

More specifically, GSK's motion to add yet more exhibits to their motion should be denied because: 1) the exhibits cannot be considered on a motion to dismiss, 2) they do not prove what GSK says they prove, 3) the inferences GSK asks the Court to draw from them are prohibited, and 4) the request they underpin will simply make unnecessary work for the Court.

First, a decision on a motion to dismiss must be based on the face of the complaint. Defendants are not permitted to simply file documents which they say contradict the Complaint and ask the Court to credit them and not the Complaint. As the Court stated in *Prah v. Maretti*, 108 Wis.2d 223, 229, 321 N.W.2d 182 (1982): "...the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true."¹ (The Court cannot take judicial notice of these documents as Plaintiff's Opposition To Defendants' Joint Motion To Dismiss makes clear.)

Second, the documents prove nothing. Although there is no way of knowing for sure since the documents are unauthenticated, these documents appear to have been sent to providers (who actually knew the prices at which defendants were selling their drugs), not the State of Wisconsin. Thus, they shed no light on what Wisconsin knew about Defendants' inflated AWP's. Indeed, these document references do not even address the allegations of the complaint. Plaintiff alleges that the Defendants systematically submitted inflated AWP's to the medical compendiums knowing that the states were locked in to relying on these prices. The documents Defendant GSK tenders here have nothing whatsoever to do with the submissions Defendant made to these medical compendiums.

Third, for the Court to utilize these documents in connection with Defendants' motion to dismiss in any substantive way would require the Court to engage in a whole series of rulings antithetical to a motion to dismiss. First, the Court would have to give no weight to the

¹ Defendants have not chosen to characterize their motion as one for summary judgment presumably for the reason that to do so would then permit Plaintiff to take full discovery.

Complaint's allegations that are inconsistent with what the documents purport to show. Second, the Court would need to admit the documents on an evidentiary basis. Third, the Court would have to infer that Wisconsin had full knowledge of their content. Fourth, to actually dismiss the case on the basis of such documents the Court would have to infer from them that Wisconsin knew all the elements of Defendants' fraudulent scheme. And, finally, the Court would have to rule that Wisconsin's knowledge of Defendants' scheme exonerates the Defendants even though Defendants continue to publish phony AWP's, continue to engage in their deceptive scheme unabated and, as a result, Wisconsin is still unable to find out the true selling prices of Defendants' drugs. As Wisconsin's brief in opposition to Defendants' joint motion to dismiss makes clear (with which we assume some familiarity), each link in this chain of required rulings is precluded by Wisconsin law.

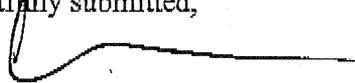
Finally, even the point GSK says it is trying to make by tendering these documents is wrong. Defendants suggest that these documents indicate that the Court should require Plaintiff to replead and fill their Complaint with a list of the drugs manufactured by each Defendant. As Plaintiff showed in its opposition to Defendants' joint motion to dismiss this argument has been rejected by most courts. In a few jurisdictions where fact pleading was required (unlike Wisconsin), either because of state pleading rules or the application of Rule 9(b) of the Federal Rules of Civil Procedure to a RICO count based on common law fraud, defendants have succeeded in requiring the plaintiffs to replead. All that this has accomplished is the creation of complaints in excess of 290 pages *without exhibits*—hardly a reasonable way to proceed. Although Plaintiff believes, and has so alleged, that the evidence of Defendants' scheme infects every drug they marketed, Plaintiffs have offered in connection with discovery to voluntarily produce a list of "subject" drugs that will dramatically reduce the number of drugs subject to

pricing discovery. (See the attached letter (without enclosures) sent to Mr. Hildebrand. No reply has yet been received to it.) Such an informal method of resolving Defendants' complaints of undue burden makes infinitely more sense than adding hundreds of pages to the Complaint which, in turn, will only generate another motion to dismiss (that is the pattern in those few jurisdictions requiring fact pleading—the follow-up motions to dismiss have then been denied, literally years after the case was filed).

In sum, there is no basis for allowing GSK to submit the documents it attached to its motion and the motion should be denied.

Dated this 24th day of April, 2005.

Respectfully submitted,



One of Plaintiff's Attorneys

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April 15, 2005

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Re: *State of Wisconsin v. Amgen Inc., et al.*
Case Number 04-CV-1709

Dear Dan:

I was in the process of drafting my letter to you when I received your letter. For the reasons that follow I don't believe your letter fully addresses Judge Krueger's concerns.

As we understand it Judge Krueger directed us to do three things before our next court appearance on May 11: First, look into the appointment of a referee to make recommendations on discovery controversies; second, see if we can agree on a confidentiality order; and, third, explore what discovery makes sense while the motion to dismiss is pending.

In response to Judge Krueger's request that the parties consider jointly requesting the appointment of a "referee" or "master" by the Court to decide any discovery disputes between the parties, we have concluded that there is ample precedent for such an appointment and that it would not only conserve the scarce resources of the Court and the parties, but also assist in the efficient administration of justice. Consequently, we endorse Judge Krueger's suggestion and urge defendants to do likewise.

In order to assist Judge Krueger at the next hearing on May 11, we request a meeting with a representative of defendants' counsel to discuss some of the procedural matters involved in the appointment in the hope we can reach agreement on them and so notify the Court. Among others, we propose that we seek agreement on the following matters:

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1. the appointment of a "master" or "referee" by the Court to settle discovery disputes (Wisconsin agrees to the appointment);
2. a recommendation regarding how the parties will apportion the compensation for the "referee" among themselves; and
3. a recommendation regarding who the referee should be, or a recommendation of a simple process whereby the parties exchange nominations for the position in such a manner as to narrow the universe of names submitted to the court.

With regard to the confidentiality order I enclose a copy of the order we submitted in Kentucky, the order entered by the court in Texas, and the agreed confidentiality agreement in California. Any one of these is acceptable to us. An objection to these orders over the provisions permitting the sharing of discovery with other states who have similarly sued the defendants, an issue one defense attorney raised at the last court appearance, makes no sense for several reasons. First, it is impracticable. Members of my firm have been appointed special assistant attorneys general to prosecute similar cases in Illinois and Kentucky. Precluding my firm from sharing discovery with these other states would make little sense. Second, other states, such as Texas, California and Florida, are permitted to share their discovery with Wisconsin. We should have reciprocal arrangements with them. Doing so will hold down not only our costs but defendants as well. Finally, it is the position of the Attorney General that as a general matter it is in the public interest for law enforcement officers to share information on their investigations. It facilitates investigations and their resolution which reduces taxpayer expense.

The states that have not been permitted to share their discovery have generally been rebuffed because their requests were too broad. Thus, as a matter of principal Connecticut and New York sought to be able to share their discovery with any law enforcement agency for any reason. Our request limits Wisconsin to sharing discovery with states that have either sued these defendants or have launched a formal investigation of them.

Please promptly review our proposed orders and let's meet and get agreement on a similar protective order. In the meantime, the absence of such an order should not delay discovery. While we work through this issue we are willing to limit review of the documents defendants produce to only the attorneys, their staffs and consultants.

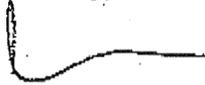
This brings me to the third and last charge of Judge Krueger, namely that we provide her with a description of the discovery which we believe is appropriate during the pendency of the motion to dismiss. The most obvious candidates for such discovery are those documents

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produced by the defendants in other, related litigation which correspond to our discovery requests. Your clients know the universe of these documents better than we do and that is why we earlier requested that you identify what it consists of for us. If this request has not already been passed on to the other defendants' counsel, would you do so now? To facilitate this process we are, for now, willing to limit the pricing data we requested to a defined group of drugs whose sales reach certain levels.

As this summary shows there is plenty for us to do between now and May 11, so I suggest we meet as soon as possible to discuss how we can work together to meet Judge Krueger's goals.

Sincerely,



Charles Barnhill

CB;jlh

Enclosures

Cc w/encl: Cynthia R. Hirsh
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