STATE OF WISCONSIN | CIRCUIT COURT Branch 7 | DANE COUNTY

STATE OF WISCONSIN, Plaintiff, v. AMGEN INC., ET AL., Defendants.	)))))))	Case No.: 04 CV 1709

ASTRAZENECA'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL ASTRAZENECA TO FURTHER RESPOND TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND INTERROGATORIES TO ALL DEFENDANTS AND IN SUPPORT OF ASTRAZENECA'S CROSS MOTION FOR A PROTECTIVE ORDER

Preliminary Statement

The State of Wisconsin (the "Plaintiff" or the "State") has refused to negotiate the scope of its discovery requests with Defendants AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively, "AstraZeneca") or to accept reasonable discovery compromises offered by AstraZeneca, all of which have been offered without prejudice to Plaintiff seeking additional information and materials in the future, if necessary, after the Court rules on the Defendants' pending motions to dismiss this action. Instead, in a transparent effort to put forth its theory of the case before the Court under the guise of a discovery dispute, Plaintiff has moved to compel the production of responses to a set of overbroad and burdensome discovery requests.

At this stage in the litigation, where there remains a pending motion regarding the scope and nature of Plaintiff's claims, and where Plaintiff's First Amended Complaint ("Complaint") contains allegations concerning only one AstraZeneca product (i.e., Zoladex®), Plaintiff's discovery motion against AstraZeneca should be denied because AstraZeneca has offered to provide substantial amounts of materials and information in response to Plaintiff's discovery requests.

Without any basis or support, Plaintiff simultaneously argues that AstraZeneca has withheld responsive information and documents on the one hand, yet offered to produce too much information and too many documents on the other hand. See Exh. 1, Pl.'s Mem. in Supp. at 5. Plaintiff cannot have it both ways. The State cannot propound overbroad discovery requests, not agree to a reasonable scope limitation, and all the while claim that it does not want to be overwhelmed by hundreds of thousands of documents.

In a recent decision and order with respect to protective order issues in this matter, Judge Krueger recognized that this case presents significant administrative and efficiency challenges due to its potential size, as well as Plaintiff's decision to create such a "crowded caption" and to

allege claims substantially similar to those pending in various other state and federal courts. See Exh. 2, Order dated November 29, 2005 at 3. In its motion to compel against AstraZeneca, Plaintiff turns a blind eye to the very common sense and fairness underlying Judge Krueger's Order and ignores the practical realities of its incredibly overbroad requests, as well as the procedural posture of this case and the context of the larger nationwide AWP litigation.[1]

Set forth below is a brief summary of AstraZeneca's business, to help place the State's discovery requests in a proper context. Following that summary, in Section II, we provide some background with respect to the Medicare/Medicaid context in which Plaintiff's allegations against the pharmaceutical industry are being made. Then, in Section III, we summarize the compromise proposals that AstraZeneca has offered to Plaintiff in response to its grossly overbroad discovery requests and explain, in light of that context, why AstraZeneca's objections to Plaintiff's discovery requests are proper and why AstraZeneca's proposals for producing information and documents at this stage are more than reasonable. Finally, in Section IV, we set forth the applicable authorities establishing that this Court can and should limit Plaintiff's fishing expedition regarding discovery at this stage in the litigation.

I. AstraZeneca's Business

AstraZeneca has offered to provide a substantial amount of discovery responsive to Plaintiff's requests, including significant information relating to the pricing and sale of AstraZeneca's products. To put in context the discovery that AstraZeneca has offered to produce to Plaintiff, we provide a brief summary of AstraZeneca's business.

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[1] Since December 2001, numerous lawsuits have been filed against AstraZeneca and dozens of other pharmaceutical manufacturers containing substantially similar allegations to those in the instant case regarding the use of AWP. To date, more than fifty of those cases have been transferred to the United States District Court for the District of Massachusetts in an action styled In re Pharmaceutical Industry AWP Litigation, MDL No. 1456 (the "MDL Proceeding").

AstraZeneca manufacturers brand name prescription pharmaceuticals, all of which are sold by AstraZeneca primarily to wholesalers. The wholesalers in turn sell AstraZeneca's products to retail pharmacies, which dispense these self-administered drugs (such as pills and creams) to patients, including Medicaid patients. AstraZeneca typically sells its products to wholesalers at a list price it sets known as "Wholesale Acquisition Cost" or "WAC," minus certain prompt pay discounts. The WAC price for AstraZeneca's products is published in certain pricing compendia, as is the "Average Wholesale Price" or "AWP." The AWP for AstraZeneca's products is currently set by the publishers of the pricing compendia, and is either 20 or 25% above the WAC set by AstraZeneca.

AstraZeneca does not sell its products to retail pharmacies, with the exception of certain mail-order pharmacies, and does not set the price at which wholesalers sell its products to retailers. Nor does AstraZeneca offer rebates to retail pharmacies. AstraZeneca does offer discounts and rebates based on WAC to certain managed care customers on certain products, based on volume purchases (in the case of discounts) or utilization rates (in the case of rebates). AstraZeneca also offers volume discounts from WAC to physicians who purchase Zoladex, an injectable physician-administered drug reimbursable under Medicare Part B, directly from AstraZeneca. Finally, AstraZeneca pays rebates on its products – whether self-administered or physician administered – to State Medicaid agencies, including Wisconsin, pursuant to federal law. These rebates are based on a different pricing benchmark known as "Average Manufacturer's Price" or "AMP," which is defined by statute as described further below.

II. The Relevant Regulatory Context

The State purports to bring this case in two capacities: (1) on its own behalf, for payments made by the Wisconsin Medicaid program, see Exh. 3, Compl. ¶¶ 1, 57-61, 75; and (2)

in its parens patriae capacity, on behalf of Wisconsin citizens and organizations who paid for some portion of prescription drugs covered under Medicare Part B. See id. at ¶¶ 1, 62-74, 75.

A. Medicaid

There are two important aspects to prescription drug coverage under the Medicaid program relevant to Plaintiffs' allegations in this case: 1) the State's compensation of pharmacists for dispensing drugs to Medicaid patients; and separately 2) rebates paid by manufacturers to the State on products utilized by Medicaid patients. Although pharmaceutical manufacturers play no role in the State's reimbursement of pharmacists, the State seeks to recover from AstraZeneca and the other Defendants alleged overpayments made by the Wisconsin Medicaid program to these pharmacies.

Although not required to do so, Wisconsin, like most states, has elected to provide prescription drug coverage to its Medicaid patients. See id. at ¶ 35. In connection with that drug coverage, Wisconsin decided many years ago to reimburse pharmacists for drugs dispensed to Medicaid patients using a formula that incorporates AWP as a reimbursement benchmark. Federal law does not dictate to states what reimbursement benchmark must be used by Medicaid programs to reimburse pharmacists. States are free to use any methodology they prefer, provided that the reimbursement rates meet certain requirements of the Medicaid statute. See Still's Pharmacy, Inc. v. Cuomo, 981 F.2d 632, 635 (2d Cir. 1992) (explaining that no federal law compels states to use a set formula for reimbursing pharmacists under Medicaid).

Chief among these requirements are the "equal access" provisions of the Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A), which require that states compensate pharmacists for dispensing drugs to Medicaid patients at a rate sufficient to ensure that "efficiency, economy, and quality of care" are not jeopardized. Establishing a reimbursement rate that complies with

this statutory criteria requires a state to conduct studies of what state pharmacists are paying for prescription drugs. See, e.g., Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1498 (9th Cir. 1997); Pediatric Specialty Care, Inc. v. Ark. Dep't Human Servs., 364 F.3d 925, 931 (8th Cir. 2004) (affirming that in changing a Medicaid plan a state "must conduct a proper study and assure . . . that the factors of economy, efficiency, quality of care and equal access will not be jeopardized") (internal quotations omitted).

For over twenty years, the federal government has cautioned that AWP is not a proxy for actual acquisition cost for pharmaceutical drugs. Indeed, the federal government discouraged the use of AWP by states as a Medicaid reimbursement benchmark. See Exh. 4, Defs.' Mem. in Supp. of Mot. to Dismiss at 19-20 (collecting citations). Accordingly, many states have chosen to employ reimbursement methodologies that do not involve AWP. See id. at 5 n.4. Wisconsin, in contrast, has continued to use AWP for its Medicaid reimbursement formula, citing a variety of perceived benefits to doing so, including "simplified and reliable estimates of the cost of drugs prescribed for Wisconsin citizens . . . ." See Exh. 3, Compl. ¶ 35. Specifically, Wisconsin has used AWP minus a percentage as its reimbursement benchmark for years, with the discount increasing over time from AWP minus 10% to AWP minus 13%. See id. ¶¶ 57-58. Accordingly, pharmacists in Wisconsin are currently compensated for the drugs they dispense to Medicaid patients on the basis of the AWP for the drug minus 13%, regardless of how much the pharmacist actually paid a wholesaler to purchase the drug.

Although AstraZeneca plays no role in the State's reimbursement of pharmacists, AstraZeneca does pay significant rebates on its products directly to state Medicaid plans, including Wisconsin, pursuant to federal law. In order for a pharmaceutical manufacturer to have its products eligible for reimbursement under state Medicaid programs, the federal

government requires the manufacturer to sign a rebate agreement with the Secretary of Health and Human Services ("HHS") in which it agrees to provide rebates on its products to state Medicaid plans based on the Average Manufacturer's Price ("AMP") of its products. 42 U.S.C. § 1396r-8(a)(1), (b)(2), & 3.[2] The rebate program is designed to ensure that state Medicaid plans, including Wisconsin, pay similar, if not better, prices than a manufacturer's commercial customers. In addition, if the AMP for a manufacturer's drug rises faster than the rate of inflation, as measured by the Consumer Price Index, the Medicaid rebate program imposes an additional rebate, so that manufacturers cannot offset the rebate by raising prices. In short, the rebate program insulates state Medicaid plans from drug price increases greater than the CPI and ensures that they receive similar discounts to those offered to commercial customers.

Thus, although on the "front end" the Wisconsin Medicaid program reimburses pharmacists for drugs dispensed to Medicaid based on a formula that includes AWP, on the "back end" the State receives rebates from AstraZeneca which lower its net cost for the pharmaceutical products used under the Medicaid program.

B. Medicare

Wisconsin also purports to bring claims on behalf of Wisconsin citizens and organizations who purchased pharmaceutical products reimbursed under Medicare Part B, which authorizes payments for certain limited categories of medicines administered by doctors (like chemotherapy treatments). 42 U.S.C. § 1395k(a)(1). In the Medicare Part B context, the physician chooses which drug to administer, purchases the drug directly from the manufacturer or distributor, administers the drug to the patient in an office setting, bills Medicare for the drug,

[2] AMP is defined as "the average price paid to the manufacturer for the drug in the United States by wholesalers for drugs distributed to the retail pharmacy class of trade, after deducting customary prompt pay discounts." 42 U.S.C. § 1396r-8(k)(1).

and is reimbursed by Medicare at the applicable reimbursement rate. Medicare generally provides its beneficiaries coverage for 80% of the allowable amount for a covered drug, with the remainder the responsibility of the beneficiaries or their insurer. 42 U.S.C. § 1395l(o).

In the past, Medicare based its maximum reimbursement to doctors for Part B drugs on a percentage of AWP, with the rate set at 100% of AWP from 1991 to 1997 and 95% of AWP from 1998 to 2003. Pub. L. No. 105-33 § 4566(a) (1997) (codified at 42 U.S.C. § 1395u(o)). As discussed above, for years the federal government knew that AWP was not an adequate proxy for the actual acquisition cost of the drug to the provider – here, physicians. Nonetheless, because of concerns that the physicians were under-compensated for the cost of administering the product in an office setting, the federal government chose to use AWP as the Medicare Part B reimbursement benchmark, even though, at roughly the same time, the government was discouraging the use of AWP as a reimbursement benchmark in the Medicaid context.

In 2003, Congress revised both the AWP-based reimbursement system for Part B drugs and the associated reimbursement for physician services for administering those drugs. The new legislation maintained reimbursement at 95% of AWP for the balance of 2003, but provided that reimbursement would generally equal only 85% of AWP in 2004. Id. § 303(b). Starting in 2005, AWP is no longer used as a benchmark for Medicare reimbursement. Instead, drugs are reimbursed under either a new average sales price ("ASP") methodology defined by regulation or through a competitive acquisition program.

Of the many AstraZeneca drugs that are the subject of Wisconsin's discovery demands, only two – goserelin acetate (Zoladex®) and budesonide inhalation suspension (Pulmicort®) – are currently reimbursable under Part B. Unlike the self-administered drugs manufactured by AstraZeneca that are sold through wholesalers and dispensed by pharmacies, Zoladex®, a

physician-administered drug, is generally purchased directly from AstraZeneca by the prescribing physician.

III. The State's Discovery Requests Are Unreasonable

A. The State's Document Requests Are Overbroad

The State's Complaint lacks specific allegations regarding any of AstraZeneca's drugs, and only references Zoladex® in an appendix. Notwithstanding the paucity of the allegations regarding AstraZeneca's drugs, Plaintiff's discovery requests seek documents and other information regarding a minimum of 32 AstraZeneca drugs, that is, 195 National Drug Codes ("NDCs"),[3] each for a minimum of a 12 year time period. See Exh. 5, Pl.'s First Set of Requests for Production of Documents; see also Exh. 6, Letter from Robert S. Libman to Kristi T. Prinzo (May 20, 2005). These 32 drugs include all but a few of the drugs currently sold by AstraZeneca in the United States. See Affidavit of Paula Flynn ("Flynn Aff.") ¶ 3. These requests, therefore, call for information regarding the vast majority of AstraZeneca's current product portfolio without providing any underlying, particularized allegations to substantiate such an onerous demand. Such sweeping requests are impermissible. See, e.g., Mid-Am. Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497, 498 (E.D. Wis. 1978) (sustaining an objection that request for production of documents was overly broad).

Against this backdrop, AstraZeneca offered to produce the following in response to Plaintiff's discovery requests:

- Transactional sale and rebate data for 15 of the products on the State's list of "targeted drugs." Significantly, this data amounts to 17 million transactional records. This data includes direct sales data which reflects all direct sales to customers, including all invoice discounts, with each transaction on a separate line. It also includes indirect sales data

[3] NDC is the 10-digit, 3-segment identifying drug number maintained by the Food and Drug Administration (the "FDA"). The FDA assigns each drug product a unique NDC which indicates a specific strength, dosage form, formulation package size for that product. The NDC also identifies the manufacturer and reflects whether the drug is a brand name or a generic equivalent.

which reflects sales made through wholesalers to other AstraZeneca customers, where those customers received a discount from AstraZeneca and that discount was "charged back" to AstraZeneca by the wholesaler. Again, all invoice discounts are reflected in this indirect sales data. Additional information about the number of units and date of each transaction, as well as the purchasing entity and its trade class, is also reflected in this data. Further, the data also lists rebate information for the 15 products, including the recipient of each rebate payment, the amount of that payment, and the quarter for which it was calculated. Finally, this data also includes quarterly reported AMP data from the first quarter of 1997 to the fourth quarter of 2003. AstraZeneca has also agreed to provide the State with the IMS data produced in the MDL Proceeding, which currently includes data relating to Zoladex® and Pulmicort®. Moreover, in the event that the State has questions about the data, how it is organized or the databases from which it was drawn, AstraZeneca has offered to provide the State with access, on an informal basis, to one of AstraZeneca's data experts.

- 440,000 pages of text-searchable documents regarding Zoladex®, the one AstraZeneca drug referenced in the Complaint, previously produced in the MDL Proceeding. This includes documents relating to the pricing, sale and marketing of Zoladex® from approximately 1991 through 2002, such as communications (including memoranda, reports, presentations, and e-mails) among and between the field sales force and sales management, call notes from field sale representatives relating to their contact with doctors, strategic marketing plans, communications (including memoranda, reports, presentations and e-mails) among the Zoladex® product marketing team, pricing recommendations and other pricing information, including communications with publishers and documents relating to the WAC and AWP of Zoladex, discounts on Zoladex and reimbursement under Medicare Part B for Zoladex.

- 31,000 pages of text-searchable documents produced in the MDL from AstraZeneca's Pricing Strategy Group relating to 15 of the drugs on Plaintiff's "targeted" list. This group is responsible for pricing strategy, pricing recommendations and communications with pricing publishers for all of AstraZeneca's products.

Altogether, the foregoing compromises would have provided the State with responsive documents and data concerning 15 AstraZeneca products, and representing 92 NDCs – that is, documents and information responsive to the State's discovery requests and well beyond what was called for by the State's passing reference to Zoladex® in the Complaint and the regulatory context in which the State is making its claims. Yet, AstraZeneca's proposals have been repeatedly rejected by the State.

The State's document requests fall into two categories: (1) requests which seek documents (the third, fourth and fifth requests), and (2) requests which seek data (the first, second and sixth requests). Each group is discussed in turn:

1. Requests Seeking Documents

The State's third request for production seeks:

> **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.**

Because AstraZeneca does not maintain separate files of such documents, if such documents even exist, this request – which is not limited to a specified number of drugs, nor to a specified time period – would require a review of the files of hundreds of employees for an unlimited time frame. Goodrich Corp. v. Emhart Indus., Inc., Nos. EDCV 04-00759, 03-00079 2005 U.S. Dist. Lexis 17190, at *13 (C.D. Cal. June 10, 2005) (holding that document requests were overbroad in that they did not impose any temporal restriction). Furthermore, because AWP and WAC are pricing benchmarks commonly used at the company, the potential scope of the materials that would need to be collected and reviewed to determine whether they actually discuss or comment on the difference between WAC and AWP would be immense. This problem is exacerbated by the fact that AstraZeneca routinely provides volume discounts and rebates off of WAC to managed care customers, as described above. Yet, Plaintiff has rebuffed all of AstraZeneca's efforts to discuss the overbreadth of this request. See Exh. 7, Letter from Robert S. Libman to Kristi T. Prinzo at 2 (Oct. 26, 2005) ("You expressed concern that without further clarification, your client might interpret our request more narrowly than the [S]tate

intends. It is our position that this request needs no further clarification. And to the extent that the [S]tate's theory and AstraZeneca's theory of the case differs, you should not limit your search for responsive documents to those that fit within AstraZeneca's theory").

Having attempted to seek clarification regarding this request, and being denied any response, AstraZeneca agreed to provide the State with its production relating to Zoladex® from the MDL Proceeding, which represents over 440,000 pages of documents, a large portion of which relate to a similar document request in the MDL Proceeding.[4] See Exh. 8, Letter from Kristi T. Prinzo to Robert S. Libman at 1 (Oct. 20, 2005); see also State ex rel. Rilla, 76 Wis. 2d 429, 435, 251 N.W.2d 476 (1977) (noting that the pleadings are of significance in determining the scope of permissible discovery). In addition, AstraZeneca agreed to provide the State with 31,000 pages of documents produced in the MDL Proceeding from the Pricing Strategy Group, the group which is responsible for pricing strategy and pricing recommendations for all of AstraZeneca's products. See Exh. 9, Letter from Kristi T. Prinzo to Robert S. Libman at 1 (Oct. 31, 2005). Again, a large portion of these documents are responsive to similar requests in the MDL proceeding. See Affidavit of Kristi T. Prinzo ("Prinzo Aff.") ¶¶ 8-9. This offer, which would provide the State with the vast majority of documents responsive to this request, was rejected.

Significantly, these documents are in a text searchable format (Optical Character Recognition, or "OCR") which easily allows the State to conduct a search of specific words or phrases utilized in the documents.[5] See Zakre v. Norddeutsche Landesbank, No. 03 Civ. 0257,

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[4]The MDL request sought "all documents concerning or relating to the difference between an AWP and any price for any [drug identified in the appendix to the MDL Complaint]."

[5] In addition, AstraZeneca agreed to perform key word searches of this production for the State, see Exh. 8, Letter from Kristi T. Prinzo to Robert S. Libman at 1-2 (Oct. 20, 2005), but again, this reasonable offer was dismissed out of hand. See Exh. 1, Pl.'s Mem. in Supp. at 14.

2004 WL 764895, at *1 (S.D.N.Y. Apr. 9, 2004) (citing The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Document Discovery (Sedona Conference Working Group Series 2004) (holding that providing 240,000 documents in a text-searchable format constitutes a sufficient response to document requests); In re Lorazepam & Corazepate Antitrust Litig., 300 F. Supp. 2d 43, 46-47 (D.D.C. 2004) (holding that a "mountain of information" provided without an index in electronic form that is text searchable did not amount to a "document dump," but rather an "opportunity" and not "a problem"). This offer, however, was rejected. See Exh. 7, Letter from Robert S. Libman to Kristi T. Prinzo (Oct. 26, 2005).

The State's fourth request for production of documents seeks:

> **Request No. 4. All Documents containing an average sales price or composite price by you in response to Request No. 1 of Plaintiff's First Set of Interrogatories to All Defendants.**

As described in AstraZeneca's interrogatory responses, prior to 2003 AstraZeneca did not calculate an average sales price for Zoladex®, the sole drug referenced in the Complaint. See Exh. 10, AstraZeneca's Responses to Pl.'s First Set of Interrogatories. Since 2003, AstraZeneca has reported an "Average Sales Price" (as that term is defined in the Corporate Integrity Agreement (CIA) between the Office of the Inspector General of the Department of Health and Human Services and AstraZeneca dated June 2003) for Zoladex and certain other injectable drugs on a quarterly basis to the Wisconsin Medicaid Program pursuant to the terms of the CIA. See id. Thus, this information has already been provided to the State.

In the MDL Proceeding the court denied a similar motion to compel the production of ASP documents brought by the MDL Plaintiffs. See Exh. 11, Tr. of Motion Hearing Before The Honorable Marianne B. Bowler at 37-38 (Sept. 27, 2004) (finding the request "really too attenuated"). Defendants argued, and the MDL Court agreed, that ASP documents were not

relevant to the litigation since they related to the new Medicare reimbursement system, and as such, involved unsettled and undefined regulatory requirements which were not at issue in the AWP matter. See id. at 18-34. Similarly, here Plaintiff does not allege that Defendants, including AstraZeneca, have engaged in any wrongdoing with respect to ASPs, a new pricing benchmark. The MDL Court further adopted the Defendants' arguments that the AMP data, which has been defined by statute for years, would be sufficient for the Plaintiffs' purposes. See id. at 23-24. AstraZeneca has already agreed to produce the AMP data produced in the MDL Proceeding for 15 of the drugs included on the State's "targeted list." That offer was likewise rejected.

The State's fifth request for production of documents seeks:

> **Request No. 5. All Documents sent to or received from FirstDataBank, Redbook and Medispan regarding the price of any Targeted Drug.**

In addition to this request being overbroad in that it seeks documents regarding 32 of AstraZeneca's drugs, it is also overbroad in that there is absolutely no time limitation. Goodrich Corp., 2005 U.S. Dist. Lexis 17190, at *13 (holding that document requests were overbroad in that they did not impose any date restriction).

Despite the breadth of this request, AstraZeneca offered to provide to the State its Zoladex® related documents produced in the MDL Proceeding, as well as all of the documents produced in the MDL from the Pricing Strategy Group – the only group at AstraZeneca that is responsible for communicating with the publishers. See Exh. 12, AstraZeneca's Responses to Pl.'s First Set of Document Requests; see Exh. 8, Letter from Kristi T. Prinzo to Robert S. Libman at 1 (Oct. 20, 2005); see also Exh. 9, Letter from Kristi T. Prinzo to Robert S. Libman at 1 (Oct. 31, 2005). This offer is reasonable in that the State's document request is similar to a request by the MDL Plaintiffs, which asked AstraZeneca to produce for each drug all documents

concerning communications between AstraZeneca and a publisher regarding the prices for that drug. Once again, this offer was rejected.

2. Requests Seeking Data

The first, second and sixth document requests seek data from AstraZeneca. The first and second requests for production of documents seek:

> **Request Nos. 1 & 2. All National Sales Data for each Targeted Drug during the Defined Time Period, and All documents containing [AMPs] as reported or calculated by [AstraZeneca] for the Targeted Drug 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.**

As with the other document requests discussed above, these requests are unduly broad in that they seek data regarding 32 of AstraZeneca's drugs, or 195 NDCs, for a 12-year time period. Despite the breadth of this request, in its negotiations with the State, AstraZeneca offered to produce the MDL data for 15 of the drugs on the State's "targeted list."

As memorialized in an October 20, 2005 letter to Mr. Libman, this data includes both direct and indirect sales data. See Exh. 8, Letter from Kristi T. Prinzo to Robert S. Libman at 2 (Oct. 20, 2005). All invoice discounts are also reflected in this data. Additional information about the number of units and date of each transaction, as well as the purchasing entity and its trade class, is also reflected in this data. Further, the data also lists rebate information for the 15 products, including the recipient of each rebate payment, the amount of that payment, and the quarter for which it was calculated. Finally, this data also includes quarterly reported AMP data from the first quarter of 1997 to the fourth quarter of 2003. See id.

Significantly, the data which AstraZeneca has been willing to produce for the 15 drugs on the State's "targeted list" amounts to approximately 17 million transactional records. See Prinzo

Aff. ¶ 3. Notwithstanding the comprehensive nature of this proposed production, Plaintiff rejected this offer as well.

Plaintiff's position is confounding in that the State has continually argued that this case should not be analyzed on a drug-by-drug basis since the alleged conduct is indicative of pervasive fraud throughout the industry. See, e.g., Exh. 13, Pl.'s Mem. in Opp. to Defs.' Joint Mot. to Dismiss at 30. If the State does not intend to analyze the case on a drug-by-drug basis, surely 17 million records regarding 15 of the drugs and 92 NDCs which the State has expressed interested in should be sufficient when a motion to dismiss with significant merit is still pending. See Swan Sale Corp. v. Joseph Schlitz Brewing Co., 126 Wis. 2d 16, 29-30, 374 N.W.2d 640, 647-648 (Ct. App. 1985) (holding that the trial court did not abuse its discretion in deferring discovery until after dispositive motion was resolved).[6]

Finally, the State's sixth request for production of documents seeks:

> **Request No. 6. All Documents in [AstraZeneca's] possession prepared by IMS Health regarding a Targeted Drug or the competitor of a Targeted Drug regarding pricing, sales or market share.**

As with the other document requests, this document request is unduly burdensome and overbroad. In addition to seeking information regarding 32 of AstraZeneca's drugs, there is also no time limitation on this request, thereby making the request indisputably overly broad. Goodrich Corp., 2005 U.S. Dist. Lexis 17190, at *13. Furthermore, this information is publicly

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[6] Plaintiff argues that AstraZeneca's motion to dismiss has "virtually no chance of prevailing," and refers to "15 decisions" all which have "rejected [D]efendants' arguments." See Exh. 1, Pl.'s Mem. in Supp. at 5. In actuality, several courts have granted Defendants' motions to dismiss. See, e.g., In re Pharm. Indus. Average Wholesale Price Litig., MDL No. 1456, Memorandum and Order, at 47 (D. Mass., May 13, 2003); Connecticut v. Pharmacia Corp., Order, No. CV-03-0083297-S (Ct. Super. Ct. Feb. 11, 2004); Commonwealth of Massachusetts v. Mylan Labs., Civ. A. No. 03-11865-PBS (D. Mass Apr. 5, 2005); In re Pharm. Indus. Average Wholesale Price Litig., MDL No. 1456, Memorandum and Order at 1 (D. Mass., Apr. 8, 2005); Ohio v. Dey, Civ. No. A0402047, Decision at 7-9 (Ohio Ct. Comm. Pleas, June 13, 2005); Alabama v. Abbott Labs., Inc., Civ. A. No. CV-05-219 (C.C. Ala. Montgomery County Oct. 13, 2005); Commonwealth v. Tap Pharm. Prods., Inc., 868 A.2d 624, 635 (Pa. Commw. Ct. 2005).

available for purchase, and thus it is unduly burdensome for AstraZeneca to produce documents which the State can easily obtain. See, e.g., Baum v. Chittenango, 218 F.R.D. 36, 40-41 n.7 (N.D.N.Y. 2003); Dushkin Publ'g Group, Inc. v. Kinko's Serv. Corp., 136 F.R.D. 334, 335 (D.D.C. 1991). The State should not be permitted to use the discovery process to shift the costs of litigating its action to AstraZeneca.

Nonetheless, AstraZeneca offered to produce to the State any IMS data which it produces in the MDL, which as of this date, includes data for Zoladex® (the only AstraZeneca drug referenced in the appendix to the Complaint) and Pulmicort. See Exh. 8, Letter from Kristi T. Prinzo to Robert S. Libman at 2 (Oct. 20, 2005). This offer, too, was rejected without compromise.

B. The State's Interrogatories Are Overbroad

As with the document requests, the interrogatories propounded by the State seek responses regarding 32 of AstraZeneca's drugs, or 195 NDCs, during a 12 year time period despite the fact that the Complaint does not set forth any specific allegations regarding any of AstraZeneca's drugs, and only references one of AstraZeneca's drugs – Zoladex® – in an appendix. See Exh. 14, Pl.'s First Set of Interrogatories to All Defs.; see also Exh. 6, Letter from Robert S. Libman to Kristi T. Prinzo (May 20, 2005). As previously mentioned, this is almost double the amount of drugs for which discovery was sought in the MDL, and includes all but a few of the drugs currently sold by AstraZeneca in the United States. See Flynn Aff. ¶ 3. Thus, in light of the vast number of drugs covered by the interrogatories and the expansive time frame, the interrogatories on their face are overly broad. 8 Wis. Practice, Civil Discovery, § 8.9 (stating that objections to interrogatories may be sustained if the interrogatories are burdensome); 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure §

2174 (2d ed. 1994); Cahela v. James D. Bernard, D.O., P.C., 155 F.R.D. 221, 227-28 (N.D. Ga. 1994). In addition to the vast quantity of drugs sought, as explained below, each interrogatory is also overbroad or not relevant for other reasons.

The State's first interrogatory seeks the following information:

> **Interrogatory No. 1. [Has AstraZeneca] 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 end 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 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.**

As AstraZeneca stated in its response, prior to 2003 AstraZeneca did not calculate an average sales price for Zoladex®, the one drug referenced in the Complaint. Since 2003, AstraZeneca has reported an "Average Sales Price" (as that term is defined in the Corporate Integrity Agreement (CIA) between the Office of the Inspector General of the Department of Health and Human Services and AstraZeneca dated June 2003) on a quarterly basis to the Wisconsin Medicaid Program pursuant to the terms of the CIA. Thus, this information has already been provided to the State.

In addition, as described above, in the MDL Proceeding the Court held that the ASP pricing benchmark was "too attenuated" to the claims asserted. See Exh. 11, Tr. of Motion Hearing Before The Honorable Marianne B. Bowler at 37-38 (Sept. 27, 2004). The same

rationale applies here to the similar claims brought by the State. Indeed, the State argues in its motion that it needs a response to this interrogatory in order to determine the "actual" price at which AstraZeneca's drugs are sold. See Exh. 1, Pl.'s Mem. in Supp. at 7. The transactional sales data which AstraZeneca has offered to produce, but the State has rejected, includes all invoice discounts and rebates offered by AstraZeneca and therefore reflects the price at which AstraZeneca sells its products. Surely the production of such data, as AstraZeneca has agreed to do for 15 of the drugs on the State's "targeted" list, is a much more efficient and less burdensome manner of determining the actual prices paid than written responses to interrogatories.

The State's second interrogatory reads:

> **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 Request 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 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.**

In essence, this interrogatory is seeking intricate information on every database at AstraZeneca that relates to pricing. Providing this detailed database information regarding pricing for 195 NDCs during a 12 year time period is unduly broad and overly burdensome.

Nonetheless, AstraZeneca offered to provide the State with access to a data expert at AstraZeneca, on an informal basis, who could provide the information sought by this Interrogatory. This approach was similarly taken in the MDL Proceeding with much success

since it is an effective and efficient way to relay this information. Instead, the State has moved to compel a burdensome written response to this interrogatory.

The State's third interrogatory reads:

> **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.**

As a preliminary matter, the term Incentive, as defined by the State, is overbroad in that it seeks every discount and rebate that AstraZeneca has provided in the context of routine commercial business. See Exh. 14, Pl.'s First Set of Interrogatories to all Defs., at 2. Thus, the State's request to describe the "general terms and conditions of each Incentive" requires detailed information regarding every single rebate and discount for 32 of AstraZeneca's drugs provided to thousands of customers. The terms of the discounts and rebates will vary from customer to customer, and will also vary with the same customer from one date to another.

If this interrogatory were limited from 1993 onward, it is estimated that it would entail a review of approximately 20,000 contracts for over 5,000 customers. See Flynn Aff. ¶ 11. Astoundingly, this Interrogatory seeks such information for an unlimited time frame, and as a result AstraZeneca's objection should be sustained. See 8 Wis. Prac., Civil Discovery, § 8.9; Hammond v. Lowe's Home Centers, Inc., 216 F.R.D. 666, 672 (D. Kan. 2003) (failure to limit the temporal scope of an interrogatory rendered it overly broad); Cahela, 155 F.R.D. at 227-28.

Despite this broad request, AstraZeneca offered to provide 17 million transactional records for 15 of the drugs on the State's "targeted list" which would provide much of the information the State is seeking. See Exh. 8, Letter from Kristi T. Prinzo to Robert S. Libman at

2 (Oct. 20, 2005). Again, the State itself argues in its motion that it needs an answer to this Interrogatory in order to determine the "actual prices" for AstraZeneca's products. See Exh. 1, Pl.'s Mem. in Supp. at 7. The data AstraZeneca offered to produce details all invoice discounts, as well as the rebates paid on a quarterly basis for 15 of the drugs on the State's targeted list. See id. The data, therefore, provides a more efficient and less burdensome method of providing the State the information it seeks, than a written response requiring details on every discount and rebate offered by AstraZeneca for 32 drugs, for thousands of customers, for an unlimited period of time. Yet the State rejected this offer.

The State's fourth interrogatory asks AstraZeneca to:

> **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.**

As previously mentioned, this request is overbroad because it is seeking information regarding 32 drugs, or 195 NDCs, during a 12 year time period, while the motion to dismiss is still pending, and when only one AstraZeneca drug is even referenced in an appendix to the Complaint. Determining the prices for 32 drugs over a 12 year time period may require information on several hundred pricing decisions, which is an overbroad and unduly burdensome demand. See id. Moreover, this information is not susceptible to an interrogatory response given the intricate process in formulating prices for AstraZeneca's products. Rather, this information is more readily obtainable through a deposition, at the appropriate time. See 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2163 (2d ed. 1987) ("the court has discretion to issue a protective order that depositions rather than interrogatories be used") (2d ed. 1994); Duncan v. Paragon Publ'g, Inc., 204 F.R.D. 127,

128-129 (S.D. Ind. 2001); Spector Freight Sys., Inc. v. Home Indem. Co., 58 F.R.D. 162, 164-165 (D. Ill. 1973).

Nonetheless, AstraZeneca agreed to provide Zoladex® related documents produced in the MDL Proceeding in response to this interrogatory, as well as documents from the Pricing Strategy Group. See supra at 11. As mentioned earlier, the Pricing Strategy Group is the group responsible for pricing recommendations at AstraZeneca for all of its products. Clearly, information responsive to the State's request would be located among the documents produced from these files. Again, the State rejected AstraZeneca's more than reasonable offer.

Finally, the State's fifth interrogatory reads:

> **Interrogatory No. 5. [Has AstraZeneca] ever included in [its] marketing of a Targeted Drug to any customer reference to the difference (or spread) between an AWP or WAC published by FirstDataBank, 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).**

This interrogatory asks that AstraZeneca provide the name of each customer with whom the difference between two price points was discussed. Since AstraZeneca provides rebates and discounts to certain of its customers on certain of its products, a response to this interrogatory would involve a review of nearly every communications between AstraZeneca and those customers, and as such, is overbroad and unduly burdensome. See id. The problem with this interrogatory is compounded by its lack of any temporal limitation. Hammond, 216 F.R.D. at

672. Nevertheless, AstraZeneca has also agreed to produce Zoladex® related documents from its production in the MDL Proceeding in response to this interrogatory. See supra at 11.[7]

C. AstraZeneca's Discovery Responses Were Served in a Timely Manner

Under Fed. R. Civ. P. 33(b)(4), a failure to timely object to an interrogatory is a waiver of the objection. Wisconsin discovery rules contain no such provision, and AstraZeneca has found no Wisconsin case holding that a failure to timely respond to a request constitutes a waiver. Even if the federal authorities cited by Plaintiff apply here, the record makes clear that the responses of AstraZeneca and the 17 other Defendants and Defendant groups served on July 15, 2005 were timely.

On April 12, 2005, the Court issued an order which stayed discovery "until May 11, 2005, or until further order of the Court." See Exh. 15, Order dated April 12, 2005. The Court did not issue an order lifting the stay of discovery on May 11, 2005. Nor did the Court lift the stay on any subsequent date.

Although the Defendants believed that the discovery stay was still in effect, since Judge Krueger encouraged the parties to make progress on discovery issues pending resolution of the motion to dismiss, several Defendants, including AstraZeneca, notified Plaintiff that they intended to serve written responses to the State's discovery requests by July 15, 2005. See Exh. 16, Letter from Andrew D. Schau to Charles Barnhill (June 30, 2005).

In addition, prior to serving its responses on July 15, 2005, AstraZeneca engaged in discussions with the State regarding the scope of discovery. See Exhs. 6, 17-19, Letter from

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[7] On October 5, 2005, Plaintiff filed a self-serving Status Report with the Court. In this Status Report, Plaintiff stated that it "has evidence that defendants caused phony and inflated wholesale prices to be published with respect to each of the listed drugs . . ." Since the Complaint did not plead any of this "evidence," on October 19, 2005 Defendants served one interrogatory and one discovery request on Plaintiff asking for the "evidence" that Plaintiff allegedly has for each drug, for each defendant, on the list attached to the Status Report. Plaintiff has still not provided Defendants the "evidence" it has, and in fact has asked for an extension of time to provide such "evidence."

Robert S. Libman to Kristi T. Prinzo (May 20, 2005); Letter from Kristi T. Prinzo to Robert S. Libman (June 22, 2005); Letter from Robert S. Libman to Kristi T. Prinzo (June 23, 2005); Letter from Kristi T. Prinzo to Robert S. Libman (July 7, 2005). Such discussions are antithetical to any notion of a waiver, "an intentional relinquishment of a known right," Milas v. Labor Ass'n of Wis. Inc., 214 Wis. 2d 1, 9, 571 N.W.2d 656, 659 (1997), and would have been illogical if a waiver had occurred on June 12, 2005, as the State incorrectly contends.

D. AstraZeneca's References to the MDL Zoladex® Production in Its Responses to the State's Fourth and Fifth Interrogatories Is Permissible

Wis. Stat. § 804.08(3) and Fed. R. Civ. P. 33(d) make clear that it is permissible to answer an interrogatory by referring to one's business records. See Concept Indus., Inc. v. Carpet Factory, Inc., 59 F.R.D. 546, 548-49 (E.D. Wis. 1973). Notwithstanding Plaintiff's lengthy argument and exhortation of a document dump regarding the responses to interrogatories four and five, see Exh. 1, Pl.'s Mem. in Supp. at 11 -15, Plaintiff fails to demonstrate that AstraZeneca's reference to records in lieu of an answer was improper. First, Plaintiff fails to bear its burden to "show that the burden of deriving or ascertaining the answers is not substantially the same for both parties." Petroleum Ins. Agency, Inc. v. Hartford Accident & Indemnity Co., 111 F.R.D. 318, 320 (D. Mass. 1983). Second, it fails to show that where, as here, "the requesting party's interrogatories are extremely broad," see supra at 18 - 20, AstraZeneca's reference to the MDL production does not meet the requirements of the rule. See 7 James Wm. Moore, et al., Moore's Federal Practice ¶ 33.105[3] (3d ed. 2005); United States v. Rachel, 289 F. Supp. 2d 688, 693 (D. Md. 2003). Moreover, as the MDL production is in a text-searchable format, it by no means constitutes a mass of undifferentiated documents. See Zakre, No. 03 Civ. 0257, 2004 WL 764895 at *1 (discussing benefits of text-searchable format).

IV. The Court Has Broad Discretion to Limit Discovery and Issue a Protective Order in This Case

For the foregoing reasons, AstraZeneca submits that Plaintiff's discovery requests are extremely overbroad and that AstraZeneca has presented reasonable compromises that properly balance Plaintiff's desire for discovery with fairness and efficiency in light of the procedural posture of this case and within the context of the nationwide AWP litigation and the regulatory background of Medicaid and Medicare. Because Plaintiff has decided to employ a no-compromise strategy, it has needlessly and prematurely brought the Court into the matter. Accordingly, AstraZeneca has no choice but to ask the Court to exercise its power to curtail Plaintiff's fishing expedition and prevent it from using discovery to unduly harass AstraZeneca.

It is well settled under Wisconsin law that a Court has the inherent authority to limit the scope of discovery. See 8 Wis. Prac., Civil Discovery, § 9.6 (noting that a Court may limit the scope of document requests); 8 Wis. Practice, Civil Discovery, § 8.9 (stating that objections to interrogatories may be sustained if the interrogatories are burdensome).[8]

Moreover, the Court has "broad powers" to "regulate or prevent discovery" by issuing a protective order. 8 Wis. Prac., Civil Discovery § 1.11. Specifically, a Court may grant a protective order when "good cause" is shown in order to protect a party from "undue burden or expense." Wis. Stat. § 804.01(3).

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[8] Rule 26(b)(2) of the Federal Rules of Civil Procedure also recognizes that a Court may limit discovery in appropriate circumstances. Fed. R. Civ. P. 26(b)(2); Patterson v. Avery, 281 F.3d 676, 681 (7th Cir. 2002) (in affirming the denial of a motion to compel discovery, holding that Rule 26(b)(2) "empowers district courts to limit the scope of discovery if 'the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.'"); Bosaw v. Nat'l Treasury, 887 F. Supp. 1199, 1213 (S.D. Indiana 1995); 6 James Wm. Moore et al., Moore's Federal Practice ¶ 26.60[6] (3d ed. 2005) ("The high costs of complex litigation often justifies the imposition of limits on discovery").

The Wisconsin statutory provision regarding protective orders is identical in all relevant respects to its federal counterpart, Rule 26(c) of the Federal Rules of Civil Procedure.[9] See Crawford v. El-Britton, 523 U.S. 574, 599 (1998) (noting that "upon motion the Court may limit . . . (the) manner of discovery, or even bar discovery altogether . . . as required 'to protect a party or person from . . . undue burden or expense.'") (citing F.R.C.P. 26(c)); 6 James Wm. Moore et al., Moore's Federal Practice ¶ 26.30[3] (3d ed. 1997) ("A court must limit the frequency or extent of use of the discovery methods otherwise permitted under the Federal Rules of Civil Procedure and by any local rule if the discovery sought is available from another source that is more convenient, less burdensome, or less expensive") (emphasis supplied).

The burden of producing documents and data for 32 drugs and 195 NDCs which the State references in its "targeted list" would be immense. In the MDL Proceeding, which addresses similar issues to this case, Plaintiffs sought discovery concerning only 17 AstraZeneca drugs (a little over half the amount sought in this matter). Responding to document requests for the MDL Proceeding, which, although greater in number, covered much of the same material sought here, amounted to significant attorney time and expense. It is estimated that responding to discovery in the MDL Proceeding, which related to just 17 drugs, took approximately one and a half years and some 8,700 hours to complete. See Prinzo Aff. ¶ 5. It is clear that 8,700 hours is an undue burden and significant expense. See, e.g., Vincent & Vincent, Inc. v. Spacek, 102 Wis. 2d 266, 272, 306 N.W.2d 85, 88 (1981) (granting plaintiff's motion for a protective order on interrogatories propounded by the plaintiff seeking all claims against the manufacturer for engine

[9] Where a Wisconsin Rule of Civil Procedure is substantially similar to its federal counterpart, a Wisconsin court may look to federal case law for guidance in its analysis. Mucek v. Nationwide Commc'ns, Inc., 252 Wis. 2d 426, 443 (Ct. App. 2002); Schneider v. Ruch, 146 Wis.2d 701, 758 (Ct. App. 1988).

Here, the only difference between W.S.A. 804.01(3) and Rule 26(c) is that the latter requires the movant to certify that it has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

defects for a five-year period in that the costs associated with the request would "deny access for any cost-conscious defendant to a court determination of the merits of the defense by forcing settlement").

Thus, AstraZeneca agreed to produce to the State documents and information from the MDL Proceeding, including its Zoladex® related production, documents from AstraZeneca's Pricing Strategy Group, and comprehensive data in lieu of further responding to the State's discovery requests. These materials would provide the State with the vast majority of the discovery it is seeking without imposing an undue burden on AstraZeneca. See, e.g., Blotcher v. Upjohn Co., 54 A.D.2d 851, 851 (N.Y. App. Div. 1976) (holding interrogatories served on the drug manufacturer Upjohn were unduly broad, especially in light of the fact that plaintiff had consistently rejected the manufacturer's offer to make available the New Drug Application which had been filed by the manufacturer with the FDA and which contained much of the material sought by the plaintiffs). This is more than reasonable, particularly in light of the pending motion to dismiss.

Ironically, the State takes issue with the volume of discovery that AstraZeneca has agreed to produce, claiming it is too much, or a "document dump." However, this repeated refrain by the State shows the complete and utter misperception that the State has with regard to discovery in this case. Contrary to the State's assertion, it is manifestly clear that the discovery sought in this matter will "not likely fill one box." See Exh. 1, Pl.'s Mem. in Supp. at 5. The discovery experience in the MDL Proceeding shows otherwise. This production is by no means a document "dump," id. at 6, nor is AstraZeneca attempting to "hide" relevant material, id. at 1.

Rather, this production reflects a careful review by numerous attorneys over a one and a half year time period of documents produced in an analogous case.[10]

Accordingly, at this stage in the litigation, the Court should issue a protective order limiting the discovery AstraZeneca must provide to that which AstraZeneca has offered from its production in the MDL Proceeding.

CONCLUSION

For the aforementioned reasons, the Court should deny Plaintiff's Motion to Compel, and grant AstraZeneca's cross-motion for a Protective Order.

Dated: December 16, 2005

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[10] The State argues that it should be awarded reasonable expenses incurred in bringing this motion, including attorneys' fees. See Exh. 1, Pl.'s Mem. in Supp. at 21-22. An award of expenses and/or fees must be pursuant to Wis. Stat. § 804.12(1)(c)(1), which states, in relevant part, that "[i]f a motion to compel discovery is granted, the court shall order the party who necessitated the motion to pay the moving party's fees and expenses unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." (emphasis supplied). AstraZeneca firmly believes that the State's motion is without merit. However, should the Court hold otherwise, AstraZeneca's efforts to ensure that that the State's requests are appropriately limited are legitimate given the complexity of the case and potential for discovery involving many millions of pages of documents produced by numerous Defendants. See Lane v. Sharp Packaging Sys., Inc., 2002 WI 28, ¶¶ 63-66, 251 Wis.2d 68, 640 N.W.2d 788; see also Mackay v. IBP, Inc., 167 F.R.D. 186, 207 (D. Kan. 1996).