

STATE OF WISCONSIN
CIRCUIT COURT – BRANCH 7 – DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., *et al.*,

Defendants.

Case No. 04-CV-1709

NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER

PLEASE TAKE NOTICE that Defendants Mylan Laboratories Inc. and Mylan Pharmaceuticals Inc. (collectively, “Mylan”), by counsel, will bring the following motion at a date and time to be determined by the Special Master, on the deposition that is the subject of this motion as scheduled for April 20, 2006:

MOTION

Pursuant to WIS. STATS. § 804.01(3)(a), Mylan, by counsel, respectfully moves the Court for an order adjourning the § 804.05(2)(e) deposition of a Mylan representative currently scheduled for April 20, 2006, to a date after the State of Wisconsin (the “Plaintiff” or “State”) has cured the defects in its First Amended Complaint (the “Complaint”), as directed by the April 3, 2006 Partial Order and Decision (the “April 3 Order”) of this Court. The grounds for this motion are as follows:

1. Under WIS. STATS. § 804.01(3)(a), the Court 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.” *Vincent & Vincent, Inc. v. Spacek*,

102 Wis.2d 266, 271-72 (Ct. App. 1981). Accordingly, this Court may issue an order precluding, limiting, or deferring discovery. *See* Wis. Stat. § 804.01(3)(a)(1), (4); *see also* 8 Wis. Prac., Civil Discovery § 1.11 (the Court has “broad powers” to “regulate or prevent discovery” by issuing a protective order).

BACKGROUND

2. On January 31, 2006, the Court entered orders granting in part and denying in part motions for protective orders by defendants AstraZeneca Pharmaceuticals LP, Pfizer and Pharmacia. (Merkl Aff. at Exhibits A and B.)

3. Following those decisions, on February 7, 2006, Plaintiff’s counsel served a Notice of Deposition (“Deposition Notice”) upon Mylan, requiring Mylan to designate a witness to give testimony concerning: (i) “Mylan’s contracts for the sale of its general pharmaceuticals” with various customers and their affiliates “during the period 1999 to the present, and the manner in which they were secured”; and (ii) the “basis for the AWP’s and WAC’s Mylan reported to First Data Bank and the Red Book from 1993 to the present.”¹ Deposition Notice, at. p. 1. (Merkl Aff. at Exhibit C.)

4. On February 14, 2006, Mylan’s counsel wrote to Plaintiff’s counsel and requested an adjournment of the deposition until after Plaintiff had identified the 15 drugs for which it would be seeking discovery. (Merkl Aff. at ¶ 5 and Exhibit D.)

5. On February 21, 2006, counsel for the Plaintiff advised Mylan of the 15 drugs for which Plaintiff would seek discovery. (Merkl Aff. at ¶ 6 and Exhibit E.)

¹ Plaintiff’s Deposition Notice also demands that Mylan’s witness bring to the deposition documents “explaining or supporting the basis for the AWP’s and WAC’s Mylan reported to First Data Bank or the Red Book from 1993 to the present.” Deposition Notice, at p. 2. Mylan served an objection to Plaintiff’s Notice of Deposition. *See* Defendants Mylan Laboratories Inc.’s and Mylan Pharmaceuticals Inc.’s Responses and Objections to Plaintiff’s Notice of Deposition, dated March 7, 2006. (Merkl Aff. at Exhibit C.)

6. On March 7, 2006, Mylan served objections to the Notice of Deposition, but agreed, subject to its objections, to produce a witness and documents in response to the Notice. (Merkl Aff. at Exhibit F.)

7. On consulting with counsel for the State, the Deposition was adjourned to April 20, 2006. Mylan agreed to Plaintiff's request that the Deposition be held in Madison, Wisconsin, despite the inconvenience to Mylan and its witnesses. (Merkl Aff. at ¶ 8.)

8. On April 3, 2006, the Court issued a Partial Decision and Order, finding that Plaintiff did not meet the pleading requirements for fraud. The Court ordered Plaintiff to amend the Complaint by June 5, 2006 and to substantially re-plead its claims involving fraud. (See Order, at p. 14.) The Court held that the Plaintiff's fraud and reliance-based claims "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.*, at p. 13.) The Court specifically stated that each Defendant "is entitled to know, with as much detail as Plaintiff can provide, **which** of its drugs are involved and **what** (name, date) publication of AWP is false, and the **actual** price that should have been published." (*Id.* (emphasis in the original).)

9. While Mylan has not objected to continuing document discovery, Mylan believes that it is entitled to know the true scope of the allegations made against it before it should have to put up a company spokesperson under § 804.05(2)(e).

10. On Thursday, April 6, 2006, in light of the Order, counsel for Mylan contacted Plaintiff's counsel to adjourn the deposition presently scheduled for April 20, 2006. Counsel for the State rejected any adjournment and indicated that he plans to take the depositions presently noticed.

ARGUMENT

11. The issuance of a protective order is within the Court's sound discretion and, upon a showing of good cause, WIS. STATS. § 804.01(3)(a) authorizes the Court to make any order which justice requires to "protect a party from discovery that would result in annoyance, embarrassment, oppression, or undue burden or expense." WIS. STATS. § 804.01(3)(a); *see also Vincent & Vincent, Inc. v. Spacek*, 102 Wis.2d 266, 271-72 (Ct. App. 1981). Accordingly, this Court may issue an order "[t]hat the discovery not be had," "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." *See* Wis. Stat. § 804.01(3)(a)(1), (4); *see also* 8 Wis. Prac., Civil Discovery § 1.11 (the Court has "broad powers" to "regulate or prevent discovery" by issuing a protective order).

A. MYLAN WILL BE SEVERELY PREJUDICED IF THE COURT DOES NOT GRANT THE REQUESTED RELIEF

12. As Judge Krueger recognized in the April 3 Order, "Plaintiff seems as though it wants to put the burden on each company to come forward with an explanation for each and every AWP listing since 1992. This is not permissible." (Order, at p. 13.) A plaintiff must plead fraud with particularity, and "[p]articularity...requires specification of the time, place, and content of an alleged false misrepresentation" (*Id.*, at pp. 12-13) (*citing Friends of Kenwood v. Green*, 239 Wis.2d 78, 87 (Ct. App. 2000)).

13. Similarly, as the Court recognized, the State knows or is in the best position to know which of the 65,000 drugs are at issue in this litigation:

Under this complaint, it is not known what Plaintiff considers the threshold for fraud. Would a few cents difference from the AWP and the actual sales price meet that definition? A few dollars? Is the State limiting this case to the drugs mentioned in Exhibits A & B attached to the Complaint or is it including the 65,000 different drugs referenced several times in that pleading?

(*Id.*, at p. 13.)

14. The Complaint references only one of Mylan's drugs. (*See* Complaint, Appendix B.) Mylan has yet to be notified "**which** of its drugs are involved and **what** (name, date) publication of AWP is false, and the actual price that should have been published." *Id.* The list of 15 drugs that the State's counsel has offered is not sufficient to tell Mylan which drugs they will have to defend, because the State is not bound to the 15 drugs they list in a letter in the same way that they would be limited by the drugs they name in a complaint. Indeed, the State does not believe it is limited to 15 drugs, as indicated in counsel's February 21, 2006 letter: "Here is our list of 15 drugs *we would like to start with.*" (Merkl Aff. at Exhibit E (emphasis added).)

15. Because the deposition at issue here is of a Mylan designee, someone who is specifically supposed to represent the company, it will severely prejudice Mylan if that deposition is ordered to take place before Plaintiff complies with the Order requiring an amended pleading. Mylan is entitled to know what the specific claims are against it so that it can properly prepare the witness who is supposed to represent it. Indeed, when Plaintiff amends its pleading to correct the deficiencies noted by the Court, the drugs at issue, the relevant time period, and other significant circumstances will change from the current inadequate pleading. The Court noted, for example, that there are statute of limitation issues that the Plaintiff needs to bear in mind in amending its pleading. (*See* Order, at pp. 9-10.) Under the circumstances, it would be highly prejudicial to require Mylan to produce a witness for deposition before the Complaint is amended pursuant to the Court's April 3 Order.

B. THE PROTECTIVE ORDER THAT MYLAN SEEKS IS LIMITED IN SCOPE AND PLAINTIFF WILL NOT BE PREJUDICED

16. The limited and narrow relief Mylan seeks – *i.e.*, adjournment of the deposition until Plaintiff files an amended complaint – will not prejudice Plaintiff in any way.

Plaintiff is not precluded from taking any deposition. Nor is Mylan requesting an indefinite adjournment. The length of the adjournment is up to Plaintiff's schedule for amending its pleading. The deposition can be scheduled once Plaintiff serves a proper complaint.

17. Mylan is not suggesting a stay of all discovery, as the document discovery has been ongoing. Indeed, Mylan has produced more than ten thousand (10,000) pages of documents and is in the process of producing additional documents that the Plaintiff can use in amending its pleading. Moreover, Mylan is undertaking an extensive and expensive collection of electronic records to review for production of documents in this and other cases.

18. Fairness also dictates an adjournment. Mylan and the other defendants will not be able to depose witnesses for the State until the Complaint is amended, since to do so before the amendment of the allegations against Mylan would be pointless and inefficient. Thus, allowing Plaintiff to go forward with this and other similar depositions, instead of granting a modest adjournment, would give Plaintiff an unfair advantage over Mylan and other defendants in terms of how much discovery it conducts – in effect, rewarding the faulty pleading and creating expensive inefficiency.

19. Moreover, even if the State is permitted to take the deposition prior to amending the Complaint, the State will likely seek to take another § 804.05(2)(e) deposition after it amends the Complaint. As a matter of basic fairness and efficiency, and to avoid duplicative depositions and the resulting burden and expense, the deposition at issue should be stayed until Plaintiff complies with the Court's April 3 Order to amend the Complaint.

C. THE INSTANT MOTION DIFFERS FROM THE PFIZER MOTION IN KEY REGARDS

20. Mylan appreciates that Special Master Eich denied Defendant Pfizer's motion for a protective order to defer "any deposition until after all dispositive motions are

resolved.” (See January 31, 2006 Decision & Report of Discovery Master (“Pfizer Decision”).) (Merkl Aff. at Exhibit B.) The instant motion is distinguishable, however, from that situation in several critical ways.

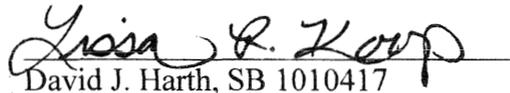
21. First, at the time that Pfizer sought a protective order, the Defendants’ joint motion to dismiss was pending with the Court and there was uncertainty with respect to the length of any postponement. Given the nature and length of the motion to dismiss, the Court could not predict how long the depositions at issue would have to have been on hold. The Court had not indicated whether the claims were plead with sufficient particularity and there was at least the possibility that no amendment would be required. In contrast, here, the motion to dismiss has been decided, in part, and we know that Plaintiff did not sufficiently plead certain claims, and that the specifics that they left out are crucial to their claims. Moreover, we know the time frame. Plaintiff must amend within 60 days of the Order. To adjourn the deposition until after that time, or sooner if Plaintiff amends the Complaint sooner, does not present the issues posed in the earlier Pfizer motion.

22. Plaintiff’s opposition to Pfizer’s motion for a stay largely focused on the supposed lack of merit of the motion to dismiss. We now know that the Court granted the motion in part. (Pfizer Decision, at p. 7.) The Court defined the problems with the pleading, and advised the State that it is not permissible for the State to avoid its pleading burden and require defendants to explain themselves. (See, *supra*, at ¶ 12.) Mylan has stated clearly and precisely the prejudice of going forward with the deposition prior to the amending of the Complaint. (See, *supra*, ¶¶ 12-15.) Mylan has also demonstrated why the State would not be prejudiced if the Mylan representative’s deposition were adjourned to a date after the amendment. (See, *supra*, ¶¶ 16-19.)

CONCLUSION

For the foregoing reasons, Defendant Mylan respectfully requests that this Court grant (1) its motion for an order adjourning the § 804.05(2)(e) deposition of a Mylan representative currently scheduled for April 20, 2006, to a date after the State has amended its Complaint to cure the defects identified in the Court's April 3, 2006 Order and (2) such other and further relief as this Court deems just and proper.

DATED: April 11, 2006



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