

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN INC., et al.,

Defendants.

STATE OF WISCONSIN'S RESPONSE TO
"DEFENDANTS' NOTICE OF SUPPLEMENTAL EVIDENCE..."

Presently before the Court are the parties' cross motions for summary judgment. These motions are fully briefed. Now, after the fact, the defendants file a "notice of supplemental evidence in further support of" their brief in opposition to Plaintiff's motion for summary judgment. The Plaintiff respectfully requests this Court to disregard and strike this "notice" for three reasons. First, it is untimely and the defendants have neither sought, nor received, Court permission for filing it. Second, the notice thumbs its nose at the Court's summary judgment rules. And, third, the factual statements that defendants make are untrue, and the law governing essential aspects of their argument is the opposite of their representations. In short, this filing has all the earmarks of an act of desperation.

I. DEFENDANTS' "NOTICE" IS UNTIMELY.

The defendants cite no authority for the submission of what they call a "notice of supplemental evidence" because there is none. Nowhere in the statutes, in the Dane County Local Rules, in rules of this Branch, or in this Court's scheduling order is there a provision for a party to file what they unilaterally assert as "new evidence" to have yet again the last word. Certainly there is no provision for this filing without first asking the Court's permission and no excuse whatsoever for this belated filing. This Court should summarily strike the notice.

Plaintiff's motion for summary judgment was filed one week short of one year ago and briefing on Plaintiff's motion for summary judgment was completed on March 7, 2008. More importantly, the answers to their sixth set of interrogatories simply stated what defendants have known all along through prior discovery. After all, defendants have taken numerous depositions, including EDS. The notion that the interrogatories contain "new" material is incredible.

II. DEFENDANTS' SUBMISSION VIOLATES THE COURT'S SUMMARY JUDGMENT RULES.

The Court's rules on summary judgment are quite specific. If defendants seek to controvert a particular fact offered by the plaintiff, it has a duty to identify the fact or facts it seeks to dispute and respond in the manner set forth in the rules, e.g., "Disputed. Contrary Evidence."

Defendants have not sought to identify a single fact which their supposed new revelation actually controverts. There is no sense speculating on their motive for this failure (although as plaintiff shows below their new facts do not controvert any essential element of plaintiff's case), it is enough that defendants have ignored this rule and, hence,

their submission is improper and should be disregarded. Defendants have offered no excuse for this failure.

III. DEFENDANTS' FACTS AND ARGUMENTS ARE DEAD WRONG IN ANY EVENT.

Defendants make two arguments, neither of which has any merit. The first is that the interrogatory response of the State for the first time makes clear that it did not directly receive defendants' phony wholesale prices—these prices were sent to its agent, EDS. Based on this fact, defendant asks the Court to find that their false representations caused Wisconsin no harm and were not made to the public.

This argument is untimely, confusing and wrong. That Wisconsin employs a fiscal agent to help in the administration of its program is a fact that has been known to the defendants for months and months—it was the subject of intense deposition testimony and defendants cannot not argue otherwise.

Second, that EDS, Wisconsin's agent, purchased defendants' inflated prices does not refute the argument that defendants' reported prices were made to the public. Indeed, it shows that there is an open and public market for defendants' prices—which is an unassailable fact.

Finally, that EDS, Wisconsin's agent, has purchased defendants' false prices and used them in connection with its work on behalf of Wisconsin does not break the chain of causation. There is no intervening cause. Defendants' false prices go directly to the pricing publications and from there to EDS and from there to Wisconsin's Medicaid program unchanged.

Defendants' second argument is that Wisconsin purchased what defendants' term the Blue Book average wholesale price, not the suggested average wholesale price, and

they contend that this price is somehow different, with the latter being supplied by the manufacturer and the former resulting from a survey of wholesalers. This, again, is not a new fact. Defendants have known this since they deposed Wisconsin officials. And it is a meaningless fact.

Defendants do not contend that the prices Wisconsin relied on are different than those reported by the defendants. They are not. Indeed, each of the defendants against whom summary judgment is sought admitted that the prices they reported to First DataBank were published verbatim by First DataBank. See, e.g., Plaintiff's Proposed Undisputed Facts in connection with plaintiff's motion against Sandoz: "17. When Sandoz reports AWP's and WAC's to First DataBank, Sandoz intends for First DataBank to publish the identical AWP's and WAC's." 18. "First DataBank publishes the identical AWP's and WAC's that Sandoz reports to it and publishes those identical AWP's and WAC's." 19. "Sandoz knows that First DataBank takes the AWP's and WAC's that Sandoz reports to it and publishes those identical AWP's and WAC's." Thus, the prices defendants reported were the very prices relied on by Wisconsin and defendants so knew.

Moreover, as defendants recognize in footnote 10 (it is amazing they need so many footnotes in a three page submission), the distinction between the prices First DataBank says it obtains from the manufacturers, and those that it obtains from surveys of wholesalers (if any such surveys actually took place—there is considerable doubt about whether surveys were actually done) is a distinction without a difference. The wholesalers have testified that they simply report the manufacturers' AWP's. Defendants try to side step this evidence by asserting that these depositions are inadmissible. But they are not. Wisconsin has long adhered to the liberal rule permitting the use of

depositions from other cases where the adverse party, as here, had the ability to cross examine the witness: "Complete mutuality or identity of all parties is not required." *Feldstein v. Harrington*, 4 Wis.2d 380, 90 N.W.2d 566 (Sup. Ct. 1958).

CONCLUSION

Plaintiff respectfully requests this Court summarily deny defendants' "notice" on the ground that it is untimely, improper, and without a substantial factual or legal basis.

Dated this 14th day of May, 2008.



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