

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

JENSEN MEHARG,	)	
ROBIN MEYER,	)	
MICHAEL MEHARG,	)	
	)	
Plaintiffs,	)	
vs.	)	NO. 1:08-cv-00184-DFH-TAB
	)	
I-FLOW CORPORATION,	)	
ASTRAZENECA PHARMACEUTICALS LP,	)	
ASTRAZENECA LP,	)	
ZENECA HOLDINGS, INC.,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

JENSEN MEHARG, et al., )  
Plaintiffs, )  
 )  
vs. ) 1:08-cv-184- DFH-TAB  
 )  
I-FLOW CORPORATION, et al., )  
Defendants. )

**ORDER ON DEFENDANTS' MOTION TO COMPEL**

Plaintiffs recently settled with Defendant I-Flow Corporation [Docket No. 193], and as part of that settlement withdrew all experts identified as against I-Flow, including Dr. Peggy Pence. [Docket No. 194 at 1-2.] The AZ Defendants<sup>1</sup> had previously arranged with Plaintiffs to depose Dr. Pence, who is listed on Plaintiffs' final witness list [Docket No. 140] and has already submitted her expert report to Defendants. However, because Plaintiffs have withdrawn Dr. Pence as a witness, Plaintiffs decline to present her for the deposition, prompting the instant discovery dispute.

The first issue is what standard should be applied where an expert who has been listed as a testifying witness and has submitted an expert report is subsequently withdrawn from the witness list. Should the expert nonetheless be treated as a testifying expert per Federal Rule of Civil Procedure 26(b)(4)(A)? Or should the expert be treated as an expert employed only for trial preparation per Rule 26(b)(4)(B) and deposed only in exceptional circumstances? Judge McKinney recently recognized two lines of cases on this issue in *United States v. Cinergy* and

---

<sup>1</sup> Astrazeneca Pharmaceuticals LP, Astrazeneca LP, and Zeneca Holdings, Inc.

found persuasive “the line of cases that distinguish experts who have been designated as testifying experts then withdrawn, from experts never designated as testifying experts.” 2009 WL 1124969, at \*2 (S.D.Ind. April 24, 2009) (citing *House v. Combined Ins. Co.*, 168 F.R.D. 236 (N.D. Ia. 1996) and *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408 (D. Minn. 1999)). *Contra Carroll v. Praxair, Inc.*, Docket No. 05-307, 2007 U.S. Dist. LEXIS 9212, at \*7-8 (W.D. La. Feb. 7, 2007) (applying exceptional circumstances standard where the witness has been withdrawn); *Estate of Manship v. United States*, 240 F.R.D. 229, 237 (M.D. La. 2006) (applying the exceptional circumstances standard where the witness was withdrawn and had not yet produced a report); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1046 (E.D. Cal. 2002) (applying the exceptional circumstances standard because, unlike in *House*, a personal medical examination pursuant to Rule 35 was not performed). In *Cinergy*, the expert had already been deposed and the issue was whether the expert’s deposition testimony should be allowed at trial. Nevertheless, *Cinergy* is more broadly applicable to the situation where an expert has been designated to testify and then withdrawn.<sup>2</sup>

Once an expert has been designated to testify at trial, that expert is taken out of the purview of Rule 26(b)(4)(B). *Cinergy*, 2009 WL 1124969 at \*2. However, it does not follow that the party seeking the withdrawn expert’s deposition or seeking to use the expert at trial is

---

<sup>2</sup> In arriving at this determination, the Court considers the supplemental information provided by Plaintiffs. [Docket No. 197.] AZ Defendants’ motion to strike Plaintiffs’ supplement [Docket No. 200] is denied. In addition to the fact that the Court is vexed by the number of overlapping and bellicose discovery motions filed by AZ Defendants in this case, “motions to strike are disfavored . . . because [they] potentially serve only to delay.” *Murray v. Conseco, Inc.*, 2009 U.S. Dist. LEXIS 38980, at \*4 (S.D. Ind. May 7, 2009) (quoting *Heller Fin. Inc. v. Midwhery Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989) and *United States v. 416.86 Acres of Land*, 514 F.2d 627, 631 (7th Cir. 1975)).

necessarily entitled to do so. *House*, 168 F.R.D. at 246. The Court uses its discretion to decide whether the expert should be deposed, weighing the probative value against the prejudice. *Id.* at 247 (citing Fed. R. Evid. 403). In making this decision, the Court should consider the four interests weighing against allowing a party to depose or to use at trial the opposing party's expert: (1) the unfairness of allowing an opposing party to reap benefits from another party's effort and expense; (2) the substantial risk of prejudice arising from the fact of the prior retention of an expert by an opposing party; (3) the desire to allow counsel to obtain expert advice without fear that every consultation will yield discovery to the opponent; (4) and the fear of discouraging experts from serving as consultants if their testimony could be compelled. *Cinergy*, 2009 WL 1124969 at \*2; *House*, 168 F.R.D. at 241. The Court should also consider its own interest in the proper resolution of the issues. *House*, 168 at 246.

AZ Defendants argue that there is no danger of cumulative evidence since they have not disclosed another liability expert as to I-Flow. They further argue there is no danger of prejudice if a jury were to find out that Plaintiffs had originally intended to offer Dr. Pence because AZ Defendants will be offering Dr. Pence for the same purpose as Plaintiffs had originally intended—to establish I-Flow's liability. AZ Defendants argue that there is no danger of "piggybacking" evidence because I-Flow only recently became a non-party in this case and I-Flow has not produced a great deal of discovery to AZ Defendants throughout the litigation. Finally, AZ Defendants argue that because Plaintiffs already provided a report for Dr. Pence and agreed to allow AZ Defendants to depose her, AZ Defendants are entitled to do so. Plaintiffs, on the other hand, argue that allowing AZ Defendants to depose Dr. Pence would undermine Plaintiffs' settlement with I-Flow and the public policy encouraging parties to settle. Plaintiffs

also argue AZ Defendants would be piggybacking on Plaintiffs' "diligence and expense in finding and retaining Dr. Pence." [Docket No. 194 at 9.]

The Court concludes that the probative value of Dr. Pence's testimony outweighs any prejudice to Plaintiffs, and therefore AZ Defendants may depose Dr. Pence. Had Plaintiffs not settled with I-Flow, they would consider Dr. Pence's testimony highly relevant and necessary to accurately establishing liability in this case. The Court has an interest in ascertaining the truth, and Dr. Pence's testimony presumably would further this goal. AZ Defendants will be piggybacking on Plaintiffs efforts (despite AZ Defendants' arguments to the contrary),<sup>3</sup> but it will be doing so no more than if I-Flow and Plaintiffs had not settled. As to the issue of prejudice, if at a later time the Court determines that it would be unfair for the jury to know that Dr. Pence was originally Plaintiffs' expert, it can always keep that information from the jury. And like in *Cinergy*, the concerns that counsel may fear that all expert advice obtained may be discoverable and that experts may be discouraged from serving if their testimony could be compelled are not relevant in this situation, where Dr. Pence's report has already been disclosed and Plaintiffs had at one time listed Dr. Pence as a witness. Also, given Plaintiffs' familiarity with Dr. Pence and her knowledge of this case, the parties as a whole will be taxed less with her as an expert as opposed to beginning the process anew with another expert. Finally, while public policy encourages settlement, it does not do so at the expense of truth and fairness, which the testimony of Dr. Pence has the potential to provide. For these reasons, AZ Defendants' motion to compel [Docket No. 190] is granted.

---

<sup>3</sup> The Court is not sure how AZ Defendants' contention that I-Flow has not produced discovery is relevant to whether AZ Defendants are piggybacking off of Plaintiffs' efforts.

AZ Defendants have also requested an emergency motion for extension of time to designate its I-Flow liability expert until this motion to compel is determined. This motion [Docket No. 196] is granted. AZ Defendants have two business days from the date of this order to designate Dr. Pence as an expert witness.

Accordingly, AZ Defendants' motion to compel [Docket No. 190] is granted, AZ Defendants' motion for extension of time [Docket No. 196] is granted, and AZ Defendants' motion to strike [Docket No. 200] is denied.

Dated: June 26, 2009

/s/ Tim A. Baker  
Tim A. Baker  
United States Magistrate Judge  
Southern District of Indiana

Copies to:

Geoffrey M. Coan  
WILSON ELSER MOSKOWITZ  
EDELMAN & DICKER, LLP  
geoffrey.coan@wilsonelser.com

John J. Cord  
JANET JENNER & SUGGS LLC  
jcord@medlawlegalteam.com

Dina M. Cox  
LEWIS & WAGNER  
dcox@lewiswagner.com

Jessica Benson Cox  
ICE MILLER LLP  
jessica.cox@icemiller.com

John P. Daly Jr.  
COHEN & MALAD LLP  
jdaly@cohenandmalad.com

Elizabeth J. Doepken  
COHEN & MALAD LLP  
edoepken@cohenandmalad.com

Audra Jae Ferguson-Allen  
ICE MILLER LLP  
audra.ferguson-allen@icemiller.com

Amy K. Fisher  
ICE MILLER LLP  
amy.fisher@icemiller.com

James J. Freebery IV  
McCARTER & ENGLISH, LLP  
jfreebery@mccarter.com

Bonnie L. Gallivan  
ICE MILLER LLP  
gallivan@icemiller.com

Robert L. Gauss  
ICE MILLER LLP  
gauss@icemiller.com

Jeff S. Gibson  
COHEN & MALAD LLP  
jgibson@cohenandmalad.com

Charles P. Goodell Jr  
GOODELL DEVRIES LEECH & DANN  
LLP  
cpg@gdldlaw.com

Robert K. Jenner  
JANET JENNER & SUGGS LLC  
rjenner@medlawlegalteam.com

Brian Ketterer  
JANET JENNER & SUGGS, LLC  
bketterer@medlawlegalteam.com

Maynard Kirpalani  
WILSON ELSER MOSKOWITZ  
EDELMAN & DICKER, LLP  
maynard.kirpalani@wilsonelser.com

Gregory L. Laker  
COHEN & MALAD LLP  
glaker@cohenandmalad.com

Irwin B. Levin  
COHEN & MALAD LLP  
ilevin@cohenandmalad.com

Lee B. McTurnan  
BINGHAM MCHALE LLP  
lmcturnan@binghammchale.com

Kimberly C. Metzger  
ICE MILLER LLP  
kimberly.metzger@icemiller.com

Kameelah Shaheed-Diallo  
LEWIS WAGNER LLP

kshaheed-diallo@lewiswagner.com

C. Calvin Warriner III  
SEARCY DENNEY SCAROLA  
BARNHART & SHIPLEY, P.A.  
ccw@searcylaw.com

Katherine A. Winchester  
ICE MILLER LLP  
winchest@icemiller.com