

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 7

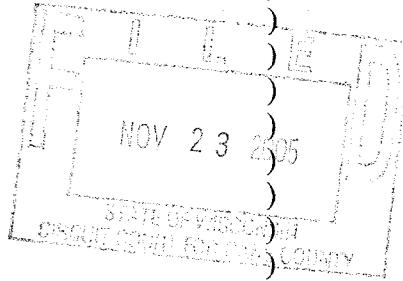
DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

AMGEN INC., et al.,

Defendants.



Case No. 04-CV-1709  
Unclassified – Civil:30703

**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ASTRAZENECA  
DEFENDANTS TO RESPOND TO PLAINTIFF'S FIRST SET OF INTERROGATORIES  
TO ALL DEFENDANTS AND PLAINTIFF'S FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO ALL DEFENDANTS**

The AstraZeneca Defendants refuse to answer interrogatories and produce documents that are indisputably relevant to the complaint in this case. Moreover, as to the documents they say they will produce, the AstraZeneca Defendants seek to hide them by burying them in over 400,000 other documents Wisconsin has not requested. These attempts to obstruct Wisconsin's discovery efforts are blatantly inconsistent with discovery practices in Wisconsin. Plaintiff, therefore, asks the Court to require the AstraZeneca Defendants to respond fully to its discovery requests and also award Wisconsin its fees and costs incurred in bringing this motion. Before turning to the Wisconsin's individual discovery requests and AstraZeneca Defendants' inadequate responses, it is useful to put the requests in context.

**The Complaint's Allegations**

For years the AstraZeneca Defendants have been reporting to medical compendiums wholesale prices for their drugs that were hugely inflated, while simultaneously hiding the true prices of their drugs from purchasers such as the State of Wisconsin. The Complaint spells out in some detail how this scheme has worked.

34. Each of the defendants and/or its subsidiaries has for years identified an average wholesale price (“AWP”) and, more recently, a price denominated as the wholesale acquisition cost (“WAC”) (or similar terms used to denote either the price charged by wholesalers or a drug’s cost to wholesalers) for most of their drugs. These prices are disseminated to the public by the defendants through publication in certain medical compendiums. Among the most prominent of these compendiums are the Drug Topics Red Book and First DataBank Annual Directory of Pharmaceuticals. These publications rely on the prices reported to them by the defendants. These are the only prescription drug prices that defendants make public.

35. For many years Wisconsin, as a payer under the Medicaid program, has based its reimbursement formula for prescription drugs on the defendants’ published AWP’s. Wisconsin has relied on these prices for many reasons. First, simplified and reliable estimates of the cost of drugs prescribed for Wisconsin citizens are needed because the huge number of different drugs and the non-transparency of the marketplace make it impracticable for Wisconsin to track the drug price changes drug by drug on a daily basis. Second, the AWP’s come directly from the defendants, the most knowledgeable source. Third, by using the term “average wholesale price,” defendants convey that term’s commonly understood meaning – that the price is an average of actual prices that are charged by wholesalers. Fourth, the compendiums in which these prices are published are widely used and respected. Fifth, these published prices are the only prices publicly available. Sixth, defendants conceal the true cost of their drugs as set forth below. Seventh, Wisconsin relies on the honesty of those who profit from Wisconsin’s Medicaid assistance programs and other State programs.

36. As a result, Wisconsin’s drug reimbursement system has been, and remains, almost completely dependent on defendants’ reported wholesale prices. Defendants know this fact and rely on it to make their AWP scheme work.

37. Defendants have illegally misrepresented the true AWP for virtually all of their drugs. One purpose of this scheme was and is to create the spread between the true wholesale price of a drug and the false and inflated AWP and thereby increase the incentive for providers to choose the drug for their patients, or, at a minimum, to counteract the same tactic used by a competitor, since if competing manufacturers are also publishing false and inflated AWP’s for their drugs, a given defendant will be at a competitive disadvantage unless it does the same for its own drugs.

38. The higher the spread between the AWP and the wholesale price the provider actually pays, the more profit a provider can make. Defendants often market their products by pointing out (explicitly and implicitly) that their drug’s spread is higher than a competing drug’s.

This scheme violates myriad Wisconsin statutes. For example, Wis. Stat. § 100.18(10)(b) states: “It is deceptive to represent the price of any merchandise as a manufacturer’s or wholesaler’s price, or a price equal thereto, unless the price is not more than the price which retailers regularly pay for merchandise.” Contrary to this statutory command, the AstraZeneca Defendants’ published wholesale prices are consistently and significantly greater than the price retailers pay for their drugs.

Further, the Public Assistance code prohibits the AstraZeneca Defendants from knowingly making, or causing to make “any false statement or representation of a material fact for use in determining rights to a benefit or payment.” Wis. Stat. § 49.49(4m)(a)(2). The AstraZeneca Defendants’ publication of phony wholesale prices, knowing that Wisconsin will use them in determining its reimbursement to providers, is a direct violation of this statute.

Wisconsin’s law is consistent with other jurisdictions. Pricing deceptions are material as a matter of law. “[A]ny representations concerning the price of a product or service are presumptively material.” *FTC v. Windward Marketing Ltd.*, 1997 WL 33642380, \*9 (N.D. Ga. 1997). *See also Sullivan’s Wholesale Drug Co. v. Faryl’s Pharmacy, Inc.*, 214 Ill. App.3d 1073, 1086 (1991) (“There can be no dispute that the representation made by the defendants went to a material fact, *i.e.*, the price which the nursing home residents were being charged for their prescriptions.”).

Because of the materiality of price to purchasers, it has been the law for well over 40 years that it is unlawful to publish a price of any kind, no matter what it is called—manufacturer’s list, list, regular or wholesale—where that price does not truly represent a price at which significant sales are made.

As the U.S. Supreme Court said in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965): “It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price, even if the offered price represents the actual value of the product and the purchaser is receiving his money’s worth.” *See also Idaho v. Master Distributors*, 101 Idaho 447, 454 (1980); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337 (1960). Phony wholesale prices are subsumed in this general rule. *See Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253 (2d Cir. 1968).

In sum, it is unlawful for a company to publish a price for a product—whether it is called a suggested list price, a manufacturer’s price or a wholesale price—where that price does not represent a price at which the product is actually sold. (The one exception to this principle is the automobile industry which is exempt by federal statute.) The AstraZeneca Defendants’ conduct in this case clearly runs afoul of this prohibition. Indeed, as discovery will make clear the AstraZeneca Defendants do not (and cannot) dispute the complaint’s representations about their conduct. Their only defense is that Wisconsin knew, or should have known, that they were publishing fraudulent prices, and that, as a consequence, Wisconsin was required to restructure its Medicaid program to account for their fraudulent practices (and to determine the actual prices despite the AstraZeneca Defendants’ best efforts to obscure them)—rather than the AstraZeneca Defendants being required to fulfill their duty to truthfully report their prices. As Wisconsin will show at the proper juncture, this defense is both factually incorrect and unavailable to the AstraZeneca Defendants against Wisconsin as a matter of law. *See, e.g., FTC v. The Crescent Publishing Group, Inc.*, 129 F.Supp. 2d 311 (S.D.N.Y. 2001).

### **Background of Discovery Dispute**

The AstraZeneca Defendants have sought to stall discovery from the beginning. First, they sought to delay any discovery until their motion to dismiss was decided, see Ex. 5 (Schau June 30, 2005 letter), even though their motion has virtually no chance of prevailing—there have been 15 separate decisions on the same or similar motions from a wide spectrum of federal and state courts all of which have rejected defendants’ arguments. Further, a previous stay on discovery expired when a temporary protective order was entered. See Section I.B.2, *infra*. At the same time, the Court urged Wisconsin to identify those drugs which were most important to its case. (The complaint alleges, and Wisconsin will prove, that all of defendants’ drugs were marketed through their phony pricing scheme.) Wisconsin followed the Court’s direction and limited its list of drugs to those in which Wisconsin had spent more than \$100,000 with certain exceptions not here relevant (hereinafter referred to as “Targeted Drugs”). Wisconsin then served each defendant with a list of these drugs. See Ex. 6 (AstraZeneca Targeted drug list). The AstraZeneca Defendants have 32 Targeted Drugs.

Wisconsin then served discovery on the AstraZeneca Defendants seeking information about these drugs. See Exs. 1, 2 (with AstraZeneca Defendants’ responses, Exs. 3, 4). As we show more specifically below, despite a series of “meet and confers” (see Exs. 7-13) the AstraZeneca Defendants have refused to answer virtually all of Wisconsin’s interrogatories and where they expressed their intention of producing documents, they did so by simply pointing Wisconsin to a pile of over 400,000 documents filed in another case in federal court in Massachusetts, few of which are responsive to Wisconsin’s very specific requests—responses to which would not likely fill one box. The AstraZeneca Defendants’ response is wholly inadequate.

## Argument

Wisconsin's discovery requests are designed to allow Wisconsin to establish the actual prices at which that the AstraZeneca Defendants' drugs were sold, the AstraZeneca Defendants' knowledge that the AWP's they caused to be published had no relation to the actual prices, and that the AstraZeneca Defendants knowingly used the spread between the actual prices and the AWP's to attempt to increase their market share.

Under Wisconsin law,<sup>1</sup> the AstraZeneca Defendants' responses to Wisconsin's discovery requests and their offers of further production are wholly inadequate. To date, they have only partially answered one interrogatory, and then in regard to only one drug. The AstraZeneca Defendants should be compelled to respond to every interrogatory and document request with regard to all drugs at issue, and should not be allowed to dump non-responsive documents on Wisconsin and force Wisconsin to rummage through hundreds of thousands of documents in the hope that it may find some responsive documents.

### I. Wisconsin's Interrogatories

#### A. Wisconsin's Interrogatories are Highly Relevant and Narrowly Tailored

Wisconsin's first set of interrogatories numbers only five. The first interrogatory asks whether the AstraZeneca Defendants ever determined an "average sales price" or similar prices for any of their Targeted Drugs. The actual sales price of many drugs is often reduced through

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<sup>1</sup> The Wisconsin Supreme Court has stated that where there is no Wisconsin law on a civil procedure issue, courts can look to federal law construing the procedural counterparts to the Wisconsin statutes as persuasive authority. *Wilson v. Continental Ins. Cos.*, 87 Wis.2d 310, 316, 274 N.W.2d 679, 682 (Wis. 1979) ("This court takes the position that federal decisions construing the procedural counterparts to the Wisconsin Rules of Civil Procedure are persuasive, but are not controlling."); *Meunier v. Ogurek*, 140 Wis.2d 782, 788, 412 N.W.2d 155, 157 (Wis. App. 1987) (citations omitted) ("Wisconsin's discovery rule is substantially identical to Fed.R.Civ.P. 26. Federal decisions construing the procedural counterparts to Wisconsin rules of civil procedure are persuasive.")

use of rebates or chargebacks which flow through the wholesalers the AstraZeneca Defendants use to sell and deliver their drugs. See Ex. 14, ¶48 (Complaint). Some pharmaceutical companies calculate “average sales prices” for their drugs, which are essentially composite prices net of rebates and chargebacks. Stripping away these sales reductions approximates the *actual* prices of drugs. Thus, the purpose of this interrogatory is to determine an “actual” price at which AstraZeneca drugs are sold and to show that the AstraZeneca Defendants knew that the actual price at which its drugs were sold by wholesalers was well below the price that the AstraZeneca Defendants were reporting to the medical compendiums. Moreover, under federal law Wisconsin was supposed to pay no more than the acquisition cost of the drugs by providers. Thus, the actual price of the drugs is also relevant to Wisconsin’s damage claim.

The second interrogatory asks the AstraZeneca Defendants to identify each electronic database that contains a price for one of the 32 targeted drugs, and five specific features of each database. The purpose of requesting the identification of, and information regarding, electronic databases and files that contain pricing information is simple—to allow Wisconsin’s computer experts to effectively and efficiently access pricing information, which as explained above, is highly relevant to establishing the actual prices of AstraZeneca Defendants’ drugs. A request for information that facilitates obtaining relevant information should be answered as a matter of course.

The third interrogatory asks for the identity of each type of incentive the AstraZeneca Defendants have offered in conjunction with the purchase of any Targeted Drug. “Incentives” is defined in detail in the discovery requests, see Ex. 1, at 2; Ex. 2, at 2, and includes anything of value provided to a customer which would lower the consideration paid for a drug. Obviously, one must strip away incentives from the published price in order to obtain an actual price, and

thus the incentives are highly relevant to Wisconsin's case. AstraZeneca has already plead guilty to a large scale federal indictment relating to its distribution of free samples of the drug Zoladex knowing and expecting that providers would seek reimbursement from state Medicaid programs for these free drugs. See Ex. 15. The distribution of free samples, or the granting of other such incentives, effectively lowers the price at which AstraZeneca's drugs actually sell.

The fourth interrogatory asks the AstraZeneca Defendants to describe in detail how they determined each price they used in the ordinary course of business for each Targeted Drug and to identify the person most knowledgeable thereof. The purpose of this interrogatory is to establish the AstraZeneca Defendants knowledge of their actual prices and to identify company officials who can give testimony on this issue.

Finally, the fifth interrogatory asks whether the AstraZeneca Defendants have ever included in their marketing of a Targeted Drug reference to the difference (or spread) between a published price and the list or actual price, including four specific categories of information. The purpose of this interrogatory is obvious—it is one way to establish that the AstraZeneca Defendants had full knowledge of the spread between the actual wholesale price and the wholesale price they reported and its impact in the market place.

B. The AstraZeneca Defendants' Responses to the Interrogatories Are Inadequate

The AstraZeneca Defendants respond to these interrogatories in three ways.<sup>2</sup> They make unsupported boilerplate objections; they announce their intention of limiting their responses to

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<sup>2</sup> The AstraZeneca Defendants answer the first interrogatory with regard to Zoladex, but even that answer is incomplete. The AstraZeneca Defendants state they have reported an "ASP" to the Wisconsin Medicaid Program and an ASP pursuant to the Medicare Modernization Act ("MMA"). However, they failed to provide, as the interrogatory directs, the ASP that was determined pursuant to the Medicare Modernization Act, the person(s) most knowledgeable regarding the either ASP determination, the methodology used to determine such prices, whether

just one drug; and they announce that they intend to produce a mass of documents from another litigation to respond to the interrogatories—in essence, make a document dump. None of these responses is acceptable under Wisconsin law and the previous holdings of this Court.

1. Defendants' Objections to the Interrogatories Are Untimely, Incorrect, and Unsupported

In response to each interrogatory, the AstraZeneca Defendants make only boilerplate objections—“not relevant, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence”—along with objecting to every definition (and most terms) as vague and ambiguous. These objections are untimely, incorrect, and unsupported.

First, the AstraZeneca Defendants' objections to the discovery requests are untimely. The discovery requests were issued on January 27, 2005. Even under a generous view of discovery procedures, the AstraZeneca Defendants' responses were overdue as of June 12, 2005, which was 30 days after the Court signed the temporary qualified protective order. Ex. 9 (Libman June 23, 2005 letter) Defendants did not respond and make their objections until July 15, 2005. Thus, the AstraZeneca Defendants failed to object in a timely manner, and their objections are waived. *See In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989) (“[W]hen a party fails to object timely to interrogatories, production requests, or other discovery efforts, objections thereto are waived.”); *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 617 (5th Cir. 1977); *Dorrough v. Mullikin*, 563 F.2d 187, 191 (5th Cir. 1977) (“Failure to object waives any available objection and the interrogatory must be answered fully.”); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (“It is well established that a failure to

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they disclosed the ASPs to a publisher, customer, or other governmental agency, and whether the ASPs were treated as confidential or commercially sensitive financial information.

object to discovery requests within the time required [to respond to the requests] constitutes a waiver of any objection.”); *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991) (“If the responding party fails to make a timely objection, or fails to state the reason for an objection, he may be held to have waived any or all of his objections”).

Further, the AstraZeneca Defendants have offered no factual support for their objections, and as such the objections should be disregarded.

[The defendant] has objected to nearly all of plaintiffs’ discovery requests by stating that the requests are overbroad, vague, ambiguous and unduly burdensome. However, these objections are not sufficiently specific to allow the court to ascertain the claimed objectionable character of the discovery request. This type of general objection is not a sufficient response to a motion to compel. Unless it is obvious from the wording of the request (as is the case with plaintiffs’ Interrogatory 15 ...), an objection that discovery is overly broad and unduly burdensome must be supported by affidavits or offering evidence revealing the nature of the burden and why the discovery is objectionable.

*Wagner v. Dryvit Systems, Inc.* 208 F.R.D. 606, 610 (D. Neb. 2001).

Finally, even if they had objected timely, the AstraZeneca Defendants’ are simply incorrect. As explained above, the Wisconsin’s interrogatories are highly relevant to the case and narrowly tailored. The AstraZeneca Defendants should be ordered to respond to all interrogatories in full.

2. The AstraZeneca Defendants Should Be Compelled to Respond to the Interrogatories with Respect to All Targeted Drugs

In their responses to the interrogatories, where the AstraZeneca Defendants have indicated that they intend to answer, they have stated that they intend to limit their answer to just one drug—Zoladex. Their refusal to provide discovery responses regarding Wisconsin’s complete list of Targeted Drugs (after Wisconsin narrowed the list at the urging of the Court) is improper and unsupported. (Indeed, it is disingenuous. AstraZeneca recently served discovery on Wisconsin for the information Wisconsin possesses on all AstraZeneca’s Targeted Drugs.)

In effect, the AstraZeneca Defendants are re-arguing their March 23, 2005 motion for a stay of discovery pending resolution of the defendants' motion to dismiss, which argued, among other things, that Wisconsin must identify with specificity each drug at issue. The State opposed that motion. In response to defendants' motion, the Court ordered that discovery was stayed "until May 11, 2005, or until further order of the Court." See Ex. 16 (April 12, 2005 Order). The Court also urged the parties to jointly draft a proposed protective order to be reviewed by the Court on May 11, 2005, and urged Wisconsin to further narrow the list of drugs for the first round of discovery. The parties subsequently agreed on a Temporary Qualified Protective Order, which was entered by the Court on May 11, 2005. At the hearing, the defendants informed the Court and Wisconsin that discovery responses would begin to flow. The Court was not asked by defendants then, or at any subsequent time, to enter any further order staying discovery.

In narrowing the drugs for the first round of discovery, Wisconsin has done precisely what the Court encouraged it to do. The AstraZeneca Defendants, by contrast, are stonewalling and recalcitrant. They should be ordered to respond to Wisconsin's discovery requests with regard to *all* drugs identified in Wisconsin's narrowed list of 32 Targeted Drugs.

3. Document Dumps Are Not Allowed in Response to Interrogatories

In response to the fourth and fifth interrogatories, the AstraZeneca Defendants announce their intention of producing a mass of documents from other litigation to respond to the interrogatories:

AstraZeneca refers to the Zoladex documents which were produced in the Multidistrict Litigation *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, No. 01 CV 12257 (PBS) (D. Mass.), which it intends to produce in this matter.

Ex. 3, at 9-10. As the AstraZeneca Defendants explain in a letter subsequent to their response, the "Zoladex documents" consist of 440,000 pages, which *include* documents responsive to

Wisconsin's requests. The AstraZeneca Defendants do not offer to go through the production to find responsive documents, but only to limit the documents to those that matched a "key word search." Ex. 11 (Prinzo October 20, 2005 letter). This is simply unacceptable.

The law on production of documents in response to interrogatories is clear in Wisconsin, and can only be used in limited circumstances that do not apply here. Wisconsin Statute 804.08 governs interrogatories. Section 3 of this provision directs that the responding party can produce business documents in response to interrogatories under limited circumstances:

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, *and* the burden of deriving or ascertaining the answer is *substantially the same for the party serving the interrogatory as for the party served*, it is a sufficient answer to such interrogatory to *specify the records* from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Wis. Stat. 804.08 (3) (emphasis added). Thus, it is only proper to respond to an interrogatory by producing business records when the burden of deriving the answer is "substantially the same for the party serving the interrogatory as for the party served." *Id.* However, the AstraZeneca Defendants have made no showing that would support such production.

Further, the responding party must *specify* the records from which the answer may be derived. *Id.* Referring Wisconsin to a massive set of documents that contains a mixture of responsive and non-responsive documents obviously does not fulfill their obligation under the statute to specify the records from which the answer may be derived. Thus, under the plain language of the statute, it is clear that the AstraZeneca Defendants' response in referring Wisconsin to a "mass of records" responsive to *other litigation* is improper.

The Wisconsin Judicial Council Committee's Note, 1974 (citing the Advisory Committee's note to 1970 Amendments of F.R.C.P. 33, the federal equivalent) states the imposition of a "mass of records" is not responsive:

The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. Thus, a respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records.

Additionally, federal courts have consistently held that producing a mass of documents is not responsive to an interrogatory, and that the responding party must adequately and precisely specify for each interrogatory, the actual documents where information will be found:

The producing party must satisfy a number of factors in order to meet its justification burden [under Rule 33(d)]. First, it must show that a review of the documents will actually reveal answers to the interrogatories. 8A [Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2178, at 330 (2d ed. 1994)]. In other words, the producing party must show that the named documents contain all of the information requested by the interrogatories. *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 564 (D.Kan. 1997). Crucial to this inquiry is that the producing party have adequately and precisely specified for each interrogatory, the actual documents where information will be found. 8A Wright, *supra*, § 2178, at 336. Document dumps or vague references to documents do not suffice. *Capacchione v. Charlotte-Mecklenburg Schools*, 182 F.R.D. 486 (W.D.N.C.1998) (200 boxes); *In re Bilzerian*, 190 B.R. 964 (Bankr. M.D.Fla.1995) (28 boxes). Depending on the number of documents and the number of interrogatories, indices may be required. *O'Connor v. Boeing North American, Inc.*, 185 F.R.D. 272, 278 (C.D.Cal. 1999).

*U.S. S.E.C. v. Elfindepan, S.A.*, 206 F.R.D. 574, 576-77 (M.D.N.C. 2002).

Under Rule 33[(d)], when a response to an interrogatory may be derived from business records and when the burden of deriving the answer from the records is substantially the same for both sides, the production of these records sufficiently answers the interrogatory. Fed.R.Civ.P. 33[(d)]. However, a party that knows or has access to an interrogatory answer may not use Rule 33[(d)] to avoid furnishing a responsive interrogatory answer where, as here, the answer cannot be ascertained from the documents. In this case the district court concluded that the plaintiffs failed to label or organize the heap of nearly 9,000 documents produced in a manner that disclosed [the requested information]. The district court also concluded that this information is not apparent from the face of the documents.

This means that the plaintiffs had exclusive access to this information, and, as such, Rule 33[(d)] does not excuse plaintiffs' failure to provide this requested information.

*Govas v. Chalmers*, 965 F.2d 298, 302 (7th Cir. 1992).

See also *In re G-I Holdings Inc.*, 218 F.R.D. 428, 438-39 (D.N.J. 2003) (production of 60 boxes of documents that failed to specify, by category and location, which documents in the boxes were responsive to each interrogatory was deficient).

Offering Wisconsin the option of performing a "key word search" of its choosing to limit the production of documents is also unacceptable. In essence, the AstraZeneca Defendants are telling Wisconsin to choose a group of words, and if documents (whether relevant or not) match those words, they will be produced. Conversely, if relevant documents exist, but do not happen to contain the "key words," then those relevant documents would remain hidden. There is no reason Wisconsin should be forced to participate in Russian roulette discovery when its requests are highly relevant and narrowly tailored. (This is not a fishing expedition for marginally relevant information.) It is the duty of the AstraZeneca Defendants, not Wisconsin, to determine which information and documents are responsive and to certify that all such information and documents have been produced:

It would be antipathetic to the spirit of the discovery rules to assume that the newly added [option to produce business records] was intended to diminish the duty of the parties to provide all information requested. Since a respondent is required to answer proper interrogatories, it is not plausible to assume that a response that an answer may (or may not) be found in its records, accompanied by an offer to permit their inspection is sufficient. This is little more than an offer to play the discredited game of blindman's buff at the threshold level of discovery.  
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I conclude that the option afforded by Rule 33[(d)] is not a procedural device for avoiding the duty to give information. It does not shift to the interrogating party the obligation to find out *whether* sought after information is ascertainable from the files tendered, but only permits a shift of the burden to dig it out once the respondents have specified the records from 'where the answer' can be derived or

ascertained. If the answers lie in the records of the defendants, they should say so; and, if, on the other side, they do not, they should say that.

*In re Master Key*, 53 F.R.D. 87, 90 (D. Conn. 1971).

Finally, specifically in regard to the fourth interrogatory, which asks the AstraZeneca Defendants to describe how they determined each price they used in the ordinary course of business and to identify the person most knowledgeable thereof, a reference to documents (even designated documents) is highly unlikely to be a sufficient answer. The process the AstraZeneca Defendants use to determine their prices is readily available to the AstraZeneca Defendants, and the question should be answered in full, and not by a reference to documents. *See Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221, 226 (10th Cir. 1976) (“if an answer is readily available in a more convenient form, [the option to produce business records] should not be used to avoid giving the ready information to a serving party”); *Budget Rent-A-Car of Mo., Inc. v. Hertz Corp.*, 55 F.R.D. 354, 358 (W.D. Mo.1972); *Atlanta Fixture & Sales Co. v. Bituminous Fire & Marine Ins. Co.*, 51 F.R.D. 311, 312 (N.D. Ga. 1970) (Plaintiff’s use of business documents option implied that the proffered records were the only source for the requested information. Court warns that if it later appears that plaintiff does, in fact, have available responsive information in a more convenient form that would justify sanctions).

Because the document dumps that the AstraZeneca Defendants propose to make are not proper, the AstraZeneca Defendants should be compelled to answer the fourth and fifth interrogatories in a full and proper manner.

## II. Wisconsin’s Document Requests

### A. Wisconsin’s Document Requests are Relevant and Narrowly Tailored

Wisconsin’s first set of requests for document production numbers only six. The first two document requests (which are addressed here together) ask for all national sales data and for

Average Manufacturer Price (AMP) data for each Targeted Drug during the defined time period. Pursuant to 42 U.S.C. 8 §1396r-8, pharmaceuticals that participate in state Medicaid programs must submit to the federal government their AMPs for all participating drugs, and these prices are supposed to reflect what wholesalers actually pay the manufacturers for their drugs. (The AMPs are used by the federal government to calculate rebates for state Medicaid programs.) The purpose of requesting the national sales data and AMPs is to establish the *actual* prices at which AstraZeneca drugs are sold and to show that the AstraZeneca Defendants knew that the actual prices at which its drugs were sold by wholesalers was well below the prices that the AstraZeneca Defendants were reporting to the medical compendiums.

The third document request asks for documents that comment on the difference (or spread) between any reported average wholesale price and the actual wholesale price of any of the AstraZeneca Defendants' Targeted Drugs or other manufacturers' drugs. As with the fifth interrogatory, the purpose of this request is to establish that the AstraZeneca Defendants had full knowledge of the spread between the actual wholesale price and the wholesale price they reported and its impact in the market place.

The fourth document request asks for all documents containing an average sales price or composite price identified by the AstraZeneca Defendants in response to the first interrogatory. The purpose of this request is to determine how the AstraZeneca Defendants used the average sales price or other composite prices, which are discussed above in relation to the first interrogatory.

The fifth document request asks for documents sent to or received from the three main compendiums in which drug prices are disseminated to the public regarding the price of any Targeted Drug. The purpose of this request is to establish the AstraZeneca Defendants'

participation in posting the published prices upon which Wisconsin relies and providers are reimbursed.

The sixth document request asks for documents prepared by IMS Health regarding a Targeted Drug or competitor's drug regarding pricing, sales or market share. IMS Health is a data warehouse and information provider for the pharmaceutical and healthcare industry. Answers to the sixth document request will show with regard to the Targeted Drugs the prices actually paid, Defendants' market share, and competitors' prices, all establishing the AstraZeneca Defendants' knowledge that the Targeted Drugs were not sold at prices even remotely close to the published AWP's.

B. The AstraZeneca Defendants' Responses to the Document Requests Are Inadequate

Defendants respond to these documents requests in essentially the same way that they respond to the interrogatories: They make unsupported boilerplate objections; they announce their intention of limiting their responses to less than the full list of drugs and of producing two masses of documents from other litigation. As with the responses to the interrogatories, these responses are acceptable.

1. Defendants' Objections to the Document Requests are Untimely, Incorrect, and Unsupported

The untimely, boilerplate objections made in response to the document requests are improper for the same reasons as those made in response to the interrogatories. See Section I.B.1, *supra*. The AstraZeneca Defendants should be ordered to produce documents in response to all document requests in full.

2. The AstraZeneca Defendants Should Be Compelled to Respond to the Document Requests with Respect to All Targeted Drugs

The AstraZeneca Defendants respond to the document requests by indicating that they will reply (to an unknown extent) with respect to either just Zoladex or to 15 of the 32 Targeted Drugs. The AstraZeneca Defendants indicate, in correspondence made subsequent to the AstraZeneca Defendants' responses, that they will supplement their responses to the first two interrogatories, which requested national sales data and AMPs (see discussion above regarding first two interrogatories), but for only 15 of the 32 Targeted Drugs, and then only to the extent that it was produced in the AWP MDL. Further, the AstraZeneca Defendants state in addition to the Zoladex set of documents, they will produce an unknown quantity of documents comprising "all documents produced in the AWP MDL from the files of the AstraZeneca's pricing strategy group ...." with regard to the 15 MDL drugs. Ex. 13 (Prinzo October 31, 2005 letter). It is unknown to which requests the AstraZeneca Defendants contend the "pricing strategy group" documents are responsive.

The only asserted justification for this limitation is that production with regard to 15 drugs "is sufficient information to allow the state to evaluate the merit of its claims." *Id.* at 1-2. First, nothing in the rules of discovery requires Wisconsin to litigate its case in this piecemeal fashion. And in any event, Wisconsin has already evaluated the merit of its claims, as it was required to do before it filed its complaint. Second, as discussed above in Section I.B.2, *supra*, limiting discovery to less than the full list of Targeted Drugs is contrary to Wisconsin discovery practice and the Court's holdings in this case.

In any case, no data whatsoever has yet been produced. The State is entitled to discovery on *all* of the 32 Targeted Drugs. The AstraZeneca Defendants should be compelled to produce all such data with respect to all 32 drugs.

### 3. Document Dumps Are Not Allowed in Response to Document Requests

In response to the last four document requests, the AstraZeneca Defendants offer *two* document dumps. First the AstraZeneca Defendants state that they will produce the mass of Zoladex documents mentioned above:

AstraZeneca will produce the documents relating to Zoladex that were produced in the Multidistrict Litigation *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, No. 01 CV 12257 (PBS) (D. Mass.).

Ex. 4, at 8-10. As mentioned in the preceding section, they supplement their response by stating that they will produce an unknown quantity of documents comprising “all documents produced in the AWP MDL from the files of the AstraZeneca’s pricing strategy group ....” Ex. 13 (Prinzo October 31, 2005 letter). Defendants further state simply that “[d]ocuments responsive to [Wisconsin’s] requests are contained within these produced files. . . .” *Id.*

A mixture of responsive and non-responsive documents is no more appropriate in response to document requests than it is in response to interrogatories, see Section I.B.3, *supra*, and is not proper under Wisconsin law. Wisconsin Statute 804.09 governs requests for the production of documents:

(1) Scope. Any party may serve on any other party a request (a) to produce and permit the party making the request, or someone acting on the party’s behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of s. 804.01(2) and which are in the possession, custody or control of the party upon whom the request is served; or (b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation therein, within the scope of s. 804.01(2).

W.S.A. 804.09(1). The statute states that any “party may serve ... a request [] to produce and permit the party making the request ... to inspect and copy, any *designated* documents ....”

*Id.* (emphasis added). Thus, the production should include only designated documents, not a mixture of responsive and non-responsive.

Further, document dumping is contrary to the general discovery principles in Wisconsin law. For example, the Rules of Professional Conduct for Attorneys, Supreme Court Rule 20:3.4, Fairness to Opposing Party and Counsel, states that a “lawyer shall not [] unlawfully *obstruct* another party’s access to evidence or unlawfully alter, destroy or *conceal* a document or other material having potential evidentiary value.” SCR 20:3.4 (emphasis added). Additionally, the Standards of Courtesy and Decorum state that lawyers should “[a]bstain from pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay,” and “[i]f an adversary is entitled to ... documents, provide them to the adversary without unnecessary formalities.” SCR 62.02 (c) & (d). These rules have teeth. *See Geneva Nat. Community Ass’n, Inc. v. Friedman*, 228 Wis.2d 572, 583-85, 598 N.W.2d 600, 606 (Wis. App. 1999) (a violation of the Standards of Courtesy and Decorum can “carry serious consequences to the merits of a given case.”); *See also Aspen Services, Inc. v. IT Corp.*, 220 Wis.2d 491, 497, 583 N.W.2d 849, 852 (Wis. App. 1998) (“[Aspen] is mistaken in its belief that the Rules in SCR 62 and SCR 20 cannot be the basis for imposing a sanction for incivility during litigation.”).

Finally, “the presumption is that the responding party must bear the expense of complying with discovery requests ....” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). Dumping documents in response to a discovery request and forcing the requesting party to sort through documents in search of responsive material constitutes an improper shifting of the expense of complying with the discovery request from the responding party to the requesting party:

The defendant has in essence told the plaintiff that, if he wishes, he may hunt through all its documents and find the information for himself. “This amounts to

nothing more than a gigantic ‘do it yourself’ kit.” See *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459 (S.D.N.Y.1974), quoting *Life Music, Inc. v. Broadcast Music, Inc.*, 41 F.R.D. 16 (S.D.N.Y.1966). This Court will not shift the financial burden of discovery onto the discovering party, in this case an indigent plaintiff, where the costliness of the discovery procedure involved is entirely a product of the defendant’s self-serving indexing scheme over which the plaintiff has no control.

*Kozlowski v. Sears, Roebuck & Co.* 73 F.R.D. 73, 76-77 (D.C. Mass. 1976). See also *In re Sulfuric Acid Antitrust Litig.*, 2005 WL 2403328 (N.D. Ill. Sep 27, 2005) (citations omitted) (“The [ ] defendants are not at liberty under federal discovery rules to dump massive amounts of documents, which the defendants concede have ‘no logical order to them,’ on their adversaries and demand that they try to find what they are looking for.”); *Rothman v. Emory University*, 123 F.3d 446, 455 (7th Cir. 1997) (production of three large storage boxes, papers, and numerous other unrelated, non-responsive materials in response to court-ordered production was sanctionable); *Transportes Aereos De Angola v. Ronair, Inc.*, 104 F.R.D. 482, 499 (D. Del. 1985) (“The court will not permit defendants to shift the burden of discovery by telling ‘plaintiff that, if he wishes, he may hunt through all the documents and find the information for himself.’”).

The AstraZeneca Defendants should be compelled to respond fully and properly to all document requests.

### III. The State Should Be Awarded its Fees and Costs of Bringing This Motion

If Wisconsin is successful in this Motion, it requests that this Court award it the reasonable expenses incurred in bringing this Motion, including attorneys’ fees. Wis. Stat. § 804.12 (1)(c) (“[i]f the motion is granted, the court shall, after opportunity for hearing, require the party ... whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the

opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.”). Wisconsin also requests an award of the fees of the Special Discovery Master (SDM) pursuant to the authority granted the SDM in para. 2(a) of the Court’s Order of June 23, 2005.

**Conclusion**

For the foregoing reasons, Wisconsin respectfully asks this Court to compel full responses to their discovery requests and to award Wisconsin the costs and fees associated with bringing this motion.

Dated this 23<sup>rd</sup> day of November, 2005.

  
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