



motions,”<sup>1</sup> and the fact that the case was in the “initial stages” of discovery<sup>2</sup>—no longer exist. Teva’s position is further undermined by the fact that in its amended complaint, plaintiff specifically showed that Teva was causing to be published phony and inflated prices for more than the 15 drugs on which Teva was permitting discovery. For example, the data indicate that Teva marked up Naproxen purchased by the State anywhere from 1,060 % to 1,426 %, depending on the year and NDC (packaging, dosage). (Exs. D & E to Second Amended Complaint) Similarly, Teva’s Cimetidine was inflated anywhere from 1,082 % to 2,266 %. (Id.) Despite this evidence, Teva considers information regarding these drugs beyond the scope of discovery because adding them to the list of Teva’s targeted drugs produces a list of more than 15 drugs. Teva has informed counsel for the plaintiff that it will continue to maintain this position unless and until the Special Master rules to the contrary. (See Barnhill Affidavit) Such a position serves no valid discovery purpose.

Lacking any substantive rationale for continuing a 15-drug limit, defendants fall back on process contending that globally lifting the 15-drug limit would improperly circumvent the meet-and-confer requirements and ignore the individual circumstances of each defendant. (August 22, 2006 Amgen Opposition, at 1-8) However, this is a non sequitur. As stated in the opening brief, plaintiff intends to conduct discovery in a reasonable manner. Individual concerns on the timing of discovery can be worked out by the parties on a case-by-case basis and defendants continue to have the right to object to any improper discovery requests. In other words, upon lifting of the limit, discovery will return to the norm under Wisconsin law: the presumption that discovery proceeds on plaintiff’s *entire* case, subject to individual defendant’s objections made in meet-

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<sup>1</sup> January 31, 2006 Decision and Report of Discovery Master: Pfizer’s Motion for a Protective Order at 7.

<sup>2</sup> January 31, 2006 Decision and Report of Discovery Master: Plaintiff’s Motion to Compel AstraZeneca Defendants, at 13.

and-confers, which if not resolved, may eventually be presented to the Special Master for resolution.<sup>3</sup>

Several defendants filed individual oppositions to plaintiff's motion. In its opposition, defendant Merck states that drugs not listed or listed without the required information in Plaintiff's Second Amended Complaint fail to comply with the Court's April 3, 2006 order directing plaintiff to identify the specific drugs at issue for each Defendant and provide the false AWP and the actual price. (August 22, 2006 Merck Opposition, at 1-2) Merck contends that such drugs should not be "part of this case." (Id.)

Merck offers no specifics to illustrate its objection, and indeed, the objection is meritless. The facts are as follows: In an April 3, 2006 order, the Court held that the counts that involved fraud<sup>4</sup> required more specificity and ordered plaintiffs to re-plead those counts and provide "as many specifics as it can." (April 3, 2006 Partial Decision and Order, at 14) Plaintiff responded with a 361-page attachment to the complaint listing all of the drugs for which they are currently seeking damages. (Ex. E to Second Amended Complaint) Although defendants misstated prices for virtually all of their drugs, and thus all drugs are relevant to this case, plaintiff listed only

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<sup>3</sup> Both parties have benefited from globalizing discovery issues. The 15-drug limit is a prime example: although the January 31, 2006 decisions setting forth the limit were made in response to motions dealing with AstraZeneca and Pfizer only, defendants have generally treated the limit to apply to each of them, *see e.g.*, Ex. E of Plaintiffs' opening motion, July 26, 2006 Letter of Ackerman (emphasis added) (referring to "the 15 drug *per defendant* limitation"), and plaintiff has not objected. Having globalized the AstraZeneca/Pfizer limit and applied it to themselves, the defendants cannot now credibly complain about a global lifting of the limit now that circumstances no longer warrant it.

<sup>4</sup> Merck ignores that fact that the re-pleading requirement applied *only* to the claims involving fraud. (April 3, 2006 Partial Decision and Order, at 11-14) (emphasis added) ("In order to maintain these causes of action *premised on fraud*, Plaintiff must re-plead them") The other claims—violation of the Wisconsin Trust and Monopolies Act and unjust enrichment—which cover all drugs, are not subject to that requirement. Thus, all drugs are "part of this case" even without the re-pleading of the fraud counts, as plaintiff has other viable counts that cover all drugs.

those drugs with sufficient utilization by plaintiff (based on the information plaintiff has *at this time*) to make them worthwhile to subject to discovery.

Plaintiffs also listed fraudulent AWP's and actual prices—and the resulting “spreads” between the two prices—for all but a very few of the drugs for which data was not available. This pricing data was obtained by plaintiff from third parties, such as national wholesalers, pricing compendia, and retail pharmacies. No defendant has challenged the accuracy of these prices. And these fraudulent prices overwhelmingly confirm plaintiff's allegations that defendants engaged in a scheme to cause to be published false prices for all of their drugs.

With regard to Merck specifically, of its 29 target drugs, plaintiff has listed fraudulent AWP's, actual prices, and spreads for all but one drug. Indeed, plaintiff provided Merck with an incredible amount of pricing data given that discovery from defendants has been virtually non-existent. This evidence shows that Merck has systematically inflated the price of all of its drugs. Merck's suggestion that discovery should not proceed on the one drug for which defendant does not have precise pricing information in the face of such a showing is simply nonsensical.<sup>5</sup>

Merck also briefly addresses the issue of improper redaction of information specific to drugs outside of the 15 drugs. (August 22, 2006 Merck Opposition, at 3-4) However, Merck simply gives an example of one drug for which it redacted information and justifies it by stating that it believes there is no Wisconsin utilization for this drug. Merck does not address plaintiff's point that even if plaintiff does not intend to *seek* discovery for a specific drug, any evidence—whether coming from a targeted drug or not—establishing the existence or operation of defendants' phony pricing scheme is relevant to plaintiff's claims, and redaction of such relevant

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<sup>5</sup> Further, if Merck believed that certain drugs or NDCs were no longer part of the case because of an insufficiency in the pleadings, it should have made the appropriate motion to dismiss those claims. No such motion was made.

information is improper. As the Court confirmed, defendants “are accused of misstating the actual AWP for *each and every one* of their drugs,” (April 3, 2006 Partial Decision and Order, at 10) (emphasis added) Further, defendants’ redactions have not been confined to drugs that allegedly have no utilization by plaintiff and defendants do not argue otherwise.

Defendant Novartis has also filed an opposition. (August 22, 2006 Novartis Opposition) However, since Novartis has already agreed to produce discovery with respect to all listed drugs, the lifting of the limit will have little impact on it—although Novartis and all other defendants will be bound by the ruling. Defendant Amgen, who submitted the joint opposition, will similarly be unaffected by the lifting of the limit since Amgen’s target drugs that are subject to discovery have always numbered fewer than 15. Finally, several defendants object to the level of utilization of a few of the listed drugs arguing that Wisconsin’s utilization does not meet its own criteria for a targeted drug. This argument misses the point that these limits are simply rough targets and purely voluntary on the part of Wisconsin. Even if a drug has lower usage than the artificial targeted amount, information on such drug is still discoverable. Indeed, defendants have not limited their discovery requests to 15 drugs or to those with sufficient utilization. Moreover, disputes regarding utilization data are best resolved individually in the required meet-and-confers.

As the Special Master noted earlier, Wisconsin’s discovery rules are to be “liberally applied so that the issues for trial may be narrowed, settlement promoted, and litigants fully informed about the facts which may come out at trial...[and, as such] discovery should be applied in a manner which aids, not hinders, the working of the adversary process.” (May 2, 2006 Decision & Report of Discovery Master: Plaintiff’s Motion to Compel Novartis Pharmaceuticals, at 7) (quoting *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 576, 150

N.W.2d 559 (1967)) The Special Master has already acknowledged that the Complaint covers “all (or nearly all)” of defendants’ drugs and has ruled that that the discovery requested regarding those drugs is relevant (AstraZeneca Decision, at 7, 9). Under Wisconsin law, a party is entitled to discovery “regarding *any matter*, not privileged, which is relevant to the subject matter involved in the pending action ....” Wis. Stats. § 804.01(2)(a) (emphasis added). Given that the reasons set forth by the Special Master for the 15-drug limit no longer exist, the presumption should be restored to the norm under Wisconsin law that plaintiff is entitled to discovery on any relevant matter and the temporary 15-drug limit should be lifted.

Dated this 12<sup>th</sup> day of September, 2006.

Respectfully submitted,

  
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STATE OF WISCONSIN

CIRCUIT COURT  
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DANE COUNTY

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

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of PLAINTIFF’S REPLY TO ITS MOTION TO PURSUE DISCOVERY OF ITS ENTIRE CASE, and AFFIDAVIT OF CHARLES BARNHILL to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20<sup>th</sup>, 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](mailto:weich@charter.net), 840 Farwell Drive, Madison WI 53704.

Dated this 12<sup>th</sup> day of September, 2006.

  
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Betty Eberle