

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THE STATE OF WISCONSIN,

Plaintiff-Appellee,

v.

AMGEN INC., et al.,

Defendants,

DEY, INC.,

Defendant-Appellant.

DEFENDANT-APPELLANT DEY, INC.'S RESPONSE TO
PLAINTIFF-APPELLEE'S MOTION FOR SANCTIONS

Defendant-Appellant Dey, Inc. ("Dey") submits this response to the Motion for Sanctions of Plaintiff-Appellee State of Wisconsin ("Wisconsin").

Wisconsin claims that Dey's appeal is frivolous and seeks sanctions against Dey, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1927, for filing this appeal. As demonstrated in Dey's Brief, filed July 16, 2007, and Dey's Reply Brief, filed October 9, 2007 (collectively, "Dey's Appeal Briefs"), the District Court abused its discretion in awarding attorneys' fees, and therefore, this Appeal is not frivolous and sanctions should be denied. Additionally, this motion should be denied for the reasons set forth below.

Under Fed. R. App. P. 38 or 28 U.S.C. § 1927, sanctions are only appropriate when the appeal is frivolous or vexatious. *See Mustafa v. City of Chicago*, 442 F.3d 544, 549 (7th Cir. 2006); *Depositer v. Mary M. Holloway Foundation*, 36 F.3d 582, 588 (7th Cir. 1994). An appeal is frivolous when “the result is obvious or the appellant’s argument is wholly without merit” and “there is some evidence of bad faith”. *Koffski v. Village of North Barrington*, 988 F.2d 41, 45 n.8 (7th Cir. 1993). For the reasons stated in Dey’s Appeal Briefs, the District Court abused its discretion in awarding attorneys’ fees, and thus, this Appeal is not frivolous.

Additionally, to prevail on a motion for sanctions due to a frivolous or vexatious appeal, Wisconsin must point to actual evidence that Dey is pursuing this appeal in bad faith, to delay the proceedings, or to harass Wisconsin. *Depositer*, 36 F.3d at 588; *Mustafa*, 442 F.3d at 550; *Koffski*, 988 F.2d at 45 n.8. This appeal and the removal have not caused delay in the underlying litigation. *See* Wisconsin’s Opposition Brief, filed September 21, 2007 (failing to challenge Dey’s assertion that no delay was caused). Moreover, there is also no evidence of any bad faith or intent to harass. Instead, Wisconsin requests that this Court infer such evidence because the fee award is allegedly trivial to Dey, the remand decision is not reversible, and the utility of a reversal in this litigation is allegedly “negligible”. Wisconsin’s arguments are inapposite because Dey has the right to challenge an erroneous judgment. Therefore, Wisconsin’s request for sanctions should be denied.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Dey's Reply Brief, filed October 9, 2007, Dey respectfully requests that Wisconsin's Motion for Sanctions be denied.

Dated: October 9, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of DEFENDANT-APPELLANT DEY, INC.'S RESPONSE TO PLAINTIFF-APPELLEE'S MOTION FOR SANCTIONS to be served as follows:

(a) by Federal Express – Overnight Delivery upon:

Charles Barnhill, Esq.
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Counsel for Plaintiff-Appellee; and

(b) on all counsel of record in the underlying action, by transmission to LexisNexis File & Serve, pursuant to the Order of the Circuit Court of Dane County, Branch 7, Case Number 04-CV-1709, dated December 20, 2005.

Dated: Chicago, Illinois
October 9, 2007



James M. Reiland