

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 ) Plaintiff, ) No. 05 CH 4056  
 )  
 ) v. ) The Honorable Charles R. Norgle, Sr.  
 )  
 ) ABBOTT LABORATORIES, *et al.*, ) Magistrate Judge Jeffrey Cole  
 )  
 ) Defendants. )

PLAINTIFF'S MEMORANDUM IN OPPOSITION  
TO DEFENDANTS' MOTION TO STAY  
ACTION ON PLAINTIFF'S MOTION TO REMAND

In an attempt to deprive the State of Illinois of its chosen forum to litigate purely state-law claims, defendants have removed this case. They argue that a recent Supreme Court decision, *Grable & Son Metal Prods. Inc. v. Darue Engineering & Manufacturing*, 125 S.Ct. 2363 (2005), changes the law of federal-question jurisdiction and provides them with a new period for removal, thus permitting them to avoid the consequences of their failure to remove within 30 days of service of the complaint. The state promptly filed a motion to remand (which is incorporated herein by reference), demonstrating that defendants' removal notice is neither timely nor substantively meritorious.

Defendants now seek a stay that, if granted, would preclude this Court from deciding the state's motion for remand. The Court should reject this request and promptly remand this case to state court.

Section I of this brief will discuss the widely adopted three-pronged test -- never mentioned by defendants -- that governs a motion to stay where a defendant, over plaintiff's opposition, has removed a case and seeks to have the Judicial Panel on Multidistrict Litigation ("JPML") transfer it to another federal court for consideration of the motion to remand.

Under the first prong of this test, the Court must make a preliminary assessment of whether the removal is valid, and must deny the stay and decide the remand motion itself if this initial assessment suggests that the removal was improper. As Section II of this brief will show, such is the case here. Under the overwhelming weight of authority, defendants' removal is untimely, and in addition, their substantive argument for federal jurisdiction is feeble. As Section III will show, defendants fail subsequent prongs of the three-pronged test as well. In particular, even if defendants could show that they have a serious argument to sustain the removal, this Court would have to balance the hardships to plaintiff of granting a stay against the hardships to defendants from denying it. As Section III will show, that balance strongly favors the State of Illinois here and provides an additional reason for denying the stay.

I. The three-pronged *Meyers* framework for considering motions to stay in this factual situation.

The tactic defendants are trying in this case and in a number of other AWP cases brought by state attorneys general under their states' laws is not a new one. Defendants frequently try to remove cases filed in state courts and then ask the federal judges in the courts to which the cases were removed to stay proceedings on motions to remand while the defendants try to persuade the JPML to transfer the case to a single court for consolidated pretrial proceedings, including a consolidated ruling on whether the removals in the various cases are proper.

Courts have developed a special analytical framework for considering motions to stay proceedings on remand motions. It is disturbing that defendants never mention this framework, or the cases (including cases from this district) that have adopted it. The reason for defendants' silence, as will be seen, is that the framework shreds their argument for a stay.

The leading case setting forth that framework is *Meyers v. Bayer AG*, 143 F.Supp.2d 1044 (E.D.Wis. 2001). *Meyers* applied a practical three-step analysis for determining how to proceed when faced with a motion to remand and a motion to stay pending possible MDL

transfer. Last year, when defendants tried to remove a similar AWP lawsuit brought by the Wisconsin attorney general on grounds of diversity of citizenship, Judge Barbara Crabb described and applied the *Meyers* framework in these terms:

In *Meyers v. Bayer AG*, 143 F.Supp.2d 1044, 1048-49 (E.D.Wis. 2001), the district court proposed an analytical framework for situations in which a court must decide both a motion to remand and a motion to stay proceedings pending a possible MDL transfer. According to *Meyers*, the district court's "first step should be to make a preliminary assessment of the jurisdictional issue." *Id.* at 1048. If this initial examination suggests that removal was improper, the court should promptly complete its consideration and remand the case to state court. If, on the other hand, the jurisdictional issue appears factually or legally difficult, the court's second step should be to determine whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL proceeding. *Id.* at 1049. Finally, "[o]nly if the jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred should the court proceed to the third step and consider the motion to stay." *Id.* I find the *Meyers* court's analytical framework persuasive and adopt it for the purpose of this order.

*Wisconsin v. Abbott Laboratories*, 2004 WL 2055717 at \*1 (W.D.Wis. 2004). (Applying the framework, Judge Crabb denied a stay, proceeded to consider the remand motion, granted it, and awarded the state its costs and attorneys' fees.)

*Meyers* explained the rationale for this three-step decisional process as follows:

My view is that a court's first step should be to make a preliminary assessment of the jurisdictional issue. Although *Landis [v. N. Am. Co.]*, 299 U.S. 248 (1936) might be read to empower me to stay the case without making any effort to verify jurisdiction, I am, nevertheless, reluctant to do so. First, *Steele Co. [v. Citizens for a Better Environment]*, 523 U.S. 83 (1998) emphasized the constitutional importance of the "jurisdiction first" principle. Second, 28 U.S.C. § 1447(c) directs that "[i]f at any time before judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded" (emphasis added). This section dictates that a judge should give at least some consideration to a remand motion. The third reason is judicial economy. "If the limited review reveals that the case is a sure loser in the court that has jurisdiction (in the conventional sense) over it, then the [transferor] court...should dismiss the case rather than waste the time of another court." *Phillips v. Seiter*, 173 F.3d 609, 611 (7th Cir. 1999) (discussing transfer of habeas corpus cases rather than multi-district civil litigation).

The fourth reason is that even though a stay does not directly implicate the merits of a case, it undeniably has important effects on the litigation. A plaintiff may carefully craft a state-court complaint in order to avoid litigating

the matter in federal court. *Garbie v. Daimler Chrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) ("plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum"). Justice Holmes observed that "the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.E. 716 (1913).

*Meyers*, 143 F.Supp.2d at 1048.

Under this framework, defendants must show that the jurisdictional issue they raise is a close question, and that other consolidated cases are raising the same issue. And even if defendants can make such a showing, that does not end the matter. "[I]f a stay motion is reached at all, it will generally require weighing the judicial economy gained and hardship to the moving party avoided by granting the stay against the harm to the non-moving party."

*Meyers*, 143 F.Supp.2d at 1049.

"The *Meyers* methodology has been widely adopted" by federal courts. *Moton v. Bayer Corporation*, 2005 WL 1653731 \*2, n. 5 (S.D.Ala. 2005) (citing *Hotseller v. Pfizer, Inc.*, 2005 WL 756224 at \*2 (S.D.Ind. 2005); *Brock v. Stolt-Nielsen SA*, 2004 WL 1837934 at \*2 (N.D.Cal. 2004); *Nekritz v. Canary Capital Partners, LLC*, 2004 WL 1462035 at \*2 (D.N.J. 2004); *Conroy v. Fresh Del Monte Produce, Inc.*, 325 F.Supp.2d 1049, 1053-54 (N.D.Cal. 2004); *New Mexico State Investment Council v. Alexander*, 317 B.R. 440, 443-44 (D.N.M. 2004); *Chinn v. Blefer*, 2002 WL 31474189 at \*3 (D.Or. 2002)).

In particular, courts in the Northern District of Illinois use the *Meyers* framework. *Nauheim v. Interpublic Group of Companies, Inc.*, 2003 WL 1888843 \*2 (N.D.Ill. 2003); *Board of Trustees v. Worldcom, Inc.*, 244 F.Supp.2d 900, 902-03 (N.D.Ill. 2002). As the court stated in *Worldcom*, "[w]hen the merits of a remand motion are easy, a decision requires little judicial time and a stay would merely postpone the inevitable." *Id.* See also *Illinois Municipal Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 852 (7th Cir. 2004) ("through some district courts stay proceedings during the interim following a conditional transfer order,...this is not required where the court concludes that it lacks subject matter jurisdiction").

II. Because a preliminary assessment of the jurisdictional issue shows that remand is highly likely, the stay must be denied.

As discussed above, under the first prong of the *Meyers* framework, the district court "first give[s] preliminary scrutiny to the merits of the motion to remand," *Meyers*, 143 F.Supp.2d at 1049, and if "this preliminary assessment suggests that removal was improper, the court should promptly complete its consideration and remand the case to state court." *Id.*

Defendants plainly cannot get a stay under this first prong. Even a cursory review of this removal shows that defendants' chances of sustaining it are remote. To use the language of various cases that have applied the *Meyers* framework, plaintiff's motion to remand is "facially meritorious" (*Moton*, 2005 WL 1653731 at \*2), the merits of plaintiff's remand motion are "easy" (*Worldcom, Inc.*, 244 F.Supp.2d at 903), and defendants' argument "is a sure loser" (*Meyers*, 143 F.Supp.2d at 1048). The question of this Court's jurisdiction is neither factually nor legally difficult. First, under the overwhelming weight of authority, defendants' removal is untimely. Second, even if the removal had been timely, defendants' substantive argument for removal is obviously weak. The Court therefore should end its inquiry here and promptly remand the matter to state court, where it belongs.

A. Defendants' removal is untimely.

As plaintiff has shown at greater length in its motion to remand, defendants' failure to remove timely, without more, compels remand.

Pursuant to 42 U.S.C. §1446(b), defendants were required to remove their case within 30 days of service. It is undisputed that they failed to do so. Conceding their lack of timeliness, defendants argue that the Supreme Court's *Grable* decision changed the law on federal jurisdiction and thereby restarted their removal clock. In support of this argument, defendants cite *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D.Mich. 1987). But as the state has shown in its motion to remand, *Smith* has been so universally repudiated that five years later it could not command agreement even from another judge in the district where it

was decided. *See Kocaj v. Chrysler Corp.*, 794 F.Supp. 234 (E.D.Mich. 1992), where the court held:

*Smith* is unpersuasive. This Court has found no other case that follows the *Smith* decision. As aptly noted by the court in *Phillips v. Allstate Ins. Co.*, 702 F.Supp. 1466, 1468 n. 2 (C.D.Cal. 1989): "The decision by the court for the Eastern District of Michigan in *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D.Mich. 1987), seems to stand alone in its conclusion that a removal is timely if filed within 30 days of a court decision which first renders the action removable."

*Kocaj*, 794 F.Supp. at 237.

*Kocaj* is overwhelmingly followed and *Smith* overwhelmingly condemned. *Morsani v. Major League Baseball*, 79 F.Supp.2d 1331, 1333 (M.D.Fla. 1999), described the current state of the law as follows:

Many courts have examined and rejected the defendants' argument that an order entered in another case may constitute an "order or other paper" pursuant to Section 1446(b). These courts interpret Section 1446(b) to refer only to "an amended pleading, motion, order or other paper" that arises within the case for which removal is sought. The plain language of the statute, referring to the "receipt by the defendant, through service or otherwise," implies the occurrence of an event within the proceeding itself; defendants do not in the ordinary sense "receive" decisions entered in unrelated cases. Accordingly, the courts consistently hold that publication of an order on a subject that might affect the ability to remove an unrelated state court suit does not qualify as an "order or other paper" for the purposes of Section 1446(b).

There is no significant contrary law. Aside from *Smith*, defendants only cite three other cases, *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001), *Doe v. American Red Cross*, 14 F.3d 196 (3rd Cir. 1993), and *Davis v. Time Ins.*, 698 F.Supp. 1917 (S.D.Miss. 1988), in support of their argument. All three cases are inapposite.

*Green* is limited to a factual setting where the defendant in the newly-removed action was also the defendant in the case changing the underlying federal law. *See Green*, 274 F.3d at 267 ("in very limited circumstances...a decision by a court in an unrelated case, but which involves the same defendant, a similar factual situation, and the question of removal -- can constitute an 'order' under sec. 1446(b)"). None of those requirements is met here. *See also Ervin v. Stagecoach Moving and Storage*, 2004 WL 1253401, \*2, n. 3 (N.D.Tex. 2004), and

*Hamilton v. United Healthcare of Louisiana*, 2003 WL 22779081, \*2-3 (E.D.La. 2003) (describing the narrow reach of the *Green* exception).

In *Doe*, the Supreme Court decision upon which defendant relied for removal was "not simply...an order emanating from an unrelated action but rather...an unequivocal order directed to a party to the pending litigation, explicitly authorizing it to remove any cases it is defending." 14 F.3d 196 at 202. The *Doe* court took "an extremely confined view" of the case before it and described its holding as "equally narrow." *Id.* Moreover, *Doe* explicitly declined to decide "whether a subsequent Supreme Court decision that does not involve the same defendant in a similar type of action is 'other paper' authorizing removal." *Id.*

In *Davis*, the court concluded that the change in federal law (holding that ERISA preempted state law) was so dramatic that it effectively created a whole new lawsuit that restarted the 30-day removal period. Moreover, *Davis*, as limited as it is, has been rejected by virtually every court that has since considered the matter. *See, e.g., Morsani*, 79 F.Supp.2d at 1333, n.6.

In sum, it is plain from the overwhelming weight of authority that defendants are highly unlikely to sustain this removal.

B. The substantive argument for removal is unpersuasive on its face.

Even if they did not face an obvious timeliness problem, defendants' substantive argument for removal is so weak as to compel the finding, at the outset, that their removal is likely to fail. This provides an additional reason under the first prong of *Meyers* to deny the stay and proceed to decide the remand motion.

The current crop of removals represents the defendants' second effort to remove AWP state-law claims to federal court. As defendants admit, the first one failed when Judge Saris ruled that the mere presence of a possible question of federal law -- the meaning of the term "average wholesale price" under Medicare statutes -- was insufficient to make these claims "arise under the laws or Constitution of the United States" for purposes of the removal statute.

*State of Montana v. Abbott Laboratories*, 266 F.Supp. 250, 256-57 (D.Mass. 2003). The defendants now contend that the recent Supreme Court decision of *Grable & Sons Metal Prods., Inc. v Darue Engineering & Manufacturing*, 125 S.Ct. 2363 (2005), changed the law on federal jurisdiction, transforming this case into a federal case, and that they should now receive a second chance to convince Judge Saris that removal is proper.

A reading of *Grable* -- which defendants' brief avoids describing in any useful way -- dispels this contention. As the state's motion to remand demonstrates at greater length, *Grable* found federal jurisdiction to exist in a unique factual setting, a quiet title proceeding in which the federal government had a substantial interest. *Grable* does not authorize removal of a state tort or statutory claim merely because a court might need to interpret a federal statute at some juncture. In fact, *Grable* affirms that such cases are not removable.

The sole matter to be decided in *Grable* was whether 26 U.S.C. §6335(a) required personal service when the plaintiff had actual knowledge of the sale of property. The sole issue before the Supreme Court was whether this question conferred federal jurisdiction.

*Grable*, 125 S.Ct. at 2366. In explaining the framework guiding its inquiry, the Court wrote:

[F]ederal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.

\* \* \*

But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of §1331.... [T]he presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.

*Id.*, at 2367-68.

Applying this reasoning, the Court concluded that federal-question jurisdiction was warranted because: (1) the meaning of the statute was the only contested factual or legal issue in the case; (2) the federal government had a strong and substantive interest in the

interpretation of the federal tax provision that governed its abilities to pursue collection of taxes and pursue property of delinquents to satisfy its claims; and (3) a finding of jurisdiction in the very rare quiet title circumstances presented would "portend only a microscopic effect on the federal-state division of labor." *Id.*, at 2368. None of these factors exists in the present case.

First, not even defendants contend that the purported "federal question" they cite is the only contested factual or legal issue in the case. To the contrary, it occupies a relatively tangential role in this litigation as a whole, amounting to one federal affirmative defense (and a highly dubious one at that) interjected against a relatively small subset of the state's claims. Both this relatively small subset of claims and the main body of the state's claims deal in all other respects with state-law issues -- so many state-law issues that the defendants' briefs on these motions to dismiss in these cases are averaging nearly 50 pages apiece. In other words, this purported federal-question defense is as far from the federal question in *Grable* as can be imagined. In *Grable*, the federal question was essentially the only game in town. Here, the one lone purported federal issue pointed to by defendants is at best a tiny tail attempting to wag an enormous state dog.

Second, if the defendants' *Grable* argument were correct, it would work a revolution in the law of removal, and the "sound division of labor between state and federal courts" would surely be "disrupted." The gist of defendants' argument is that any time they offer an affirmative defense to a state-law claim that depends in any way on the meaning of a federal statutory term, the case becomes a "case arising under the Constitution, laws and treaties of the United States" and is removable. Such a rule could well lead to the federalization of much state consumer litigation, because federal standards often apply to consumer products and many state consumer lawsuits based on unfair or deceptive practices will call for the interpretation of such federal standards. The disruption is particularly serious when the state itself is the plaintiff. Dragging a sovereign state into federal court against its will for litigation of a claim under the state's own consumer-protection laws is a serious disruption of state-federal relations. To do so solely because there happens to be one issue of federal law

amid a plethora of state-law issues cannot be justified even under the most expansive reading of *Grable*.

In short, any fair preliminary assessment of defendants' *Grable* argument leads to the conclusion that its probability of success is minuscule. Added to the plain untimeliness of the removal, the weakness of defendants' substantive argument means that defendants hopelessly fail the first prong of the *Meyers* test. This requires denial of the motion for stay.

C. Defendants' authority on motions to stay is inapposite.

In the face of the *Meyers* framework, and the insuperable timeliness and substantive problems this removal faces, none of the cases cited by defendants gets them anywhere.

The cases cited by defendants generally fall into three categories. First, defendants cite cases establishing that a district court has broad discretion to issue a stay to control its docket. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). No one disputes this proposition. Second, defendants cite cases that recognize the power of an MDL transferee court to rule on a motion to remand. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001); *In re Ivy*, 901 F.2d 7, 9 (2nd Cir. 1990). However, neither of these categories of decision addresses or answers the question presently before this Court, *i.e.*, whether a stay of remand proceedings should issue while defendants attempt to convince the JPML to transfer the case.

Third, defendants cite cases in which stays were issued pending a transfer decision by the JPML, including other cases brought against many of the same defendants. While such decisions exist, there is an equal, if not greater, number of courts that have decided remand motions before the JPML acts to transfer a case. *See, e.g., Moton*, 2005 WL 1653731 at \*2 ("[m]any courts have concluded that motions to remand should always, or usually, be resolved prior to transfer"). In fact, there is substantial authority holding that a remand motion *must* be decided before a motion to stay pending a transfer decision by the JPML. *Farkas v.*

*Bridgestone/Firestone, Inc.*, 113 F.Supp.2d 1107, 1115, n. 8 (W.D.Ky. 2000) ("the jurisdictional issue *must* be resolved before deciding whether to stay or transfer the case to the MDL panel") (emphasis added); *Lloyd v. Cabell Huntington Hosp., Inc.*, 58 F.Supp.2d 694, 696 (S.D.W.Va. 1999) ("[t]his Court cannot, however, stay proceedings in an action over which it lacks jurisdiction"); *Stern v. Mut. Life Ins. Co. of N.Y.*, 968 F.Supp. 637 (N.D.Ala. 1997) ("[i]t is incumbent upon a court whose subject matter jurisdiction is questioned to make a *determination* as to whether it has, or does not have, jurisdiction over the action. This determination involves no issues that the putative transferee court in the multi-district action would be uniquely qualified to address") (emphasis added).

More importantly, in none of the cases cited by defendants was there an issue of the *timeliness* of removal, much less the obvious untimeliness of the removal petitions in the present round of cases. In the present case, as demonstrated above and in the state's motion for remand, the crushing weight of authority holds that the removals were untimely. This fact renders defendants' cases inapposite.

In sum: a "preliminary assessment" of the jurisdictional issues presented by the state's motion to remand not only "suggests that removal was improper," but shows that this case is overwhelmingly likely to be remanded. Accordingly, defendants fail the first prong of the *Meyers* test, and this Court should deny their motion to stay, without even reaching the question of the balance of hardships.

### III. Defendants also fail the remaining prongs of the *Meyers* framework.

As shown in Section I, even where the defendants have a substantial argument for removal -- and here they do not -- the second and third prongs of the *Meyers* framework require the Court to consider (2) whether the issues raised by defendants' removal arise in other cases either in the MDL or awaiting decision by the JPML; and (3) whether the balance of hardships favors a stay. If this Court were to reach these questions, they would weigh in favor of the state and against any stay of remand proceedings.

First, it is unlikely there will *be* a consolidated proceeding at which the intended transferee court, the District of Massachusetts, will consider the removal issue on multiple cases. As far as the State of Illinois can determine, every state whose case has been removed has filed, or intends to file, a motion for remand. Given the state of the law described above, the great likelihood is that most, if not all, the federal courts considering those motions will apply the *Meyers* analytical framework and grant the motions to remand. Moreover, the transfer process itself -- which the states are vigorously contesting -- may never take place. The first time the JPML transferred AWP cases to consider a removal effort, the result was the granting of the remand motions by Judge Saris -- meaning that the whole exercise in transfer ended up being a wild-goose chase that only wasted everyone's time and delayed these cases for many months. Even if any of the federal judges hearing these cases decides to stay proceedings while the JPML rules, it is highly questionable that the JPML will think that another such wild-goose chase is worthwhile.

Second, the balance of hardships favors denial of a stay and prompt ruling on the remand motion. Defendants' removal already has considerably disrupted the underlying litigation. At the time the case was removed, Cook County Circuit Judge Peter Flynn had before him two lengthy motions -- a motion to dismiss that contained hundreds of pages of exhibits, and a motion for a protective order. He had been working on resolving the latter motion for a number of weeks. This process has now been interrupted.

Moreover, defendants' responses to plaintiff's first set of interrogatories and requests for production of documents are due on August 8, 2005. If defendants stonewall as they have with regard to similar discovery requests of other states, the State of Illinois will be powerless to advance this litigation pending resolution of the motion to remand, because it will be unable to move to compel discovery without thereby consenting to this Court's removal jurisdiction. *See, e.g., Barcena v. State of Illinois, Department of Insurance*, 1992 WL 186068, \*2 (N.D.Ill. 1992) ("when a party takes affirmative action following removal that advances the litigation in the district court, that party may waive its right to object to procedural irregularities in the removal proceedings"). And such discovery stonewalling is a

certainty, as exemplified by the responses of defendant Sandoz, Inc. to discovery requests of the State of Wisconsin in Wisconsin's AWP case (attached to this brief as Exh. 1). There is no reason to expect a different response from Sandoz and other defendants in the present case. In light of behavior like this, the suggestion by defendants that discovery can continue unimpeded despite the paralysis of these proceedings pending JPML consideration (see defendants' memorandum in support of defendants' motion to stay, p. 14) is disingenuous at best.

Furthermore, even assuming that one or more of the federal judges in question issue a stay and thereby offer the JPML a chance to consider whether to transfer the case, and even assuming the JPML decides in favor of transfer to allow Judge Saris a second chance to sustain a removal she previously rejected, the result will be an even more prolonged paralysis of these proceedings. The JPML process itself takes many months, as one of the cases cited by defendants in their motion confirms. *See In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F.Supp.2d 1346, 1347 (J.P.M.L. 2001) ("as a practical matter, there is a lag time of at least three or four months from the filing of an action, its identification as a potential tag-along action, issuance of a conditional transfer order, stay of transfer when a party timely objects to the conditional transfer, briefing on the question of transfer, the panel hearing session, and the issuance of the panel's subsequent order..."). Adding to this delay is the time necessary to transfer the files and obtain a hearing before the transferee judge. And any resolution of plaintiff's remand motion may have to await decisions from other districts on defendants' stay motions.

These delays are likely to be compounded by the fact that the transferee court proposed by defendants, Judge Saris's court in the District of Massachusetts, is inundated with motions and discovery issues in the MDL litigation as it is, and there is no telling when the court will be able to reach plaintiff's remand motion. Thus, for example, the transferee court has not yet reached plaintiffs' class certification motion even though it was fully briefed and argued in February. Moreover, in the Nevada and Minnesota actions, it took 19 and 14 months, respectively, from the date the removal notice was filed until the state-court clerk

received Judge Saris's remand order and the case file back so that the parties could start litigating.

In short, in the name of an attempt at removal that is massively contrary to the weight of case authority, defendants are asking this Court to impose a stay that will paralyze these proceedings for many months, if not longer.

Such delays will inflict serious harm on the State of Illinois and the citizens in whose name it is suing. The two principal components of this lawsuit are claims brought on behalf of the Illinois Medicaid program and claims brought on behalf of Medicare Part B beneficiaries. Putting an end to defendants' practices and collecting from defendants money owed to the Illinois Medicaid program as soon as possible is of critical importance to the state and its taxpayers. Additionally, because Medicare Part B beneficiaries generally are elderly and infirm (often suffering from cancer), delay in their monetary recovery might, as a practical matter, mean no recovery at all.

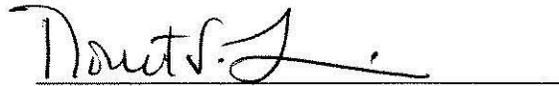
There are no corresponding disadvantages to defendants if this Court promptly decides the motion to remand. Defendants cite the supposed threat of inconsistent rulings from different federal judges on the issue of removal. With all deference, it is hard to take this prospect seriously. Given the law, there is little chance of any of the courts to which these cases have been removed ruling in favor of defendants. But the worst that can happen to defendants from "inconsistent" rulings is that one or more of these cases -- which raise purely state causes of action -- will end up being decided by highly-qualified state-court judges while others will be decided by highly-qualified federal judges. This hardly constitutes a serious hardship. It must be remembered that the transfer sought by the defendants is only a transfer for *pretrial* proceedings. Ultimately, even if the removal is sustained in a given case, the case will be remanded at the conclusion of pretrial proceedings to the federal court to which it was originally removed. 28 U.S.C. §1407. Thus, these cases will be ultimately tried before a plethora of judges, whether in the state system, the federal system, or a combination of the two. In short, defendants' claimed "hardship" from hypothetical inconsistent rulings carries little weight compared to the serious harm that the state would suffer if the stay is granted.

CONCLUSION

For all the foregoing reasons, the State of Illinois respectfully requests that this Court deny defendants' motion for a stay and that it proceed to consider, and to grant, plaintiff's motion to remand.

Respectfully submitted,

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providing these responses, Sandoz does not agree to produce documents in advance of any case management order or discovery schedule entered by this Court or by the court presiding in In re Pharmaceutical Industry Average Wholesale Price Litigation.

### GENERAL OBJECTIONS

The following General Objections apply to each Definition and Interrogatory and shall have the same force and effect as if fully set forth as a Specific Objection to each Definition and Interrogatory:

1. By objecting and responding to these First Interrogatories, Sandoz does not in any way waive or intend to waive (a) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any information or documents that may be provided or produced in response to the First Interrogatories; (b) any objections as to the vagueness, ambiguity, or other infirmity in the form of any Interrogatory; (c) any objections based on the undue burden imposed by any Interrogatory; (d) any objections to the use of the documents or information that may be produced in response to the First Interrogatories at any hearings or at trial; (e) any objections to any further interrogatories involving or relating to the subject matter of the First Interrogatories; (f) any privileges, rights, or immunity under the applicable FRCP, Federal Rules of Evidence, statutes, or common law.

2. By stating herein that it agrees at an appropriate time to produce documents or information in response to a particular Interrogatory, Sandoz does not assert that it has responsive documents or information or that such materials exist, only that it agrees that, at the appropriate time, it will conduct a reasonable search of its files most likely to contain responsive documents or information and produce responsive, non-objectionable, non-privileged documents

revealed by such investigation. No objection made herein, or lack thereof, is an admission by Sandoz as to the existence or non-existence of any information.

3. To the extent that Sandoz agrees to produce at an appropriate time documents in response to an Interrogatory from which an answer to the Interrogatory may be derived or ascertained, Sandoz incorporates by reference all objections set forth in its written response to the State's First Requests for the Production of Documents.

4. Sandoz objects to the First Interrogatories as they were not upon Sandoz pursuant to the requirements of WIS. STAT. § 804.08 and in violation of the stay entered by the State of Wisconsin Circuit Court ("Wisconsin Circuit Court") in its Order dated April 8, 2005. Notwithstanding this objection, Sandoz has accepted service of the First Interrogatories. Sandoz further objects to the First Interrogatories to the extent that the State purports to amend them by the letter from its counsel, Miner, Barnhill & Galland, P.C. to counsel for Sandoz, dated May 20, 2005 in a manner unauthorized by the Wisconsin Rules of Civil Procedures or the FRCP. In making the objections and responses set forth herein, Sandoz understands the State to have merely offered, as a possible compromise, to narrow its definition of "Targeted Drugs" to the over 300 formulations of 52 drugs marketed by Sandoz that are identified in Exhibit A to that letter.

5. Sandoz objects to the First Interrogatories to the extent that they are premature and were propounded by the State in violation of the Wisconsin Circuit Court's stay entered on April 8, 2005. Sandoz further objects to the extent that the First Interrogatories are premature in that they seek a response while Defendants' motion to dismiss this action is *sub judice*. Sandoz further objects that it has had inadequate time to complete its investigation and discovery relating

to this action and any Objections set forth below are based upon, and necessarily limited to, information that has been ascertained thus far.

Pursuant to FRCP 26(e) Sandoz accordingly reserves its right to amend, supplement, and/or to withdraw any General or Specific Objection set forth herein on the basis of documents or information found during its investigation or any discovery that might be taken in this action.

6. Sandoz objects to each Definition and Interrogatory to the extent it imposes discovery obligations greater than, or inconsistent with, Sandoz's obligations under the Federal Rules of Civil Procedure and to the extent that the State seeks discovery beyond that permitted by such Rules.

7. Sandoz objects to each Definition and Interrogatory to the extent it seeks information or documents protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

8. Sandoz objects to each Definition and Interrogatory to the extent it seeks the production of proprietary or commercially sensitive information, including but not limited to, personal financial information, confidential and/or proprietary research, procedures and processes relating to the pricing of pharmaceuticals, current and past marketing plans and methods, and current and past business planning and financial information. Sandoz' production of any document or provision of information pursuant to these Interrogatories shall not be constructed as a waiver of the confidentiality of any such information or document. Sandoz reserves its right to withhold production prior to the entry of a protective order by this Court or the court presiding in the MDL.

9. Sandoz objects to each Definition and Interrogatory to the extent it requires Sandoz to disclose information or produce documents outside of Sandoz' possession, custody, or

control and/or no longer in existence, to seek information about or produce documents from persons not currently employed or associated with Sandoz, or to provide or search for information or documents in the possession, custody or control of non parties. At the appropriate time, Sandoz will only disclose information and produce documents that are within its possession, custody, or control.

10. Sandoz objects to each Definition and Interrogatory to the extent it seeks information or documents already in the State's possession, custody, or control or in the possession, custody, or control of any of the State's officers, employees, agents, agencies, or departments. Sandoz further objects to each Definition and Interrogatory to the extent it requires Sandoz to search for information publicly available or to search for information or documents for which the burden of deriving or ascertaining the information or documents is substantially the same for or less the State or any of its officers, employees, agents, agencies, or departments as it is for Sandoz.

11. Sandoz objects to each Definition and Interrogatory to the extent it is duplicative or redundant of other Definitions or Interrogatories or other discovery requests propounded by the State. Each written response and/or document that may be produced in response to a specific Interrogatory is deemed to be produced in response to every other Interrogatory or discovery request of the State to which the written response, document, or information is or may be responsive.

12. Sandoz objects to each Definition and Interrogatory as unduly burdensome to the extent it seeks the provision or production of "any" or "all" documents on a subject matter. Subject to and without waiver of this objection, and subject to resolution of Sandoz' other objections set forth herein, Sandoz agrees that at an appropriate time it will produce non-

privileged documents that are located following a reasonable search of those Sandoz' files that are most likely to contain documents or information responsive to these Interrogatories.

13. Sandoz objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in the First Interrogatories. Sandoz' written response or production of documents or information in connection with a particular Interrogatory is not intended to indicate that Sandoz agrees with any implication or any explicit or implicit characterization of facts, events, circumstances, or issues in the First Interrogatories, or that such implications or characterizations are relevant to this action.

14. Sandoz objects to the definition of "Average Manufacturer Price" and "AMP" as set forth in Definition No. 1 on the grounds that it is vague and ambiguous, including the terms "the price you report or otherwise disseminate as the average manufacturer price for any Pharmaceutical that you report." Sandoz further objects to this definition to the extent that it purports to set an accurate or legally significant definition of the terms Average Manufacturer Price or AMP and refers to the statutes and regulation for the definition of this term.

15. Sandoz objects to the definition of "Chargeback" as set forth in Definition No. 2 on the grounds that it is vague and ambiguous, including the terms "payment, credit or other adjustment," "purchaser of a drug," "difference between the purchaser's acquisition cost and the price at which the Pharmaceutical was sold to another purchaser at a contract price." Sandoz further objects to this definition to the extent that it purports to set an accurate or legally significant definition of the term Chargeback and to the extent it differs from the common usage and understanding of the term in the industry.

16. Sandoz objects to the definition of "Defined Period of Time" as set forth in Definition No. 3 on the grounds that it is overly broad and unduly burdensome. Sandoz further

objects to this definition to the extent that it seeks information of documents from outside the statute of limitations applicable to the State's claims, beyond the time period relevant to this action, and beyond the time period reasonably anticipated to encompass probative information that is relevant to the claims in this action.

17. Sandoz objects to the definition of "Document" in Definition No. 4 to the extent that it seeks to impose discovery obligations that are broader than, or inconsistent with, Sandoz' obligations under the FRCP. Sandoz further objects to this definition to the extent it would require Sandoz to produce multiple copies of the same document or to conduct an unduly burdensome search for duplicative information including, among other things, electronic databases containing overlapping information.

18. Sandoz objects to the definition of "Incentive" as set forth in Definition No. 5 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further objects to this definition to the extent that it seeks information or documents from outside the statute of limitations applicable to the State's claims, beyond the time period relevant to this action, and beyond the time period reasonably anticipated to encompass probative information that is relevant to the claims in this action.

19. Sandoz objects to the definition of "National Sales Data" as set forth in Definition No. 6 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz objects to this definition to the extent that it seeks information or documents on "National Sales" that are not relevant to the State's claims, which are limited to reimbursements made in the State of Wisconsin. Sandoz further objects to the definition of National Sales Data to the extent it incorporates other objectionable definitions, including "Incentive" and "Targeted Drugs."

20. Sandoz objects to the definition of "Pharmaceutical" as set forth in Definition No. 7 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further objects to this definition to the extent that it seeks to impose on Sandoz the burden to ascertain or obtain information in the exclusive possession of its customers or other non parties to this action.

21. Sandoz objects to the definition of "Spread" as set forth in Definition No. 8 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further objects to this definition to the extent that it seeks to impose on Sandoz the burden to ascertain or obtain information in the possession of its customers or other non parties to this action.

22. Sandoz objects to the definition of "Targeted Drugs" as set forth in Definition No. 9 to the extent that it is vague and ambiguous and inconsistent with the drugs identified in Exhibit A to the State's letter of May 20, 2005. Sandoz further objects to this definition to the extent it seeks information from beyond the time period relevant in this litigation or information about drugs not named in the Amended Complaint on the grounds that such information is not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence.

In addition, as set forth above in General Objection No. 10, Sandoz objects that this Definition requires Sandoz to undertake the burden of identifying drugs relevant to the State's claims when such information is already in the State's possession, custody, or control or in the possession, custody, or control of any of the State's officers, employees, agents, agencies, or departments, and/or the burden on the State or its officers, employees, agents, agencies or departments to identify the drugs relevant to its claims is substantially the same or less than the burden on Sandoz.

**SPECIFIC OBJECTIONS****Interrogatory No. 1:**

**Have you ever determined an average sales price or other composite price net of any or all Incentives for a Targeted Drug during the Defined Period of Time? If so, for each Targeted Drug for which you have made such a determination, identify:**

- (a) the beginning and ending dates of each period applicable to each such determination;**
- (b) the applicable class(es) of trade for which each determination was made;**
- (c) each average sales price or composite price determined;**
- (d) the person(s) most knowledgeable regarding the determinations;**
- (e) the methodology used to determine such prices;**
- (f) your purpose(s) in making such determinations;**
- (g) whether you disclosed any average sales price or composite price so determined to any publisher, customer, or governmental entity. If so, identify each publisher, customer or governmental entity to whom each such price was disclosed and the corresponding date of the disclosure; and**
- (h) whether any such average sales price or composite price was treated as confidential or commercially sensitive financial information.**

**Objection to Interrogatory No. 1:**

In addition to the foregoing General Objections, Sandoz objects to Interrogatory No. 1 on the grounds that it is overly broad, vague, ambiguous, and unduly burdensome, particularly with regard to the phrases "average sales price," "composite net price," "class(es)" of trade," "purpose(s) in making such determinations," and "composite price." Sandoz also objects to this Interrogatory to the extent that it seeks information or documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence.

For example, on its face, this Interrogatory may be reasonably construed to require Sandoz to first perform numerous calculations to identify the drugs subject to the State's request, then search its files covering the period from 1993 to the present for data referring to those drugs, and then to ascertain whether the undefined terms "average sales price" and "composite net price" are revealed by such data.

**Interrogatory No. 2:**

Identify each electronic database, data table or data file that you now maintain or have maintained during the Defined Period of Time in the ordinary course of business which contains a price for a Targeted Drug. For each such electronic data entity, identify, describe or produce the following:

- (a) the name or title of each such database, data table, or data file;
- (b) the software necessary to access and utilize such data entities;
- (c) describe the structure of each database, data table or data file identified in response to Interrogatory No. 2(a) above and identify all files or tables in each such database, data table or data file. For each such file or table, identify all fields and for each field describe its contents, format and location within each file or table record or row;
- (d) the current or former employee(s) with the most knowledge of the operation or use of each data entity identified above; and
- (e) the custodian(s) of such data entity.

**Objection to Interrogatory No. 2:**

In addition to the foregoing General Objections, Sandoz objects to Interrogatory No. 2 on the grounds that it is overly broad, vague, ambiguous, and unduly burdensome, particularly with regard to the phrases "price," "electronic data entity," "structure," "data table," "data file," "knowledge of the operation," and "custodian." Sandoz also objects to this Interrogatory to the extent that it seeks information or documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence.

For example, this Interrogatory may be reasonably construed to require Sandoz first to first perform numerous calculations to identify the drugs subject to the State's request, then to deduce what information or data the State seeks by its reference to "price," and then to search its files covering the period from 1993 to the present for all databases, data tables, or data files referring to those drugs to ascertain whether they reveal information about the undefined "price" of the drugs identified by Sandoz.

Subject to and without waiving the foregoing objections, Sandoz agrees that at an appropriate time it will respond to a properly narrowed Interrogatory.

**Interrogatory No. 3:**

**Describe each type of Incentive you have offered in conjunction with the purchase of any Targeted Drug. For each such Incentive, identify:**

- (a) the type(s) of Incentive(s) offered for each Targeted Drug;
- (b) the class(es) of trade eligible for each Incentive;
- (c) the general terms and conditions of each Incentive; and
- (d) the beginning and ending dates of each period during which the Incentive was offered.

**Objection to Interrogatory No. 3:**

In addition to the foregoing General Objections, Sandoz objects to Interrogatory No. 3 on the grounds that it is overly broad, vague, ambiguous, and unduly burdensome particularly with regard to the phrases "class(es) of trade," "eligible," "conjunction with" and "offered." Sandoz also objects to this Interrogatory to the extent that it seeks information or documents relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence.

For example, this Interrogatory may be reasonably construed to require Sandoz to search its files for any documents relating to all of Sandoz' customers, which currently total over

30,000, over the last twelve years, to determine whether, if any, of what the State considers an "Incentive" has been offered to such customers in connection with the sale of a "Targeted Drug."

**Interrogatory No. 4:**

**Describe in detail how you determined each price you used in the ordinary course of business of each Targeted Drug for each year during the Defined Period of Time and identify the person(s) most knowledgeable in making such determinations for each Targeted Drug for each year.**

**Objection to Interrogatory No. 4:**

In addition to the foregoing General Objections, Sandoz objects to Interrogatory No. 4 on the grounds that it is overly broad, vague, ambiguous, and unduly burdensome, particularly with regard to the terms "price," "determinations," and "ordinary course of business." Sandoz further objects to the extent that this Interrogatory is cumulative and duplicative of Interrogatory No. 1. Sandoz also objects to the extent that this Interrogatory seeks information or documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence.

For example, this Interrogatory can be reasonably construed to require Sandoz first to first perform numerous calculations to identify the drugs subject to the State's request, next to deduce what information or data the State seeks by its references to "price," and then to search its files covering the period from 1993 to the present for any documents which include a "determination" of "price," and then to conduct an investigation to determine how the "price" was determined and the person most knowledgeable about such determination.

**Interrogatory No. 5:**

Have you ever included in your marketing of a Targeted Drug to any customer reference to the difference (or spread) between an AWP or WAC published by First DataBank, Redbook or Medi-span and the list or actual price (to any customer) of any Targeted Drug? If so, provide the following information for each Targeted Drug:

- (a) the drug name and NDC;
- (b) the beginning and ending dates during which such marketing occurred;
- (c) the name, address and telephone number of each customer to whom you marketed a Targeted Drug in whole or in part by making a reference to such difference(s) or spread(s); and
- (d) identify any document published or provided to a customer which referred to such difference(s) or spread(s).

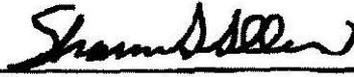
**Objection to Interrogatory No. 5:**

In addition to the foregoing General Objections, Sandoz objects to Interrogatory No. 5 on the grounds that it is overly broad, vague, ambiguous, and unduly burdensome, particularly with regard to the phrases "marketing," "customer reference," "list or actual price," "marketed a Target Drug in whole or in part."

For example, this Interrogatory may be reasonably construed to require Sandoz to first perform numerous calculations to identify the drugs subject to the State's request, then to search its files for any documents relating to all of Sandoz' customers, which currently total over 30,000, over the last twelve years, for any reference to a "Spread," a search which is particularly burdensome and overbroad in light of the fact not all of Sandoz' current 30,000 customers market drugs in the State of Wisconsin.

Dated at Milwaukee, Wisconsin, on July 15, 2005.

FRIEBERT, FINERTY & ST. JOHN, S.C.

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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STATE OF WISCONSIN,	:	
Plaintiff,	:	
v.	:	Case No.: 05 C 408 C
	:	
ABBOTT LABORATORIES, et al.,	:	
Defendants.	:	

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**DEFENDANT SANDOZ INC.'S RESPONSES AND OBJECTIONS TO  
PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure ("FRCP"), defendant Sandoz Inc. ("Sandoz"), by its attorneys, hereby asserts its Responses and Objections to Plaintiff State of Wisconsin's ("the State") First Set of Requests for Production of Documents (the "First Document Requests"), that were served prior to the removal of this action to this Court, as follows:

In making these objections and responses, Sandoz deems the States' First Document Requests as having been propounded under the FRCP and responds pursuant to the FRCP. The objections and written responses set forth herein are being offered pursuant to a prior agreement with counsel for the State to provide written responses to the First Document Requests on or before July 15, 2005. However, Sandoz reserves its right to seek a stay of discovery before this Court or before the court to which the multi-district litigation, In re Pharmaceutical Industry Average Wholesale Price Litigation, MDL No. 1446, has been assigned; Defendants will seek to have this action transferred to that multi-district litigation. Moreover, by

providing these responses, Sandoz does not agree to produce documents in advance of any case management order or discovery schedule entered by this Court or by the court presiding in In re Pharmaceutical Industry Average Wholesale Price Litigation.

### GENERAL OBJECTIONS

The following General Objections apply to each Definition and Request and shall have the same force and effect as if fully set forth as a Specific Objection to each Definition and Request:

1. By objecting and responding to these First Document Requests, Sandoz does not in any way waive or intend to waive (a) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any information or documents that may be produced in response to the First Document Requests; (b) any objections as to the vagueness, ambiguity, or other infirmity in the form of any Request; (c) any objections based on the undue burden imposed by any Request; (d) any objections to the use of the documents or information that may be produced in response to the First Document Requests at any hearings or at trial; (e) any objections to any further Requests involving or relating to the subject matter of the First Document Requests; (f) any privileges, rights, or immunity under the applicable FRCP, Federal Rules of Evidence, statutes, or common law.

2. By stating herein that it agrees at an appropriate time to produce documents or information in response to a particular Request, Sandoz does not assert that it has responsive documents or information or that such materials exist, only that it agrees that, at the appropriate time, it will conduct a reasonable search of its files most likely to contain responsive documents or information and produce responsive, non-objectionable, non-privileged documents revealed

by such investigation. No objection made herein, or lack thereof, is an admission by Sandoz as to the existence or non-existence of any information.

3. Sandoz objects to the First Document Requests as they were not served upon Sandoz pursuant to the requirements of Wis. STAT. § 804.09 and in violation of the stay entered by the State of Wisconsin Circuit Court ("Wisconsin Circuit Court") in its Order dated April 8, 2005. Notwithstanding this objection, Sandoz has accepted service of the First Document Requests. Sandoz further objects to the First Document Requests to the extent that the State purports to amend them by the letter from its counsel, Miner, Barnhill & Galland, P.C. to counsel for Sandoz, dated May 20, 2005 in a manner unauthorized by the Wisconsin Rules of Civil Procedures or FRCP. In making the objections and responses set forth herein, Sandoz understands the State to have merely offered, as a possible compromise, to narrow its definition of "Targeted Drugs" to the over 300 formulations of 52 drugs marketed by Sandoz, that are identified in Exhibit A to that letter.

4. Sandoz objects to the First Document Requests to the extent that they are premature and were propounded by the State in violation of the Wisconsin Circuit Court's stay entered on April 8, 2005. Sandoz further objects to the extent that the First Document Requests are premature in that they seek a response while the Defendants' motion to dismiss this action is *sub judice*. Sandoz further objects that it has had inadequate time to complete its investigation and discovery relating to this action and any Objections set forth below are based upon, and necessarily limited to, information that has been ascertained thus far.

Pursuant to FRCP 26(e), Sandoz reserves its right to amend, supplement, and/or to withdraw any General or Specific Objection set forth herein on the basis of documents or information found during its investigation or any discovery that might be taken in this action.

5. Sandoz objects to each Definition and Request to the extent it imposes or purports to impose discovery obligations greater than, or inconsistent with, Sandoz's obligations under the FRCP and to the extent that the State seeks discovery beyond that permitted by such Rules.

6. Sandoz objects to each Definition and Request to the extent it seeks information or documents protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

7. Sandoz objects to each Definition and Request to the extent it seeks the production of proprietary or commercially sensitive information, including but not limited to, personal financial information, confidential and/or proprietary research, procedures and processes relating to the pricing of pharmaceuticals, current and past marketing plans and methods, and current and past business planning and financial information. Sandoz' production of any document or provision of information pursuant to these Requests shall not be constructed as a waiver of the confidentiality of any such document or information. Sandoz reserves its right to withhold production prior to the entry of a protective order by this Court or the court presiding in the MDL.

8. Sandoz objects to each Definition and Request to the extent it requires Sandoz to disclose information or produce documents outside of Sandoz' possession, custody, or control and/or no longer in existence, to seek information about or produce documents from persons not currently employed or associated with Sandoz, or to provide or search for information or produce documents in the possession, custody or control of non parties. At the appropriate time, Sandoz will only disclose information and produce documents that are within its possession, custody, or control.

9. Sandoz objects to each Definition and Request to the extent it seeks information or documents already in the State's possession, custody, or control or in the possession, custody, or control of any of the State's officers, employees, agents, agencies, or departments. Sandoz further objects to each Definition and Request to the extent it requires Sandoz to search for information publicly available or to search for information or documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or any of its officers, employees, agents, agencies, or departments as it is for Sandoz.

10. Sandoz objects to each Definition and Request to the extent it is duplicative or redundant of other Definitions or Requests or other discovery requests propounded by the State. Each written response and/or document that may be produced in response to a specific Request is deemed to be produced in response to every other Request or discovery request of the State to which the written response, document, or information is or may be responsive.

11. Sandoz objects to each Definition and Request as unduly burdensome to the extent it seeks the provision or production of "any" or "all" documents on a subject matter. Subject to and without waiver of this objection, and subject to resolution of Sandoz' other objections set forth herein, Sandoz agrees that at an appropriate time it will produce non-privileged documents that are located following a reasonable search of those Sandoz' files that are most likely to contain documents or information responsive to these Requests.

12. Sandoz objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in the First Document Requests. Sandoz' written response or production of documents or information in connection with a particular Request is not intended to indicate that Sandoz agrees with any implication or any explicit or implicit

characterization of facts, events, circumstances, or issues in the First Document Requests, or that such implications or characterizations are relevant to this action.

13. Sandoz objects to the definition of "Average Manufacturer Price" and "AMP" as set forth in Definition No. 1 on the grounds that it is vague and ambiguous, including the terms "the price you report or otherwise disseminate as the average manufacturer price for any Pharmaceutical that you report." Sandoz further objects to this definition to the extent that it purports to set an accurate or legally significant definition of the terms Average Manufacturer Price or AMP and Sandoz refers to the statutes and regulation for the definition of this term.

14. Sandoz objects to the definition of "Chargeback" as set forth in Definition No. 2 on the grounds that it is vague and ambiguous, including the terms "payment, credit or other adjustment," "purchaser of a drug," "difference between the purchaser's acquisition cost and the price at which the Pharmaceutical was sold to another purchaser at a contract price." Sandoz further objects to this definition to the extent that it purports to set an accurate or legally significant definition of the term Chargeback and to the extent it differs from the common usage and understanding of the term in the industry.

15. Sandoz objects to the definition of "Defined Period of Time" as set forth in Definition No. 3 on the grounds that it is overly broad and unduly burdensome. Sandoz further objects to this definition to the extent that it seeks information of documents from outside the statute of limitations applicable to the State's claims, beyond the time period relevant to this action, and beyond the time period reasonably anticipated to encompass probative information that is relevant to the claims in this action.

16. Sandoz objects to the definition of "Document" in Definition No. 4 to the extent that it seeks to impose discovery obligations that are broader than, or inconsistent with, Sandoz'

obligations under the FRCP. Sandoz further objects to this definition to the extent it would require Sandoz to produce multiple copies of the same document or to conduct an unduly burdensome search for duplicative information including, among other things, electronic databases containing overlapping information.

17. Sandoz objects to the definition of "Incentive" as set forth in Definition No. 5 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further objects to this definition to the extent that it seeks information or documents from outside the statute of limitations applicable to the State's claims, beyond the time period relevant to this action, and beyond the time period reasonably anticipated to encompass probative information that is relevant to the claims in this action.

18. Sandoz objects to the definition of "National Sales Data" as set forth in Definition No. 6 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz objects to this definition to the extent that it seeks information or documents on "National Sales" that are not relevant to the State's claims, which are limited to reimbursements made in the State of Wisconsin. Sandoz further objects to the definition of National Sales Data to the extent it incorporates other objectionable definitions, including "Incentive" and "Targeted Drugs."

19. Sandoz objects to the definition of "Pharmaceutical" as set forth in Definition No. 7 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further objects to this definition to the extent that it seeks to impose on Sandoz the burden to ascertain or obtain information in the exclusive possession of its customers or other non parties to this action.

20. Sandoz objects to the definition of "Spread" as set forth in Definition No. 8 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. Sandoz further

objects to this definition to the extent that it seeks to impose on Sandoz the burden to ascertain or obtain information in the possession of its customers or other non parties to this action.

21. Sandoz objects to the definition of "Targeted Drugs" as set forth in Definition No. 9 to the extent that it is vague and ambiguous and inconsistent with the drugs identified in Exhibit A to the State's letter of May 20, 2005. Sandoz further objects to this definition to the extent it seeks information from beyond the time period relevant in this litigation or information about drugs not named in the Amended Complaint on the grounds that such information is not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence.

In addition, as set forth above in General Objection No. 9, Sandoz objects that this Definition requires Sandoz to undertake the burden of identifying drugs relevant to the State's claims when such information is already in the State's possession, custody, or control or in the possession, custody, or control of any of the State's officers, employees, agents, agencies, or departments, and/or the burden on the State or its officers, employees, agents, agencies or departments to identify the drugs relevant to its claims is substantially the same or less than the burden on Sandoz.

### **SPECIFIC OBJECTIONS**

#### **Request No. 1:**

**All National Sales Data for each Targeted Drug during the Defined Period of Time.**

#### **Objection to Request No. 1:**

In addition to the foregoing General Objections, Sandoz objects to Request No. 1 on the grounds that it is overly broad, vague and ambiguous, unduly burdensome, and designed to harass and annoy Sandoz. For example, on its face, this Request may be reasonably construed

to require Sandoz to first perform numerous calculations to identify the drugs subject to the State's request, then search its files covering the period from 1993 to the present for all documents containing data related to Sandoz' sales of those identified drugs, and then organize that data from the manner in which it is maintained to the manner called for by the State's request.

Sandoz also objects to Request No. 1 on the grounds that calls for the production of information or documents not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence. Sandoz further objects to Request No. 1 to the extent that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain.

Subject to and without waiving the foregoing objections, Sandoz agrees that at an appropriate time it will conduct a reasonable search for and produce non-privileged documents responsive to a properly narrowed request.

**Request No. 2:**

**All Documents containing AMPs as reported or calculated by you for the Targeted Drugs OR a spread sheet or database showing all reported and calculated AMPs for each Targeted Drug over the Defined Period of Time which lists when such AMPs were reported or calculated, and the quarter to which each AMP applies.**

**Objection to Request No. 2:**

In addition to the foregoing General Objections, Sandoz objects to Request No. 2 on the grounds that it is overly broad, unduly burdensome, and seeks documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably

calculated to lead to the discovery of admissible evidence. Sandoz incorporates by reference its objection to the Definition "Targeted Drugs" and objects to Request No. 2 on the grounds that the phrases "reported or calculated" is overly broad, vague, and ambiguous. Sandoz further objects to Request No. 2 on the grounds that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain. Sandoz also objects to Request No. 2 to the extent it seeks information protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

Subject to and without waiving the foregoing objections, Sandoz agrees that it will at an appropriate time produce non-privileged documents sufficient to show the AMP reported by Sandoz to the Centers for Medicare and Medicaid Services for any Sandoz drug determined to be at issue in this action for the time period determined to be relevant to this action.

**Request No. 3:**

**All Documents created by you, or in your possession, that discuss or comment on the difference (or Spread) between any Average Wholesale Price or Wholesale Acquisition Cost and the list or actual sales price (to any purchaser) of any of defendants' Pharmaceuticals or any Pharmaceuticals sold by other manufacturers. Documents which merely list the AWP or WAC price and the list or actual sales price without further calculation of the difference, or without other comment or discussion of or about the spread between such prices are not sought by this request.**

**Objection to Request No. 3:**

In addition to the foregoing General Objections, Sandoz objects to Request No. 3 on the grounds that it is overly broad, vague, and ambiguous, particularly the phrases "discuss or

comment," "other manufacturers," "difference (or Spread)," "Average Wholesale Price," "Wholesale Acquisition Cost," "list or actual sales price," and "purchaser" are overly broad, vague, and ambiguous. For example, this Request may be reasonably construed to require Sandoz to search its files covering the period from 1993 to the present for any document mentioning the term "Spread," with reference to any "Pharmaceutical" manufactured by any defendant in this action, literally thousands of drugs. The State's attempt to narrow this Request by omitting documents lacking any "comment or discussion . . . about the spread" does not resolve the ambiguity of this Request and imposes on Sandoz the burden of deducing what type of references to the "Spread" are sought by this request.

Sandoz also objects to this Request to the extent it seeks documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence. Sandoz also objects to Request No. 3 on the grounds that it requires Sandoz to disclose information and produce documents outside of Sandoz' possession, custody, or control; to seek information and produce documents about persons not currently employed or associated with Sandoz; or to provide or seek information and produce documents regarding non parties. Sandoz further objects to Request No. 3 on the grounds that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain. Sandoz further objects to Request No. 3 to the extent it seeks information protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

Subject to and without waiving the foregoing objections, Sandoz agrees that at an appropriate time it will produce non-privileged documents responsive to a properly narrowed request.

**Request No. 4:**

**All Documents containing an average sales price or composite price identified by you in response to Interrogatory No. 1 of the State's First Set of Requests to All Defendants.**

**Objection to Request No. 4:**

In addition to the foregoing General Objections, Sandoz objects to Request No. 4 on the grounds that the phrase "average sales price" and "composite price" are overly broad, vague, and ambiguous and Sandoz hereby incorporates by reference its objections and response to Interrogatory No. 1.

Sandoz also objects to this Request to the extent it seeks documents neither relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence. Sandoz further objects to Request No. 4 on the grounds that it purports to require Sandoz to disclose information or produce documents for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State as or its officers, employees, agents, agencies or departments as it is for Sandoz, or for which responsive information or documents are available in the public domain. Sandoz further objects to Request No. 4 to the extent it seeks information protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or protection against disclosure.

**Request No. 5:**

**All Documents sent to or received from First DataBank, Redbook and Medi-span regarding the price of any Targeted Drug.**

**Objection to Request No. 5:**

In addition to the foregoing General Objections, Sandoz objects to Request No. 5 on the grounds that it is overly broad, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence. Sandoz also objects to the extent that the Request seeks documents not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to admissible evidence, nor relevant to the time period relevant to this action. Sandoz also objects to Request No. 5 on the grounds that it requires Sandoz to disclose information and produce documents outside of Sandoz' possession, custody, or control; to seek information and produce documents about persons not currently employed or associated with Sandoz; or to provide or seek information and produce documents regarding non parties. Sandoz further objects to Request No. 5 to the extent it seeks reported prices on the grounds that the Request purports to require Sandoz to disclose information or produce documents which are available in the public domain, or for which the burden of deriving or ascertaining the information or documents is substantially the same or less for the State as or its officers, employees, agents, agencies or departments as it is for Sandoz.

Subject to and without waiving the foregoing objections, Sandoz will produce at an appropriate time non-privileged documents sent to or received from First DataBank, Redbook and Medi-span to the extent such documents include a price for any Sandoz drug determined to be at issue in this action.

**Request No. 6:**

**All Documents in your possession prepared by IMS health regarding a Targeted Drug or the competitor of a Targeted Drug regarding pricing, sales or market share.**

**Objection to Request No. 6:**

In addition to the foregoing General Objections, Sandoz objects to Request No. 6 on the grounds that the phrases "regarding," "the competitor," and "pricing, sales or market share" are overly broad, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence. Sandoz also objects to the extent that the Request seeks documents not relevant to the subject matter of this action, relevant to a claim or defense of any party, nor reasonably calculated to lead to admissible evidence, nor relevant to the time period relevant to this action. For example, this Request requires Sandoz to search for IMS Health documents that refer to, not only Sandoz' drugs, but also to the unidentified drugs that the State considers "competitor[s]" of Sandoz' drugs.

Subject to and without waiving the foregoing objections, Sandoz agrees that at an appropriate time it will conduct a reasonable search for and produce responsive, non-privileged documents that were prepared by IMS Health to the extent such documents include information about the price, sales, or market share of any Sandoz drug determined to be at issue in this action.

Dated at Milwaukee, Wisconsin, on July 15, 2005.

FRIEBERT, FINERTY & ST. JOHN, S.C.

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CERTIFICATE OF SERVICE

Lisa Mecca Davis certifies that she caused a copy of the attached Notice and Opposition to be served upon counsel to whom the foregoing Notice is directed, by telefax, this third day of August, 2005.



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Lisa Mecca Davis