

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
AMGEN INC., et al.,)	
)	
Defendants.)	
)	

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of State of Wisconsin's Memorandum in Opposition To Sandoz's Motion For Protective Order and In Support of Plaintiff's Cross-Motion to Compel Production of Documents and Answers to Interrogatories and **Filed under seal** the Affidavit of Robert S. Libman with attached exhibits to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20th, 2005.

I also certify that I caused a true and correct copy of these documents to be delivered via e-mail and U.S. Mail upon the Honorable William F. Eich, weich@charter.net, 840 Farwell Drive, Madison WI 53704.

Dated this 19th day of May, 2006.



 Charles Barnhill

Moreover, Sandoz has recently advised the State that in light of Judge Krueger's April 3, 2006 Order directing the State to file a second amended complaint, it will not produce any additional documents nor substantively answer the State's interrogatories at least until the State does so, and likely much longer. Moreover, Sandoz has suspended its search and review of documents for future production. As of today, Sandoz has not substantively answered any of the State's interrogatories nor produced many of the key documents which the State has requested. Accordingly, the State cross-moves to compel interrogatory answers and production of documents.

In Section I of this brief, we describe the factual background of this dispute. In Section II, we demonstrate that Sandoz is not entitled to a protective order regarding the State's properly noticed deposition. In Section III, we show that Sandoz is not entitled to the stay that it seeks with respect to the State's written discovery requests and should be compelled to answer the State's interrogatories and produce documents.

I. BACKGROUND OF DISPUTE¹

Sandoz was served with the State's first set of interrogatories and first set of requests for production of documents on or about May 6, 2005. As the Discovery Master knows, this discovery consisted of five interrogatories and six document requests and were limited to the core information relating to the State's claims: the prices Sandoz charged for its drugs, the inflated prices Sandoz reported to the medical compendia, Sandoz's knowledge of what it was doing (including documents relating to the "spread" between acquisition cost and reimbursement), and the manner in which Sandoz kept the true prices of its drugs secret. The

¹ The facts and information presented in this Section are supported by the attached affidavit of Robert S. Libman ("Libman Affidavit"), and exhibits thereto, which are being filed under seal because they include, and make reference to, certain documents that have been designated as confidential by Sandoz pursuant to the Court's protective order.

Discovery Master has already found that these requests seek relevant information. *See* January 31, 2006 Decision & Report of Discovery Master regarding Plaintiff's Motion to Compel against the AstraZeneca Defendants, at 8-9.

Sandoz's discovery responses, served on July 15, 2005, were in fact non-responses, consisting entirely of objections. Sandoz did not substantively respond to a single interrogatory nor state that it intended to produce a single responsive document. On the same day it served its "responses," Sandoz (along with the other defendants) removed this case to federal court (for the second time). The State promptly filed a motion to remand. Because one of the State's arguments in support of remand was procedural (the removal was untimely), the State was powerless to compel discovery or otherwise advance the litigation without running the risk of consenting to federal jurisdiction.

On September 29, 2005, Judge Crabb of the United States District Court for the Western District of Wisconsin granted the State's motion to remand (and ordered defendants to pay the State's attorneys' fees and costs). The State promptly wrote to Sandoz advising that its discovery responses were inadequate, summarizing the parties' previous attempts to "meet and confer," and stating that it intended to file a motion to compel. The State subsequently filed such a motion. This had the desired effect, as Sandoz shortly thereafter agreed to begin production of documents and to supplement its interrogatory answers. More specifically, by letter dated October 18, 2005, Sandoz agreed to begin rolling production of documents within four weeks and estimated that the production would be substantially complete within the following ten to twelve weeks. In addition, Sandoz agreed to supplement its interrogatory answers in two to three weeks. As a result of this agreement, the State withdrew its motion to compel without prejudice to re-file or file a new motion in the future if necessary.

On November 8, 2005, the State served on Sandoz its third set of requests for production of documents. This consisted of four specific requests, only three of which pertained to Sandoz: policies or practices regarding the disclosures that providers or pharmacy benefit managers can make of drug pricing information provided by Sandoz or wholesalers; exemplar agreements between Sandoz and providers or PBMs regarding such policies or practices; and sworn statements or deposition testimony of current or former employees relating to claims or investigations pertaining to false reporting of AWP or WAC. The State sought the first two categories of information in order to establish Sandoz's policy and practice of keeping secret the true prices of its drugs. On January 9, 2006, Sandoz interposed numerous boilerplate objections but agreed to produce responsive documents.² However, no such documents have been produced.

The State has repeatedly asked Sandoz to provide a date by which it will serve supplemental interrogatory answers. Although Sandoz has consistently responded that it intends to do so, as of this date, it has not. This is particularly troubling given that some of the documents produced by Sandoz and documents obtained by the State through other means indicate that Sandoz knows and can easily answer the interrogatories.

For example, Interrogatory No. 1 asks whether Sandoz has ever determined "an average sales price or other composite price net of any or all Incentives" for its drugs and, if so, to provide additional information requested in the subparts to the interrogatory. Among the documents produced by Sandoz are documents entitled "2004 YTD-Sales by Product" and "YTD Sales by Product by Customer through September 2004," which identify for numerous Sandoz drugs the "ASP," calculated as "Net Sales" divided by the "Quantity." *See* Exhibits 13 and 14 to

² Sandoz stated that it had no documents responsive to the State's request for sworn statements or deposition testimony.

the Libman Affidavit. ASP clearly stands for “average sales price.” Other documents produced by Sandoz identify for numerous Sandoz drugs a “6 Mth Rolling Avg Price” and a “3-month Average Price.” *See* Exhibits 15 and 16 to the Libman Affidavit. In addition, the State has obtained through other means a document entitled “WAC to Avg Contract Price Comparison, Geneva³ Pharmaceuticals Price List, Updated January 23, 2003,” which also identifies the “3-month Average Price” for numerous drugs. *See* Exhibit 17 to the Libman Affidavit. These documents demonstrate that Sandoz has determined or calculated “an average sales price or other composite price net of any or all Incentives” within the meaning of Interrogatory No. 1. And the documents make clear that such calculations and determinations are done on a regular, periodic basis. Yet Sandoz has refused to admit this fact or provide any of the other information requested in Interrogatory No. 1.

The above documents are also responsive to the State’s Document Request No. 4, which seeks “all documents containing an average sales price or composite price identified by you in response to Interrogatory No. 1.” However, Sandoz has only produced a few of these types of documents. These documents are critical, because they demonstrate Sandoz’s knowledge that its WACs were significantly higher, and its AWP’s were grossly higher, than the true average prices of its drugs. For example, the drug Ranitidine (150mg) shows a 3 month average contract price

See Exhibit 17 to Libman Affidavit, p. 6.

The spread between the 3 month average contract price and AWP

Because the documents themselves suggest that they are regularly updated, the State has written to Sandoz requesting that it prioritize its production of documents and produce similar documents for all other time periods covered by the discovery requests. As of this date, Sandoz has not produced additional similar documents.

³ Geneva was the predecessor company to Sandoz.

The State's Interrogatory No. 5 asks whether Sandoz has ever included in its marketing of its drugs to any customer reference to the "spread." And the State's Document Request No. 3 asks for all documents that discuss or comment on the "spread." Although not produced to the State by Sandoz in this litigation, the State has obtained through other means a Sandoz document entitled "Meeting Brief for Albertsons, Meeting Date: April 5, 2001." *See* Exhibit 19 to the Libman Affidavit. This document appears to be notes of a meeting between Sandoz sales and marketing personnel and David Vucurevich, R.Ph., the Director of Pharmacy Procurement for Albertsons, which operates a national chain of pharmacies. Under the heading "Agreements reached," the document states that "David agreed to price increases if he can remain competitive, and the spread is maintained." (Emphasis added) Under the heading "Next Steps," the document states, "Supply David with AWP for the products with price increases for his review of the spread." (Emphasis added) Clearly, Sandoz is well aware of the spread and its importance to its customers. Yet Sandoz has neither responded to the interrogatory nor produced the above document or any other responsive documents.

On March 23, 2006, the State served a notice of deposition on Sandoz, requiring it to produce a corporate designee on May 10, 2006 to testify about six subject matters. Notwithstanding Sandoz's contention to the contrary, there was no agreement (formal, informal, or otherwise) that the State would defer any deposition until after written discovery had been completed. On April 14, 2006, Sandoz served written objections to the deposition notice. Among other things, Sandoz maintained that the notice did not describe the subject matters with reasonable particularity. However, the Discovery Master has already considered and rejected this argument in connection with its denial of Pfizer's motion for a protective order regarding the identical deposition notice. *See* January 31, 2005 Decision & Report of Discovery Master

regarding Pfizer's motion for protective order, at 5. Nevertheless, the State wrote to Sandoz on April 25, 2006, providing additional information regarding the types of information that the State intended to elicit at the deposition (the information was intended to be illustrative, not exhaustive, of the areas of inquiry).

On May 10, 2006, after it had filed the present motion, Sandoz advised the State that that in light of Judge Krueger's April 3, 2006 Order ("Order"), Sandoz did not intend to supplement its interrogatory answers or produce any additional documents or data at least until the State filed its second amended complaint, and possibly longer. Sandoz further advised that other issues, such as Judge Krueger's ruling on the remainder of defendants' motions to dismiss, and the possibility that Sandoz may file a dispositive motion with regard to the State's second amended complaint, may result in extending the date when Sandoz will resume its production of documents and data and supplement its interrogatory answers. When counsel for the State asked if Sandoz was stopping its search and review of documents in preparation for future production, counsel for Sandoz stated that he would prefer not to answer the question.

The State also asked for Sandoz's position regarding the location of the State's deposition of Sandoz in light of Sandoz's suggestion that the Discovery Master's ruling on Merck's motion for a protective order might not be applicable to Sandoz. Sandoz's counsel stated that Sandoz did not have a position, and could not take a position as to whether the Discovery Master's ruling is applicable to Sandoz because of what Sandoz believes is the lack of reasonable particularity of the deposition notice. The State advised Sandoz that its objections to the deposition notice should not be litigated piecemeal, and that any objection relating to the location of the deposition should be raised with the Discovery Master immediately.

On May 16, 2006, Sandoz confirmed that it does not intend to supplement its interrogatory answers or produce any additional documents or data at this time. In addition, Sandoz stated that it has suspended its review of documents and does not intend to resume it at least until its motion for protective order is resolved. Furthermore, Sandoz took the position that even if the Discovery Master's ruling on Merck's motion for protective order is affirmed by Judge Krueger, to whom it was recently appealed, Sandoz does not intend to produce its designee for deposition in Wisconsin.

II. SANDOZ'S MOTION FOR PROTECTIVE ORDER SHOULD BE DENIED

A. Burden of Proof

As the party seeking a protective order, Sandoz bears the burden of establishing "good cause." *Earl v. Gulf & Western Mfg. Co.*, 123 Wis.2d 200, 208 (Ct. App. 1985). Sandoz has not met its burden. As demonstrated below, none of the arguments advanced by Sandoz justifies the postponement of the deposition that it seeks.

B. Sandoz is Seeking an Indefinite Continuance of the Deposition

Initially, it is important to understand the extraordinary relief that Sandoz is seeking. Sandoz's assertion that it is requesting only a "short standstill," Memorandum in Support of Defendant Sandoz Inc.'s Motion for Protective Order ("Motion"), at 3, is disingenuous. Rather, Sandoz seeks to postpone the deposition at least until the beginning of 2007, and probably longer.

First, Sandoz explicitly asks for "an order staying the State's discovery until at least six weeks after Plaintiff files an amended complaint that successfully cures the deficiencies in the Amended Complaint and the Court renders its decision on the remainder of Defendants' Motion to Dismiss." Motion, at 14. This carefully crafted language makes clear it is not only seeking a

stay until six weeks after the State files its second amended complaint. Rather, it seeks a stay until Sandoz determines that the State has cured the deficiencies in the first amended complaint. Indeed, Sandoz states that it seeks a stay in order to “permit Sandoz a reasonable opportunity to assess the viability of Plaintiff’s amended pleading” Motion, at 3. As Sandoz and the other defendants have consistently and uniformly done in other AWP litigation where the plaintiff has been ordered to amend its complaint to provide more specificity, they will undoubtedly move to dismiss the State’s second amended complaint, arguing that it is not in compliance with Judge Krueger’s order, and take the position that discovery should be stayed until the new motions to dismiss are decided. Briefing and resolution of such motions will take weeks, if not months.

Second, as explained in greater detail below, Sandoz seeks a stay of the State’s deposition until such time as Sandoz has completed its document production. Motion, at 10. Sandoz estimates that this will require approximately six additional months. Motion, at 4. Moreover, the State is likely to serve additional document requests on Sandoz in the interim and on a rolling basis in the future. Under Sandoz’s approach, such requests would require further postponement of the deposition.

In sum, rather than a “short standstill,” Sandoz is really asking this Court to stay the State’s deposition to at least the beginning of the next calendar year, and in all likelihood longer. Sandoz’s request, which would effectively stay discovery, is not only unworkable, but contradicts the Special Master’s previous finding that Judge Krueger has already denied defendants’ request for stay of discovery. *See* January 31, 2005 Decision & Report of Discovery Master regarding Pfizer’s motion for protective order, at 4.

Below, we address the specific arguments advanced by Sandoz and demonstrate that Sandoz is not entitled to stay the deposition for any length of time.

C. The State's Deposition is Consistent With Judge Krueger's April 3, 2006 Order

First, Sandoz argues that Judge Krueger's April 3, 2006 Order requiring the State to file an amended complaint justifies postponement of the deposition.⁴ Sandoz contends that as a result of the Order, there is no "operative complaint." Motion, at 2. This argument is specious. As an initial matter, the court did not dismiss the State's complaint. Rather, it directed the State to file an amended complaint identifying the drugs at issue, the falsely-reported AWP's, and the actual prices that should have been reported. Moreover, if as Sandoz contends, there is no "operative complaint," then the Court would have had no reason or basis for stating that "work will continue on the balance of the contentions in defendants' motion to dismiss." Order, at 15. Furthermore, nothing in the Order suggests that discovery should grind to a halt until the State files its amended complaint. Indeed, to the contrary, the Court acknowledges that "discovery has been on-going in this case . . ." Order at 14.

Second, Sandoz contends that Judge Krueger's Order expresses uncertainty as to the viability of Plaintiff's claims. Motion, at 2. To the contrary, Judge Krueger found that the State's complaint "does a very thorough job of describing the key points of what is repeatedly referred to as a 'scheme' which Plaintiff claims was shared by all Defendants," Order, at 9, and that "Plaintiff has done a masterful job of describing a 'dauntingly complex' drug sale and reimbursement system . . ." Order, at 13. Judge Krueger further found that "[f]or general pleading purposes, these vast allegations are adequate to put Defendants on notice of the claims against them." Order, at 10.

⁴ To the extent that Sandoz raises the same arguments made by defendant Mylan in its pending motion for protective order (filed April 11, 2006), the State incorporates by reference its opposition thereto, which was filed on April 20, 2006.

Finally, Sandoz contends that the State's deposition (and indeed, all discovery) should be postponed because the State's second amended complaint is needed to "provide the necessary reference point to guide any further discovery," Motion, at 3, and the State's claims "are subject to change." Motion, at 7. Stated differently, Sandoz claims that until the State files its second amended complaint, "Sandoz cannot reasonably ascertain whether the testimony and documents sought by the Notice of Deposition are relevant." Motion, at 7. These arguments are utterly lacking in merit. First, Sandoz knows very well that the State's claims are not going to change. The State has not been ordered, nor does it intend, to add or delete causes of action or the legal bases for its claims. The additional specificity that Judge Krueger has asked the State to provide will simply result in the State identifying specific drugs, the false AWP's, and the true market prices. The same drugs the State identified to Sandoz when it provided it with a Targeted Drug List (which is the same list of drugs attached to the State's deposition notice) will be identified in the State's second amended complaint. Accordingly, the subject matters listed in the deposition notice, which the Discovery Master has already found to be relevant, will still be relevant with respect to the second amended complaint.

D. The Deposition Notice Describes the Subject Matters With Reasonable Particularity

Next, Sandoz argues that the subject matters identified in the deposition notice are neither "decipherable," nor stated with "reasonable particularity." Motion, at 2, 5, 7. However, the Discovery Master has already considered and rejected this argument, which was advanced by defendant Pfizer in its motion for protective order. *See* January 31, 2006 Decision & Report of Discovery Master, p. 5. Nevertheless, and although not required to do so, the State provided Sandoz with a more detailed description of the types of information it seeks to elicit from the deposition:

As you know, we spent some time during our call today discussing Sandoz's written objections to the notice of deposition, particularly those related to the alleged "overbreadth" of the notice. I advised you of some of the types of information we seek with regard to each subject matter identified in the notice. With regard to subject matters 1 and 2, the State seeks to establish whether Sandoz has any evidence or information showing that retail pharmacies ever purchased Sandoz's drugs at a price equal to or greater than AWP. With respect to retail pharmacies with whom Sandoz has contracts, Sandoz should produce a designee who has knowledge of the contract prices, any Incentives such as rebates, discounts, or chargebacks, and the reported AWP's. You expressed a concern that given the manner in which Sandoz does business, there are likely to be sales of Sandoz's products to retail pharmacies by wholesalers about which Sandoz has no information. That is, Sandoz does not in fact know the price paid by retail pharmacies in this context. If this is the case, then Sandoz should produce a designee who can testify to this fact. Such information is relevant to the State's claims, as we are entitled to know the basis for the AWP's reported by Sandoz. You also expressed a concern about the time frame given the information available from Sandoz's computer systems. We are willing to move forward with the deposition for the time period 1997 to the present while Sandoz gathers information sufficient to enable it to designate a witness to testify in the future about time period 1993 to 1997.

In subject matters 3 and 4, the State seeks, among other things, information regarding Sandoz's contacts with First DataBank or the RedBook including, but not limited to, communications regarding the prices of Sandoz's drugs. For example, we seek information regarding the method of communication (electronic, hard copy, telephonic); the frequency of communication, the Sandoz employee(s) responsible for the communications; the identity of the person(s) at the reporting services with whom Sandoz communicates, identification of the pricing information that is provided by Sandoz, *e.g.*, WAC, AWP, DP, SWP, or other pricing terms or acronyms, and Sandoz's definitions, if any of these terms; the conditions under which Sandoz reports changes in any of the pricing information; whether the reporting services send pricing verification forms or similar documents to Sandoz; and whether Sandoz has ever communicated that the AWP's it reported were not actually an average of wholesale prices, nor a price ever paid by the retail class of trade.

In subject matters 5 and 6, the State seeks, among other things, information regarding Sandoz's methodology for calculating AMPs pursuant to the federal Medicaid statute, including what discounts, rebates, chargebacks, or other Incentives are deducted, and which purchasers Sandoz considers to be in the retail class of trade for purposes of calculating the AMPs.

See Exhibit 18 to the Libman Affidavit. This description provides Sandoz with more than sufficient particularity regarding the nature of the State's inquiries at deposition.

In a footnote to its motion, Sandoz suggests that the parties will likely be able to resolve Sandoz's objections regarding the subject matters of the deposition notice and therefore proposes that they be addressed after the Court rules on the present motion. Motion, at 8, n.3. However, as the State has already advised Sandoz, it neither believes it is obligated, nor does it intend, to provide any more detail regarding the subject matters listed in the deposition notice.

Accordingly, the time for resolution of this issue is now. The State therefore requests that the Discovery Master overrule Sandoz's objections and find, as it has previously, that the deposition notice describes the subject matters with reasonable particularity.

E. The Discovery Master's Ruling on Merck's Motion for a Protective Order Regarding the Location of the Deposition is Applicable to Sandoz

In another footnote, Sandoz suggests that the Discovery Master's ruling on Merck's motion for a protective order regarding the location of the State's deposition may not be applicable to Sandoz. Motion, at 12, n.7. Yet Sandoz urges the Court to defer ruling on this issue as well. Sandoz's piecemeal approach to resolving disputes regarding the State's deposition notice reveals its real agenda – delay. If Sandoz believes the ruling is not applicable to it, the time to make that argument is now.⁵ Otherwise, Sandoz should be deemed to have waived it.

The only argument Sandoz articulates with regard to the applicability to Sandoz of the Discovery Master's ruling on the location of the deposition is that “the ruling does not preclude the possibility that discretionary factors, such as the need to produce multiple witnesses, might warrant a change in the location of the deposition.” *Id.* As an initial matter, Sandoz provides no

⁵ Sandoz suggests that resolution of this issue should be deferred because “the meet and confer process regarding Sandoz's specific objections to the Notice of Deposition is not yet complete.” *Id.* The State disagrees and considers the meet and confer process to have concluded, unsuccessfully. On May 16, 2006, Sandoz advised the State that even if the Discovery Master's ruling is affirmed by Judge Krueger, to whom it was recently appealed, Sandoz “believe[s] that the circumstances involving the deposition of a Merck designee are distinguishable, and Sandoz is not required to produce its designee for deposition in Wisconsin.” Yet Sandoz offers no explanation for its position. *See* Exhibit 22 to the Libman Affidavit. Sandoz's game of “cat and mouse” is inappropriate.

citation to the ruling for this proposition. Moreover, Sandoz's argument, if accepted, would effectively give Sandoz the power to control the location of the deposition by simply telling the State that it needs to produce several witness for the deposition, even if knowledge of the subject matters resides in only one or two people.

The Court should resolve the matter now, and find that Sandoz is required to appear for deposition in Madison, Wisconsin.

F. The State Must Be Allowed To Control the Order and Timing of its Discovery

Sandoz argues that State's desire to take a deposition of a corporate designee before Sandoz has produced all relevant documents "defies the logical order for conducting discovery." Motion, at 10. Whether Sandoz believes that the State's discovery plan is illogical is of no moment. It is the State, rather than Sandoz, that is best-suited to determine the order and timing of its own discovery. Nothing in the Wisconsin discovery rules dictates the order in which a party may utilize the available discovery tools. In fact, the Wisconsin rules of civil procedure say just the opposite:

Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Wis. Stat. § 804.01(4) (emphasis added). And in any event, the subject matters identified in the State's deposition notice are not the type for which review of hundreds of thousands of pages (as Sandoz proposes) is required. Subject No. 1 seeks any evidence that is in Sandoz's possession that shows that retailer pharmacies ever purchased its drugs for a price equal to or greater than Sandoz's published AWP. Documents produced by Sandoz, as well as the arguments Sandoz and the other defendants have raised in their dispositive motions to dismiss in

this case and others, make clear that there is no such evidence. While there is likely to be a dispute over the legal significance of this fact, the State is entitled to establish this fact through the deposition testimony of a Sandoz corporate designee.

Subject No. 2 seeks information showing that the published AWP's for Sandoz's drugs were higher than the prices that pharmacies were paying. Documents produced by Sandoz (including those described in this brief) and arguments raised by Sandoz elsewhere make clear that this, too, is a fact that Sandoz will not dispute. Again, although the parties may disagree over the import of this fact, the State is nevertheless entitled to establish it through deposition of a Sandoz designee.

Subject No. 3 seeks information about Sandoz's contacts with First DataBank or the Redbook (the pricing compendia). As explained earlier, the State has described for Sandoz the types of information it seeks through this subject matter. Testimony on this subject will come from the person with responsibility for corresponding with the compendia.

Subject No. 4 seeks to determine whether Sandoz ever communicated with the compendia telling them that the AWP's it was publishing for Sandoz were not the true prices. The person testifying about subject no. 3 will have this knowledge.

Subject Nos. 5 and 6 seek information regarding the Average Manufacturer's Prices ("AMPs") reported by Sandoz to the federal government. Sandoz has already produced AMPs to the State. Review of the AMPs themselves is not required for a Sandoz designee to testify about how the AMPs are calculated and how Sandoz interprets the terms set forth in the statutory definition of AMP.

Next, Sandoz argues that unless its designees are permitted to review all documents that Sandoz intends to produce in this case, there will likely be disputes about whether the designee

was adequately prepared. This is a red herring. The subject matters of the State's deposition notice, like its interrogatories and document requests, are discrete, targeted, and focused. Preparation will not require review of hundreds of thousands of documents.

Finally, Sandoz asserts that the State's deposition notice is an "end run" around an alleged agreement between the parties. There should be no ambiguity on this point. There was no agreement – formal, informal, or otherwise – to defer noticing this or any other deposition until Sandoz completed its document production. Libman Affidavit, ¶10.

III. THE STATE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY ANSWERS SHOULD BE GRANTED

In addition to moving for a protective order to delay the State's deposition, Sandoz has advised the State that it has unilaterally decided to stay written discovery as well, and has refused to answer the State's interrogatories or produce any additional data or documents. Sandoz's position contradicts the rulings by the Discovery Master and Judge Krueger.

A. Burden of Proof

Although the State is cross-moving to compel Sandoz to produce documents and answer interrogatories, because Sandoz is the party resisting discovery, it bears the burden of demonstrating "good cause" for its self-imposed stay of discovery. *See* May 2, 2006 Decision & Report of Discovery Master regarding Plaintiff's Motion to Compel against Novartis Pharmaceuticals Corporation, at 7. It has not done so.

B. The Court Has Already Denied Defendants' Motion to Stay Discovery

As the State has demonstrated, *see* Plaintiff State of Wisconsin's Opposition to Defendant Pfizer's Motion for Protective Order, filed December 27, 2005, and the Discovery Master has concluded, *see* January 31, 2005 Decision & Report of Discovery Master regarding Pfizer's motion for protective order, at 5, Judge Krueger previously denied defendants' request

to stay discovery pending resolution of the motions to dismiss. Sandoz's position effectively seeks reconsideration of these rulings. While it is true that the Court recently issued a partial ruling on defendants' motions, nothing in the ruling suggests that the Court's previous denial of defendants' request for a stay should be disturbed. To the contrary, if a stay was not justified during the pendency of the motion to dismiss, even where there was a possibility that the case could be dismissed, it is even less justified now, because the Court did not dismiss the case. Rather, the court simply directed the State to provide more specificity regarding the drugs at issue, the false AWP's, and the true prices.

C. Sandoz Should Provide Substantive Answers to the State's Interrogatories

Sandoz has provided no justification for its refusal to provide a single substantive response to the State's interrogatories, which were served on Sandoz more than a year ago and which Sandoz promised in October 2005 to answer in "two to three weeks." Sandoz should be instructed to answer these interrogatories forthwith.

The Discovery Master is intimately familiar with the State's interrogatories, so they will not be reproduced *in toto* here. Interrogatory No. 1 asks whether Sandoz has determined an average sales price or other composite price net of any or all Incentives (defined in the interrogatories as discounts, rebates, chargebacks, and the like). Documents produced by Sandoz here and elsewhere that refer to "ASP," "3-month Average Price," and "6 Mth Rolling Avg Price" (*see* Exhibits 13-17 to the Libman Affidavit) make clear that Sandoz has in fact determined "an average sales price or other composite price net of any or all Incentives" for its drugs within the meaning of Interrogatory No. 1. Sandoz should therefore answer the interrogatory in the affirmative and provide all of the information requested in subparts (a) through (h). The State is entitled to the information, along with a verification from an appropriate Sandoz official.

Interrogatory No. 2 seeks information regarding each electronic database that contains a price for Sandoz's drugs. Although Sandoz has made employees from its IT staff available to discuss the databases, this is not an adequate substitute for, and the State is entitled to, a verified answer to the interrogatory.

Interrogatory No. 3 asks Sandoz to identify all "Incentives" offered for its drugs. Sandoz sales and marketing personnel certainly have the information necessary to answer this interrogatory. There is no adequate explanation for Sandoz's failure, after more than twelve months, to identify a single "Incentive." Sandoz can easily answer this interrogatory based on the knowledge of its sales and marketing personnel and supplement it in the future to the extent that its investigation and document review reveals additional information.

Interrogatory No. 4 asks Sandoz to describe how it determines the prices for its drugs and identify the person(s) most knowledgeable about such determinations. At a minimum, Sandoz should be required to identify such persons.

Interrogatory No. 5 asks whether Sandoz has ever made reference to the "spread" in the marketing of its drugs. This request is not limited to printed materials or documents, but also includes oral communications. The document entitled "Meeting Brief for Albertsons, Meeting Date: April 5, 2001" (which was not produced to the State but which it obtained through other means) states, "Supply David with AWP for the products with price increases for his review of the spread." *See* Exhibit 19 to the Libman Affidavit (emphasis added). This document demonstrates that Sandoz has in fact made reference to the spread when marketing or selling its products. If Sandoz disagrees, it should say so. Regardless of Sandoz's spin on this particular

document, Sandoz should be required to answer this interrogatory, as it has had more than a year to consult with its employees and otherwise investigate the matter.⁶

D. Sandoz Should Continue to Search for and Produce Responsive Documents

Not only is Sandoz refusing to continue its production of documents, it has suspended its search for and review of responsive documents for future production. Again, Sandoz's position makes clear that its real interest is delay, rather than an orderly and efficient movement forward of this case.

Although Sandoz has produced some documents to the State and engaged in informal discussions to facilitate production of electronic data, Sandoz originally advised the State in October 2005 that its rolling production of all responsive documents would be completed in "ten to twelve weeks." Yet the State has still not received all of the documents or data it has requested. For example, the State has not received any data in response to Request No. 1 (national sales data, which includes sales, rebates, discounts, chargebacks, etc...). However, as a result of the informal discussions between the State's data consultant and Sandoz's IT staff, the parties have identified the universe of data to be produced from one of Sandoz's computer systems, the AS/400. Sample data has been produced and reviewed and the State has notified Sandoz that production of the data from the AS/400 system responsive to Document Request No. 1 should now be produced. Sandoz has refused to produce it. Sandoz has also suspended informal discussions regarding transactional sales data from the SAP system, another Sandoz computer system.

Nor has Sandoz honored the State's request for prioritizing its search and production. For example, in light of the few documents produced by Sandoz which make reference to "ASP"

⁶ In light of the other pending investigations against Sandoz which predated the filing of this lawsuit, Sandoz has had substantially more than a year to gather information and documents regarding its use of the "spread."

as well as those calculating the percent discount below WAC that Sandoz's average contract prices represent, *see* Exhibits 13-17 to the Libman Affidavit, the State has asked Sandoz to produce similar documents for other time periods. These documents, which are clearly responsive to Request No. 4, appear to be created monthly and annually and are likely to be maintained in the same location. They are critical documents, because they demonstrate: (1) that the true prices of Sandoz's drugs are substantially less than its reported WACs and AWPS;⁷ and (2) Sandoz's knowledge of this fact.

Sandoz has not produced any documents responsive to Request No. 3, which seeks documents that discuss or comment on the "spread." Yet the State has obtained from another source one such document (the Albertsons document described above, *see* Exhibit 19 to the Libman Affidavit). Sandoz should produce all other responsive documents.

Finally, Sandoz has not produced any documents responsive to Request Nos. 8 and 9, which ask for policies and exemplar contracts relating to the use that pharmacies and PBMs can make of Sandoz's pricing information. Such documents should not be difficult to locate and produce.

III. CONCLUSION

For the above reasons, Sandoz's motion for a protective order should be denied, Sandoz should be ordered to appear for deposition in Madison, Wisconsin, and Sandoz should be ordered to answer the State's interrogatories and produce responsive documents.

Dated this 12th day of May, 2006.



One of Plaintiff's Attorneys

⁷ The document attached as Exhibit 17 to the Libman Affidavit states that the average contract prices of Sandoz's drugs range from This means that WAC is between above the average contract prices. Because Sandoz's AWPs are substantially higher than its WACs, the spreads between average prices and AWP are exponentially larger.

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AND EXHIBITS 1 – 22

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