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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

APRIL KRUEGER, Individually and on behalf of all others similarly situated,

Plaintiff,

v.

WYETH, INC., f/k/a AMERICAN HOME PRODUCTS, a Pennsylvania Corporation, et al.,

Defendants.

CASE NO. 03cv2496-JAH (MDD)

ORDER DENYING
DEFENDANTS' MOTION TO
RE-DEPOSE PLAINTIFF

[DOC. NO. 164]

Before the Court is Defendants' motion to re-depose April Krueger, the class representative Plaintiff. The motion was filed on May 25, 2012. (Doc. No. 164). Defendants supplemented their motion on May 29, 2012. (Doc. No. 165). Plaintiff responded in opposition on May 31, 2012 (Doc. No. 166).

Background

In this litigation, Plaintiff alleges Defendants' advertising campaign misrepresented the benefits and failed to disclose the risks of its hormone replacement drugs during the class period. The underlying class action complaint was filed in this district on December 12, 2003. (Doc. No. 1). On March 20, 2004, the Judicial Panel on Multidistrict Litigation transferred this case to the Eastern District of Arkansas for coordinated pretrial proceedings. (Doc. No. 6). On March 20, 2007,

1 after that court declined to certify a multi-state class of consumers alleging consumer
2 fraud and seeking medical monitoring for any future injuries that arise from their
3 use of Prempro, it remanded Plaintiff's case to this district. (Doc. No. 9).

4 Back in this court, Plaintiff moved to certify a class on May 14, 2007. (Doc. No.
5 15). That motion was denied without prejudice on February 19, 2008. (Doc. No. 44).
6 On March 4, 2008, Plaintiff moved to stay all proceedings pending the outcome of
7 certain litigation pending before the California Supreme Court. (Doc. No. 47). The
8 stay was granted, ultimately, until July 31, 2009. (Doc. Nos. 52, 58). On January 7,
9 2010, Plaintiff again moved for class certification. (Doc. No. 61). That motion was
10 granted in part and denied in part on March 30, 2011. (Doc. No. 108). A motion for
11 reconsideration was denied on July 13, 2011. (Doc. No. 122). The Court of Appeals for
12 the Ninth Circuit declined permission to appeal the class certification order on
13 October 18, 2011. (Doc. No. 124).

14 The class, as certified by the District Court is:

15 All California consumers who purchased Wyeth's Hormone Replacement
16 Therapy products, Premarin, Prempro, and/or Premphase, for personal
17 consumption between January 1995 and January 2003, and were
18 exposed to a representation from Wyeth, or health care providers, or
19 read in literature in which Wyeth advertised or provided to third parties
20 to be disseminated under its brand or the third parties' brand, that
21 Premarin, Prempro, and/or Premphase lowered cardiovascular,
22 Alzheimers and/or dementia risk, or did not increase breast cancer risk,
23 and do not seek personal injury damages resulting therefrom.

20 Discussion

21 Plaintiff Krueger initially was deposed on April 13, 2005, during the
22 Multidistrict Litigation ("MDL") proceedings. That deposition was taken pursuant to
23 Practice and Procedure Order No. 1 issued by the MDL court. (Doc. No. 164, Exh. 2).
24 That Order limited discovery to class certification issues and specifically prohibited
25 any "merits" discovery, except for required initial disclosures and for interrogatories
26 and document requests. (*Id.* at §§ 13.1, 14.1). Regarding the identified class
27 representatives, including Ms. Krueger, the Order required these Plaintiffs to provide
28 or disclose certain information including "any materials about Prempro or hormone

1 replacement therapy that she received, read and/or viewed” (*Id.* at § 13.3(e)).
2 The Order also provided that the identified class representative Plaintiffs, including
3 Ms. Krueger, were subject to deposition and “will not be subject to additional
4 deposition examination as to matters on which they could have been examined at the
5 time of the initial deposition, except upon stipulation or by order of the Court.” (*Id.* at
6 § 13.6). Defendants were ordered to make a good faith effort to conduct the
7 examination so that a further deposition would be unnecessary. (*Id.*)

8 Defendants assert that a further deposition of Plaintiff Krueger is necessary.
9 They contend that their initial examination was limited to class certification issues
10 by the MDL Order discussed above; that statements made by Plaintiff in later filings
11 warrant examination; and, that the passage of six years suffices for Defendants to be
12 allowed to inquire of Plaintiff her current view of the issues in litigation. Plaintiff
13 counters that Ms. Krueger was examined extensively on merits issues during her
14 initial deposition; that the subsequent case filings do not reflect new issues or claims
15 sufficient to require Ms. Krueger to be re-examined; and, that the mere passage of
16 time is not sufficient grounds for re-examination.

17 The Court has reviewed the transcript of Ms. Krueger’s deposition. It covers
18 219 pages and lasted about 4 hours. (Doc. No. 166, Exh. 1). Defendants’ counsel had
19 the opportunity to and did inquire of Ms. Krueger regarding her exposure to articles
20 and advertisements regarding Prempro and other hormone therapy drugs. It does not
21 appear that the examination was limited. Defendants, although referring to the MDL
22 Order’s prohibition on taking “merits” discovery, have not identified areas of inquiry
23 that were not explored because of the MDL Order. Defendants reliance on alleged
24 inconsistencies between her deposition testimony and later filed declarations to
25 support their motion to re-depose Ms. Krueger actually mitigates against their
26 position that the limitations of the MDL Order had any bearing upon their
27 examination. Defendants have not raised any avenue of inquiry that they did not
28 actually pursue in the initial deposition. There are no new claims or defenses and no

1 new parties. The fact that six years have passed does not provide a basis to subject
2 Ms. Krueger to a further deposition.

3 The Court is left with the firm impression that Defendants seek to re-depose
4 Ms. Krueger primarily to attempt to impeach her earlier testimony. If that is their
5 desire, they may have the opportunity to do so at trial. The Court finds that
6 Defendants have failed to show good cause for a second deposition of Ms. Krueger.

7 Conclusion

8 For the foregoing reasons, Defendants' motion to re-depose Ms. Krueger is
9 **DENIED.**

10 **IT IS SO ORDERED:**

11 DATED: June 1, 2012

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14 Hon. Mitchell D. Dembin
U.S. Magistrate Judge

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