



STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH 9

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AVENTIS PHARMACEUTICALS INC.,

Defendant.

**DEFENDANT AVENTIS PHARMACEUTICALS INC.'S REPLY TO
THE STATE'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE AVENTIS'
AMENDED ANSWER/FOR LEAVE TO TAKE DISCOVERY AND
THE STATE'S RESPONSE TO AVENTIS' MOTION TO AMEND ITS ANSWER**

ARGUMENT

I. Why The State Refuses To Take "Yes" For An Answer.

The Amended Answer withdraws Aventis' defenses to the state's allegations as to two drugs – Anzemet and Taxotere. It also indicates that Aventis does not contest the present value of the state's damages claims and the number of occurrences upon which the state will ask this Court to enter forfeitures concerning these two drugs. In so doing, Aventis gives the state all it could seek from the jury concerning these products and renders evidence relating to these drugs entirely irrelevant. It is this last fact that prompts the state's objections to what would otherwise be a "win" as to these drugs.

Halfway through its brief the state concedes that what motivates its objections to Aventis' amendment is its fear of losing a trial not built around Anzemet and Taxotere evidence. As the

state puts it, a trial which does not include proof about these drugs would “be highly prejudicial to the State.” *See* State’s Reply Brief, Section II, at 8. The state makes this argument even though more than 99% of its case against Aventis has nothing to do with these drugs. This disproportionate focus, however, is nothing new. Based on its discovery efforts and pre-trial filings, the state apparently plans to persuade the jury to decide the entire case on the basis of evidence about Anzemet and Taxotere alone. It is precisely this confusion—unfairly prejudicial to Aventis—that Aventis seeks to avoid.

II. The State’s Arguments Misstate both the Law and the Facts of the Case.

Contrary to the state’s assertion, *Hess v. Fernandez* does not place a burden on the party seeking a late amendment to its pleadings to justify its position. *See* State’s Reply Brief, Section II, at 8 (citing *Hess v. Fernandez* 2005 WI 19, 278 Wis. 2d 283, 692 N.W.2d 655). Rather, that case holds that a court deciding whether to allow a late amendment must perform a balancing test, and enumerates some of the factors to be weighed. *Hess*, 2005 WI at ¶ 33. The question before the Court is not whether allowing Aventis to amend its Answer would be prejudicial to the state. Of course it would. Indeed, in an adversarial system, everything a party does should prejudice its opponent’s case; evidence that has no adverse impact on an opponent’s case is likely irrelevant and a waste of time. The proper questions are whether it is *unfairly prejudicial* and whether “justice so requires.” *See* WIS. STAT. § 904.03 (“Although *relevant*, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence) (emphasis added); *see also Lease Am. Corp. v. Ins. Co. of N. Am.*, 88 Wis. 2d 395, 401, 276 N.W.2d 767, 770 (1979) (evidence is unfairly prejudicial “if it has a tendency to influence the outcome [of a trial] by improper means

or . . . causes a jury to base its decision on something other than the established propositions in the case") (citation and internal quotation marks omitted); *see also* WIS. STAT. § 802.09(1) (Leave to amend “shall be freely given at any stage of the action when justice so requires.”).

Here, allowing Aventis’ amendment will keep the trial short, focused, and free from confusion and unfair prejudice – all legitimate interests of justice. By contrast, adopting the state’s position would turn Wisconsin law and procedure on its head, forcing a defendant to undergo a lengthy trial on claims to which no defense is raised. Under our law, discovery and pretrial proceedings are intended to narrow and clarify the issues requiring trial. Including evidence on undisputed claims violates the rule that only relevant evidence is admissible, and increases the risk of jury confusion.

The state accuses Aventis of “likening this case to a criminal prosecution or an action pursuant to a forfeiture citation.” *See* State’s Reply Brief, Section I.B at 5. Aventis does not “liken” this case to a forfeiture action; it is one: the state’s Complaint explicitly seeks forfeitures, both for violations of WIS. STAT. § 100.18(1) pursuant to WIS. STAT. § 100.26, and for violations of WIS. STAT. § 49.49. The state builds on this misperception by arguing that Wisconsin law does not allow a “no contest” plea in response to its Complaint. This argument makes no sense; parties are entitled – and encouraged – to plead “no contest” in forfeiture matters. Moreover, and contrary to section I.C of the State’s Reply Brief, Wisconsin law expressly provides that the introduction of “a plea of no contest [...] in civil forfeiture actions [...] is not admissible in any civil [...] proceeding against the person who made the plea.” WIS. STAT. § 904.10. Not only is a plea of no contest in a forfeiture action authorized by statute, but such a plea is inadmissible against Aventis. The state’s reliance on *Rachwal* is misplaced: the crux of that case was the consolidation of two criminal matters, and the question was whether the no contest plea entered

by the defendant in the first matter was applicable to the second case once the two were consolidated. The consolidation aspect was the key: the court found that once the pleadings were “fused into a single action,” “any defenses or admissions should be treated in a like manner, *i.e.*, as pertaining to the entire action.” *State v. Rachwal* 159 Wis. 2d 494, 515, 465 N.W.2d 490 (1991). There is no question of consolidation in this matter.

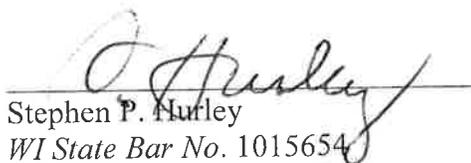
Setting aside the forfeiture aspect of the case, every defendant has the right not to contest any or all of a plaintiff’s allegations. More importantly, each party has a duty, after discovery is closed and trial approaches, to determine which of the issues raised in the pleadings are still viable. Here, Aventis fulfilled that duty by deleting affirmative defenses and withdrawing its defenses as to the state’s claims premised on Anzemet and Taxotere. The state’s objections to Aventis’ amendment should not be granted.

CONCLUSION

The notion that a party is unfairly prejudiced when its opponent declines to defend a claim is odd; the state should not be allowed to dictate what issues Aventis can concede. For the reasons set forth above, Aventis respectfully asks the Court for leave to amend its Answer to the Third Amended Complaint.

Dated at Madison, Wisconsin this 19th day of March, 2015.

Respectfully submitted,



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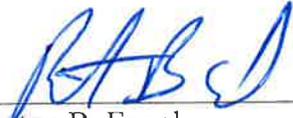
A large, stylized handwritten signature in black ink, appearing to read "Michael L. Koon". The signature is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Peyton B. Engel, hereby certify that on this 19th day of March, 2015, I caused a copy of the foregoing Defendant Aventis Pharmaceuticals Inc.'s Reply To The State's Brief In Support Of Its Motion To Strike Aventis' Amended Answer/For Leave To Take Discovery And The State's Response To Aventis' Motion To Amend Its Answer to be served on all counsel of record via Lexis Nexis File & Serve.



Peyton B. Engel