witness who can testify as to Pharmacia's corporate structure, business and operations prior to 2004. Even as to the post-2004 period, there is no one Pfizer witness who will have personal knowledge about the topics to which the discovery is directed. For that reason, Pfizer's attorneys will have to "educate" a number of matters with which they have no familiarity. That is a perversion of the normal corporate designee deposition, in which an employee with knowledge about a particular subject can, without undue burden, testify on behalf of an entity about that topic. While Pfizer concedes that interrogatories can be subject to abuse and are limited in their usefulness, there are occasions in which they are the discovery method of choice—occasions in which a party must research many areas to provide the answers sought. This is one such occasion.

IV. CONCLUSION

Plaintiff's opposition brief makes clear that it seeks this discovery to find support for a motion it never filed, and whose time for filing has long passed. Given the unreasonable burden that would be required to respond to Plaintiff's overly broad deposition notice, this discovery is unwarranted, and Pfizer's Motion for a Protective Order should be granted.

Dated this 18th day of April, 2008.



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CERTIFICATE OF SERVICE

I, Beth J. Kushner, hereby certify that on this day of 18th day of April 2008, a true and correct copy of Pfizer, Inc.'s Reply to Plaintiff's Opposition to Motion for a Protective Order was served on all counsel of record by Lexis Nexis File & Serve®.



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