

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

**THE JOHNSON & JOHNSON DEFENDANTS'
SEPARATE REPLY MEMORANDUM IN SUPPORT OF
THE MOTION TO DISMISS THE AMENDED COMPLAINT**

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REPLY ARGUMENT

The State's claim that the Johnson & Johnson Defendants have made "wild" and "egregious" misuse of evidentiary materials shows an unmistakable flair for the dramatic, and a distressing disregard for the facts. The State's basic point appears to be that the allegations in the Amended Complaint must be "accepted" no matter what, and that the J&J Defendants are asking the Court to make premature findings based on "unsupported lawyers' statements" or "third party" opinion. (*See* Pl. Individ. Memo. at 11-12.) Of course, that is not what the J&J Defendants seek at all. The J&J Defendants are not asking the Court to make any "findings" at this stage, least of all a finding that the J&J Defendants "did nothing wrong." (Pl. Memo. at 19.) Indeed, the J&J Defendants acknowledged in their opening brief that, on a motion to dismiss, courts generally must accept a plaintiff's allegations as true, "no matter how implausible and absurd the allegations may be." (J&J Memo. at 2.)

Why then did the J&J Defendants submit materials that directly refute the State's claims? For one reason only: we cited contrary evidence to show why it would be inequitable to let the State drag 37 diverse companies into a massive and unwieldy litigation on the basis of a generalized pleading that is not particularized as to each defendant. The State's failure to plead specific facts as to each company is a signal either that it is not able to do so, or that the omitted specifics would undermine the State's claims. As set forth in the defendants' joint memoranda, this is at odds with even the most rudimentary pleading standards. *See also In re: Pharmaceutical Average Wholesale Price Litigation*, Memorandum and Order (April 8, 2005) (dismissing plaintiffs' claims against Johnson & Johnson and others for failure to plead fraud allegations with particularity)(Johnson & Johnson will provide the Court with a copy of the opinion upon request of the Court).

As to the five J&J Defendants, the State's only specific allegation appears in Appendix B, where it is alleged that, in 2000, three J&J Defendants published AWP figures for three medicines that were modestly higher than the prices paid by the Wisconsin Department of Corrections. The State admits that this Department (which supposedly did not know the prices it was paying) was part of a larger group of governmental entities that wielded enormous "purchasing power in price negotiations with manufacturers." (Pl. Indiv. Memo. at 11.) It is hardly surprising, therefore, that these entities were able to extract favorable pricing. Yet, according to the State, the fact that they paid less than AWP somehow supports an inference of wrongdoing sufficient to hold the J&J Defendants in the case.

Ironically, the State all but admits that the Amended Complaint is not sufficiently particular as to the J&J Defendants. In order to determine what they allegedly did wrong, the J&J Defendants are urged to look, not to the Amended Complaint, but to "the big picture of which this lawsuit is a part." (Pl. Memo. at 2). This "big picture" (whatever it is) cannot substitute for specific allegations concerning misconduct by each defendant.

Other facts included in the J&J Defendants' memorandum also illustrate why it is important to require the State to plead with particularity. For example, the State alleges that testimony from an entity called Ven-A-Care "uniformly supports" its claims against "defendants." (Am. Cmplt., ¶ 43.) The J&J Defendants quoted Ven-A-Care's testimony in order to show that Ven-A-Care actually said exactly the opposite with respect to Johnson & Johnson. The point was not, as the State would have it, that "the opinion of a third party" somehow controls on a motion to dismiss. (Pl. Indiv. Memo. at 12.) The point, rather, is that the State should not be allowed to drag individual defendants into a costly and politically-charged litigation based on generalized averments that are inapplicable to specific companies.

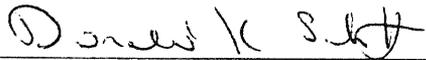
Because the Amended Complaint does not state a sufficiently particularized claim against the J&J Defendants, the J&J Defendants should be dismissed.

Dated: April 19, 2005

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