

STATE OF WISCONSIN  
CIRCUIT COURT Branch 7  
DANE COUNTY

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

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**DEFENDANT SANDOZ INC.'S MEMORANDUM IN FURTHER SUPPORT  
OF ITS MOTION FOR A PROTECTIVE ORDER AND IN OPPOSITION  
TO PLAINTIFF'S CROSS-MOTION TO COMPEL PRODUCTION OF  
DOCUMENTS AND ANSWERS TO INTERROGATORIES**

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Defendant Sandoz Inc. respectfully submits this memorandum in further support of its motion for a protective order and in response to Plaintiff State of Wisconsin's cross-motion to compel discovery.

By its motion, Sandoz seeks only narrowly-tailored relief – to temporarily suspend Plaintiff's discovery of the Company, including further production of documents, supplementation of its interrogatory response, and any depositions of a Sandoz' corporate designee – until Plaintiff has successfully amended its complaint. As demonstrated below, such relief is wholly consistent with Your Honor's recent Order of May 31, 2006 granting a motion by defendants Mylan Laboratories Inc. and Mylan Pharmaceuticals Inc. to adjourn the deposition of its designee until Plaintiff files its new complaint (the "Mylan ruling").<sup>1</sup>

Even in the absence of the Mylan ruling, Sandoz has shown the unfairness and burden that will inure to Sandoz by continuing with discovery in the absence of a complaint far outweighs any prejudice to Plaintiff that might result from such an adjournment. Accordingly, Your Honor has ample basis to grant Sandoz the relief it seeks and can end the inquiry there.

In response to Sandoz' motion, however, Plaintiff insists on addressing other potential disputes between the parties regarding Sandoz' objections to the adequacy of Plaintiff's Notice of Deposition of a Sandoz company representative and the location of any such deposition. Although these disputes could likely be resolved by further negotiations, or could be moot once Plaintiff amends its complaint, should Your Honor choose to resolve these disputes, they should be decided in Sandoz' favor.

First, Plaintiff's Notice of Deposition does not set forth the proposed topics of examination with reasonable particularity as required by Wis. Stat. § 804.05(2)(e). Plaintiff's

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<sup>1</sup> A true and correct copy of the Mylan ruling is annexed as Exhibit 23 to the Affidavit of Paul Olszowka in Further Support of Sandoz' Motion to Compel ("Olszowka Reply Aff.").

attempts to explain just what information it seeks by this proposed deposition have not mitigated this overarching flaw. Plaintiff only has provided “illustrative” examples about the information it seeks to obtain from Sandoz and warns that “other things”, nowhere mentioned or described, also will be covered. (See Pl. Mem. at 11-12; Letter from Robert Libman to Paul Olszowka (April 25, 2006) (Libman Aff. Ex. 18).) Courts repeatedly have found that such catch-all notices are inadequate. See, e.g., Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000) (deposition notice for corporate designee providing that “inquiry will ‘include[e], but not [be] limited to’ the areas specifically enumerated” fails to identify “the outer limits of the areas of inquiry”).

Moreover, Topics Nos. 3 and 4 of Plaintiff’s Notice of Deposition, which purport to seek information “evidencing” certain facts as alleged by Plaintiff, constitute an impermissible attempt to elicit the work product of Sandoz’ counsel. No witness could be prepared to testify about such matters absent the assistance of counsel to inform them, based on counsel’s judgment, just what that evidence might consist of. See, e.g., Smithkline Beecham Corp. v. Apotex Corp., No. 98 Civ. 3952, 2000 WL 116082, at \*9 (N.D. Ill. Jan. 24, 2000) (“the recipient of a Rule 30(b)(6) request is not required to have its counsel muster all of its factual evidence to prepare a witness to be able to testify regarding a defense or claim.”) In addition, as Your Honor reasoned in the Mylan ruling, through this deposition, Plaintiff is wrongly trying to shift to Sandoz the burden of explaining its conduct. (See Olszowka Reply Aff. Ex. 23 at 4.)

Further, the notice improperly demands that Sandoz, a Colorado company whose principle place of business is in Princeton, New Jersey, produce its company designees in Madison, Wisconsin. Plaintiff contends that Your Honor’s ruling in connection with the Motion brought by Merck & Co. applies to Sandoz. But, as shown below, Sandoz has no employees or sales force located in Wisconsin. And although Sandoz has shipped products to Wisconsin

addresses, these sales amount to less than 2% of its total shipments. Accordingly, Sandoz cannot be found to “transact business” in the state under Wis. Stat. § 804.05(3)(b)(6).

For these reasons, and others set forth below, the Court may properly strike Plaintiff’s Deposition Notice in its entirety and to direct that any deposition of a Sandoz designee occur in New Jersey.

### **ADDITIONAL BACKGROUND**

Set forth below are a few additional facts relevant to Sandoz’ motion that have arisen since its filing date of May 5, 2006. First, although Plaintiff speculates in its papers about the potential length of the discovery adjournment Sandoz seeks, Plaintiff itself has lengthened the period by its request to extend the time by which to file its amended complaint pursuant to the Court’s order of April 3, 2006. (See Wisconsin’s Unopposed Mo. For Extension of Time to File Amended Complaint (Olszowka Reply Aff. Ex. 24).) Second, the Court has issued the remainder of its decision on Defendants’ motion to dismiss, finding that a three-year statute of limitations applies to Plaintiff’s Consumer Protection Act claims. (Plaintiff has yet to offer any explanation of how its remaining claims warrant responding to its various document requests, interrogatories or the topics of its proposed deposition for the period before 2001.)

Also, Plaintiff has unilaterally declared an end to any meet and confer about the scope of subject matter of its deposition notice. When filed, Sandoz’ motion sought only the limited relief to adjourn discovery for a short period. Moreover, the motion’s timing was dictated by Plaintiff, whose chosen date for Sandoz’ deposition (May 10, 2006) was approaching, and Plaintiff insisted that Sandoz either file the motion or produce a witness. (See Sandoz Opening Mem. at 2.) While acceding to Plaintiff’s demand to bring a motion or appear, Sandoz was hopeful that because the parties had only had one discussion about Sandoz’ written objections to Plaintiff’s

notice, further meet and confer would serve to resolve them, at least in part. (Sandoz Opening Mem. at 12 n.7; Olszowka Reply Aff. ¶ 4.) In response to Sandoz' invitation, however, Plaintiff has refused to engage in further discussion. According to Plaintiff, it "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." (Pl. Mem. at 13.)

Several inaccuracies in Plaintiff's description of the record and recitation of the facts require clarification.<sup>2</sup> First, Plaintiff suggests that Sandoz has cut off all discovery while this motion is pending, and in particular has "refused" to produce data from its AS/400 data system. (See Pl. Mem at 19.) However, as counsel for Sandoz has informed Plaintiff, certain unresolved issues remain about data production; for instance, the parties have yet to reach agreement as to the sharing of costs attendant to obtaining the data from Sandoz' system. (See Letter from Paul Olszowka to Robert Libman (November 1, 2005) (Olszowka Reply Aff. Ex. 25).) Sandoz also has expressed its willingness to continue to work with Plaintiff's data consultant to resolve outstanding questions he has about Sandoz' other (SAP) data system. (See Letter from Paul Olszowka to Robert Libman (May 16, 2006) (Libman Aff. Ex. 22) at 2 ("We understand that your consultant still has questions about the form and content of any data that Sandoz might produce and we are willing to continue in the informal process[.]").)

Plaintiff also chides Sandoz for not "prioritizing its search and production" for documents that refer to "ASP," (see Pl. Mem. at 19), yet ignores that it also requested Sandoz to "prioritize" search for documents responsive to Requests No. 2, 5, and 6 – which Sandoz did, producing documents on December 9, 2005 and January 18, 2006. (Olszowka Aff. ¶¶ 13-14.)

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<sup>2</sup> Certain facts relating to the location of any deposition of Sandoz are provided further below in Section C, which addresses Plaintiff's demand that any deposition of Sandoz take place in Madison, Wisconsin. (See supra p. 17.)

Last, in another effort to support some argument that Sandoz has not been proceeding expeditiously in discovery, Plaintiff misstates case history. Plaintiff is wrong that Sandoz has twice attempted to remove the action. (Pl. Mem. at 3.) Sandoz was named as a defendant in Plaintiff's first amended complaint and was not a party when the action was removed to federal court in the summer of 2004. (See Olszowka Aff. ¶ 4.)

### **ARGUMENT**

#### **A. Sandoz Has Shown That a Short Adjournment in Discovery Is Warranted – Plaintiff's Various Arguments for Proceeding With Discovery Should Be Rejected**

##### **1. An adjournment is an appropriate exercise of Your Honor's supervisory authority over the conduct of discovery**

Plaintiff's opposition (and its motion to compel) rest on a fundamental misunderstanding about a trial court's powers to supervise discovery. Plaintiff claims to have an unlimited "right" to "determine the method, order, and timing of discovery" and argues that Sandoz' motion should be denied as improper interference with that right. (See Pl. Mem. at 1.) In support, however, Plaintiff cites just a single statute, Wis. Stat. § 804.01(4).

This claimed absolute right does not exist. The plain language of subsection 804.01(4) refutes any such reading. It begins, "[u]nless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise . . . ." Id. (emphasis added). Sandoz' instant motion for a temporary abatement in discovery is precisely the type of "motion" that this subsection contemplates. True, Plaintiff, like any party, can choose the discovery methods it seeks to pursue. But where those choices cause undue prejudice, which Sandoz has shown here, a court may intervene. See, e.g., Keller v. Edwards, 206 F.R.D. 412, 416-18 (D. Md. 2002) (ordering party seeking a deposition to first respond to an interrogatory regarding the

facts of the claim; noting that the analogous federal rules of civil procedure “give the court ample authority to resolve issues regarding the sequence and timing of deposition discovery”).<sup>3</sup>

**2. Plaintiff vastly understates the scope and corresponding burden of the discovery it seeks**

According to Plaintiff, regardless of the fact that it lacks a complaint, Sandoz should be compelled to continue reviewing and producing documents. (See Pl. Mem. at 19-20.) Plaintiff also charges that Sandoz is malingering on its discovery obligations and that – contrary to the undisputed evidence Sandoz has provided of the burden imposed by Plaintiff’s discovery – Sandoz should be able to (and should be compelled to) produce responsive documents, data, and testimony immediately and simultaneously.<sup>4</sup> (See, e.g., id. at 20 (arguing that documents responsive to Requests Nos. 8 and 9 “should not be difficult to locate and produce”); id. at 4 (arguing that Sandoz should be able to “easily answer” Plaintiff’s interrogatories).) For several reasons, Plaintiff’s positions should be rejected outright.

First, in arguing that the deposition topics on which Sandoz witnesses are to testify are simple and straightforward, and thus no time should be allowed for Sandoz to complete its document review, Plaintiff just ignores its other demand that the Sandoz designee have background knowledge that can only be obtained by a thorough document review. To illustrate, Plaintiff has described Deposition Topic No. 1 as seeking the alleged “fact” that “published AWP’s for Sandoz’ drugs were higher than the prices that pharmacies were paying.” (See Pl. Mem. at 15.) But preparing such a witness is no easy matter given Plaintiff’s statement that the

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<sup>3</sup> Section 804.01 is largely based on the language of a prior version of Rule 26 of the Federal Rules of Civil Procedure (before the 1993 amendments to the federal rules). See 8 Jay E. Grenig & Jeffrey S. Kinsler, WISCONSIN PRACTICE: Civil Discovery § 1:64 (2d ed. 2006). However, courts in Wisconsin have recognized section 804.01 parallels the post-1993 version of Rule 26 as well. See Borgwardt v. Redlin, 196 Wis. 2d 342, 354, 538 N.W.2d 581, 586 (Ct. App. 1995) (Rule 26(b)(3) is the “federal analogue” of section 804.01(2)(c)).

<sup>4</sup> The burden imposed by Plaintiff’s requests is described in Sandoz’ opening submissions. (See Olszowka Aff. ¶¶ 13-17, 25-29.)

designee for this topic should have “knowledge of the contract prices, any incentives such as rebates, discounts, or chargebacks, and the reported AWP.” (See Letter from R. Libman to P. Olszowka (April 25, 2006) (Libman Aff. Ex. 18) at 2 (describing deposition topics)). It is this very demand – that Sandoz’ designee be familiar with Sandoz contract prices and “incentives” for apparently any customer that had a contract to purchase any one of fifty-two drug types – that requires Sandoz to complete its document review before producing a witness (and that would cause undue prejudice to Sandoz if it were compelled to produce a witness before the review was completed). Simply put, Plaintiff cannot demand that Sandoz’ corporate designee have knowledge about a wide array of topics and then deny Sandoz the time necessary to prepare that witness.

As another example of Plaintiff’s understating the burden of its discovery demands, in defending Deposition Topics No. 3 and No. 4 (involving Sandoz’ contacts with pricing compendia and the nature of those communications), Plaintiff glibly suggests that one person could testify about both, namely “the person with responsibility for corresponding with the compendia.” (Pl. Mem. at 15.) However, as should be evident to Plaintiff from Sandoz documents that were turned over more than five months ago, during the relevant time between 1998 and 2004, at least two different Sandoz employees have had communications with the compendia, neither of which is still with the company. (See Olszowka Reply Aff. Ex. 26 (SANDOZWISC0000093); Ex. 27 (SANDOZWISC0003324).)

In addition, should the deposition go forward before Sandoz is able to complete its document review and production, as Plaintiff insists, there is a risk that Sandoz witnesses will have to be deposed twice – once as a designee and then potentially in his or her individual capacity about documents that would be produced afterward. Sandoz raised this concern in its

opening memorandum, (see Sandoz Opening Mem. at 10-11), but nowhere in its submission does Plaintiff provide a response or other solution of how to avoid this result.

Further, with respect to Interrogatories, pointing to snippets of a few Sandoz documents, Plaintiff says that Sandoz should be able to answer them “easily.” (See Pl. Mem. at 4-5.) Plaintiff specifically highlights two documents from 2003 and 2004 as being relevant to Interrogatory No. 4, which inquires about Sandoz’ “net prices.” (Id.) While these documents appear relevant, in suggesting that such documents yield an easy answer, Plaintiff ignores that the interrogatory spans back to 1993 for hundreds of different inventory items, that the interrogatory requires Sandoz to provide information for any price (not just “net” prices), and that Sandoz is purportedly required to describe in detail how it arrived at that price. (See Pl. First Interrog. (Olszowka Aff. Ex. 2) at 5 (“Describe in detail how you determined each price you used in the ordinary course of business of each Targeted Drug for each year during the Defined Period of Time[.]”).) Like nearly all of Plaintiff’s discovery, this information it seeks can only be provided once the files are reviewed.

\* \* \*

In sum, Sandoz has demonstrated not only that the burden imposed by Plaintiff’s discovery warrants an adjournment until Plaintiff’s claims are successfully amended, but also that Plaintiff’s demand in its cross-motion to proceed with all three prongs of its discovery would be unduly burdensome and prejudicial.

**3. Plaintiff has not shown that any prejudice would result from an adjournment in discovery**

Without any elaboration as to the standard, Plaintiff summarily states that Sandoz has not shown “good cause” entitling it to relief. (Pl. Mem. at 1, 8.) As Your Honor knows, however, the standard is not insurmountable, and simply requires a showing that the discovery request is

considered likely to oppress an adversary or might otherwise impose an undue burden. See Vincent & Vincent, Inc., v. Spacek, 102 Wis. 2d 266, 271-72, 306 N.W.2d 85, 87-88 (Ct. App. 1981) (reversing denial of protective order where the burden imposed by preparing a response to interrogatories outweighed the value and relevance of the information sought); see also 6 James Wm. Moore et al., Moore's Federal Practice § 26.104(1) (3d ed. 1999) (“‘Good cause’ is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury.”). As demonstrated in the preceding section, and supported by the factual showing in the affidavits of counsel, (Olszowka Aff. ¶¶ 25-30), Sandoz has shown the unnecessary burden that will result should discovery continue unabated, thereby meeting any obligation to show “good cause.” Indeed, that Sandoz is entitled to relief is wholly consistent with Your Honor’s conclusion in the Mylan ruling that it is unreasonable for the Plaintiff “to produce a witness to speak on its behalf when the Plaintiff has yet to offer a statement of its position that would enable the defendant to fairly respond.” (Decision & Report, May 31, 2006 (Olszowka Reply Aff. Ex. 23) at 4-5.)

Moreover, Sandoz’ showing of the burden it faces far outweighs any resulting prejudice to Plaintiff. While Plaintiff complains about the potential length of time of any adjournment, many of the factors contributing to its length are of its own doing. Since Sandoz filed this motion, Plaintiff requested additional time to file its amended complaint as required by the Court’s Order of April 3, 2006. As to Plaintiff’s overreaching allegation of delay by Sandoz, as the Court recognized in its Order of November 29, 2005, Plaintiff chose to bring a single suit involving multiple defendants and must accept the complexities inherent in doing so. (See Decision & Order, November 29, 2005 (Olszowka Reply Aff. Ex. 28) at 3 (“Combining three dozen major pharmaceutical companies in this one lawsuit is plaintiff’s prerogative, but this

crowded caption inures to only plaintiff's benefit. Being part of such a big group can increase delay, add to attorneys' fees, and afford less individual attention for the defendants.") (emphasis added.)

Further, rather than serving discovery tailored, at least in some way, to each defendant, or engaging in a meet and confer adequate to iron-out the resulting rough edges, Plaintiff has rushed to enforce one-size-fits-all omnibus requests without regard to the defendant's history, size, or product line (e.g., brand name or generic). As the Court likewise foreshadowed in its November 29 Order, it is unsurprising that effort has led to discovery disputes such as this one. (See Decision & Order, November 29, 2006 (Olszowka Reply Aff. Ex. 28) at 3.)

Moreover, any prejudice Plaintiff claims will arise from a pause in discovery is refuted by Plaintiff having obtained abundant material from Sandoz (some of which it wrongly attempts to introduce in this discovery dispute in an effort to somehow malign Sandoz).<sup>5</sup> (Pl. Mem. at 18.) Indeed, aside from the document snippets Plaintiff mentions in its memorandum and some of the discovery correspondence, the record otherwise suggests that Plaintiff's counsel have yet to read the 160,000 pages of Sandoz documents that they already have. For in response to Sandoz' interrogatory request that Plaintiff identify the evidence it claimed to have "that the manufacturers caused phony and inflated wholesale prices to be published," Plaintiff identified just one document. (See Olszowka Reply Aff. Ex. 29 (Pl. Resp. to Def. First Interrog. And Doc.

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<sup>5</sup> For example, Plaintiff points to a document it ints possession (Libman Aff. 10 which Plaintiff alleges concerns "marketing" of the so-called spread. Plaintiff complains that Sandoz has yet to "prudce" it in response to Plaintiff's Interrogatory No. 5 or Document Request No. 3. But the reference in this document does not suggested that there was such a business practice. And even assuming the document is responsive, that Plaintiff would complain that a document it already has should also have been "produced" rings hollow. To the contrary, that Plaintiff has such material it believes relevant only reinforces the fact that Plaintiff will not be prejudiced by the standstill that Sandoz seeks.

Requests) at 2; Ex. 30 (Pl. Supplemental Resp. To Def. First. Interrog. And Doc. Requests) (identifying single responsive document).)

#### **4. The Court's May 2005 Order no longer applies**

Given the changes in circumstance over the last year, Plaintiff is wrong that the Court's decision in May 2005 to deny Defendants' joint request for a stay pending resolution of the motion to dismiss has some bearing on Sandoz' motion. First, the argument flies in the face of the Mylan ruling, in which Your Honor delayed Plaintiff's discovery effort. For similar reasons, delaying discovery of Sandoz is appropriate. Since that time, while Plaintiff complains that Sandoz has been foot dragging, Plaintiff cannot deny that it now has access to a large volume and variety of Sandoz material. Moreover, back in May 2005, the Court had not yet evaluated Plaintiff's claims. Having done so, the Court has limited some, and found that others were not adequately pleaded, and has dismissed the complaint. While Plaintiff says that its "claims are not going to change" and it does not "intend" to "add or delete causes of action or the legal bases for its claims," (see Pl. Mem. at 11), Plaintiff still has not yet filed that pleading. Sandoz should not be burdened with discovery on the basis of Plaintiff's mere promises that its new complaint will allege the same claims, as to the same drugs, and will do so adequately. In other AWP-pricing cases, originally identified defendants have been dropped from the litigation where, as is the case here, the plaintiff was required to re-plead its allegations with particularity, including State of Alabama v. Abbott Lab., et al., No. CV-05-219 (Cir. Ct. Montgomery Co.).

#### **B. The Notice of Deposition Should Be Quashed**

As originally filed, Sandoz' motion sought narrow relief – to adjourn discovery during the time that Plaintiff attempted to re-plead. In so confining its motion, Sandoz believed that certain incipient disputes regarding Plaintiff's Notice of Deposition could be resolved through

negotiations. (See Sandoz' Opening Mem. at 8 n.3.) Since that time, however, Plaintiff has unilaterally declared an end to further meet and confer regarding Sandoz' objections, has further declared that it will not provide "more detail regarding the subject matters," and demands that Sandoz present all its objections now. (Pl. Mem. at 13.) While Sandoz disagrees that Plaintiff has discharged its obligation to meet and confer when the process has consisted of a single telephonic discussion among counsel with a follow-up letter (which under Dane County Local Rule No. 319 is alone reason to deny Plaintiff any relief), Sandoz will show below that the Notice of Deposition is facially invalid and should be quashed. See, e.g., Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000) (quashing a deposition notice deemed impermissibly overbroad).

**1. The Notice of Deposition is overbroad and vague and ambiguous**

As shown above, supra pp. 6-8, Plaintiff dramatically understates the breadth of information sought by the six topics of the notice and the amount of information that must be reviewed to possibly prepare the witnesses to testify about the topics. (See Olszowka Aff. ¶¶ 23-30.) While Sandoz does not contest that the topics are few in words, as applied, they try to cover far too much ground.

As Your Honor knows, a deposition notice for a corporate designee must set out the subject matter with "reasonable particularity" so that the party on notice can properly identify a designee and, if necessary, educate a witness for the deposition. See Wis. Stat. § 804.05(2)(e) Jay E. Grenig & Jeffrey S. Kinsler, WISCONSIN PRACTICE: Civil Discovery § 6:12 (2d ed. 2006) ("The notice must designate with reasonable particularity the matters on which the examination is requested. An organization cannot be expected to designate an appropriate representative at a deposition if it does not know the subject matter of the testimony.").

Plaintiff's Notice falls far short of this mark. As set forth in Sandoz' written objections to the deposition notice, the Topics are vague and ambiguous and unfairly purport to impose on Sandoz a burden to interpret at its own risk what information the Plaintiff seeks. (See Olszowka Aff. Ex. 20). For example, Topics Nos. 1 and 2 refer to prices paid by "retail pharmacies" and prices paid by just "pharmacies." Topic No. 4 refers to "retail classes of trade." (See Notice of Dep. (Olszowka Aff. Ex. 18) at 1-2.) By Plaintiff's use of these terms, it would appear to seek information as to certain types of Sandoz customers. But Plaintiff has provided no explanation, in the other parts of notice or during the abbreviated meet and confer, of what criteria should be used to determine whether a customer is a "retail pharmacy," a "pharmacy," or in the "retail classes of trade."

In addition, all Topics are unduly burdensome and overly broad to the extent that Plaintiff seeks designees to testify regarding all of the fifty-two different drug products it has identified as being relevant. Simple math refutes Plaintiff's arguments that Topics Nos. 1 and 2 do no more than seek to elicit facts regarding whether published AWP prices were higher than prices paid by pharmacies and retail pharmacies (which are undefined), (Pl. Mem. at 14-15), and that this inquiry is "discrete, targeted, and focused." (Id. at 16.) The list of fifty-two products relates to over three hundred actual, priced inventory items of different package sizes. (Olszowka Aff. ¶ 7) Thus, even if Sandoz only sold these items to ten different customers, given that the Topics purport to reach back over a dozen years, these Topics require Sandoz to prepare its designee(s) to have some understanding of multiple thousands of transactions.

The most stark evidence that the Notice of Deposition fails to state the topics with reasonable particularity comes directly from Plaintiff's counsel. When asked to provide additional detail about the topics, Mr. Libman has been unable to do so with certainty and has

admitted that the topics only set forth some of the information that Plaintiff seeks. In the letter following the parties' one discussion about the deposition topics, counsel for Plaintiff states that he is only advising Sandoz' counsel of "some of the types of information we seek." (See Letter from R. Libman to P. Olszowka (April 25, 2006) (Libman Aff. Ex. 18) at 2 (emphasis added).) In that same letter, while purporting to clarify Topics Nos. 3 and 4, counsel states that Plaintiff will seek information about other matters not described in either the notice or the explanatory letter. Id. ("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.") (emphasis added). Indeed, as Plaintiff states in the memorandum filed in connection with this motion, counsel's letter "was intended to be illustrative, not exhaustive, of the areas of inquiry." (Pl. Mem. at 7.)

Court after court has deemed that "among other things" and similar terms do not set forth deposition topics with reasonable particularity. See Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000) (explaining that a deposition topic which states that the "inquiry will 'include[e], but not [be] limited to' the areas specifically enumerated" fails to identify "the outer limits of the areas of inquiry" and finding such topic impermissibly overbroad); Innomed Labs, LLC v. Alza Corp., 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (use of the phrase "including but not limited to" "turns the subpoena into an overbroad notice, in contradiction to the 'reasonable particularity' required by Rule 30(b)(6)"); Shannon v. TAESA Airlines, No. Civ.A. 2:93-CV-689, 1994 WL 931216, \*1-2 (S.D. Ohio Nov. 10, 1994) (Deposition seeking to depose corporate representative "regarding 'all aspects of [its] operations, including but not limited to its operations in employee manuals' is overbroad."). Your Honor should follow this authority and strike Plaintiff's deposition notice for failing to reasonably particularize the subject matter of the deposition.

**2. Plaintiff is attempting to seek disclosure of work product**

Plaintiff's Notice impermissibly seeks testimony that is protected by the attorney work product doctrine. As Your Honor knows, Wisconsin has long recognized that an attorney's mental impressions regarding the case are privileged work product. See generally State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis. 2d 559, 589, 150 N.W.2d 387, 404 (1967) (attorney work product includes "the mental impressions [and] the legal theories and strategies that [a lawyer] has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs. . . legal and factual research, mental impressions, personal beliefs and other tangible or intangible means.")

Topic Numbers 1, 2, and 6 of the Notice each purport to require a Sandoz corporate representative to testify about "evidence" regarding certain of Plaintiff's allegations.<sup>6</sup> As set forth in Sandoz' written objections, however, whether certain information or documents constitute "evidence" necessarily requires an exercise of judgment by Sandoz' counsel (Olszowka Aff. Ex. 20 ¶ 6.) In effect, rather than reading and analyzing the multiple thousands of pages of Sandoz documents that Sandoz has produced (and the multiple thousands more Plaintiff demands be produced), Plaintiff seeks to have Sandoz' counsel do this work for them, educate a Sandoz employee about their findings, and then have that Sandoz designee testify about those findings.

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<sup>6</sup> For example, Topic No. 1 states in its entirety:

The evidence or information, if any, about which it is aware, which shows that any of the drugs listed on Exhibit A to this notice of deposition ("targeted drugs") were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price ("AWP") published by either First DataBank or the Red Book in any year from 1993 to present.

(See Notice of Dep. (Olszowka Aff. Ex. 18) at 1) (emphasis added).)

It is well established that a party cannot use the deposition of a corporate designee to testify regarding steps “customarily. . . performed with the assistance of counsel [because such a] proposed area of inquiry improperly trespasses into the areas of work product and attorney-client privilege.” Smithkline Beecham Corp. v. Apotex Corp., No. 98 Civ. 3952, 2000 WL 116082, at \*9 (N.D. Ill. Jan. 24, 2000) (party responding to a Rule 30(b)(6) deposition notice cannot be compelled to testify regarding an “area of inquiry [that] improperly trespasses into areas of work product and attorney-client privilege.”); see also In re Indep. Serv. Org. Antitrust Litig., 168 F.R.D. 651, 654 (D. Kan. 1996) (granting a protective order to preclude a Rule 30(b)(6) deposition seeking the defendant testify about the facts supporting answer and affirmative defenses).

To be sure, such a conclusion is consistent with Your Honor’s analysis in the Mylan ruling. There, Your Honor found it to be unduly burdensome to attempt to shift the burden to Defendants in this action to adduce evidence to support Plaintiff’s claims. (Olszowka Reply Aff. Ex. 23 at 4.) Yet, Plaintiff is going beyond mere burden shifting, it is also seeking to obtain the work product of Sandoz’ counsel. Accordingly, for either (or both) reasons, Your Honor should strike Topics 1, 2, and 6 of the Notice.

### **3. The Special Master’s “Pfizer Ruling” does not apply to Sandoz**

Plaintiff incorrectly interprets Your Honor’s January 2006 ruling on Defendant Pfizer, Inc.’s motion for a protective order (“the Pfizer ruling”) as having somehow “blessed” Plaintiff’s Notice of Deposition insofar as Plaintiff might seek to apply it to other defendants. See Pl. Mem. at 1, 11-12. But Sandoz did not join Pfizer in that motion nor did it otherwise participate in that proceeding. Plaintiff offers no explanation how Sandoz could now be bound.

Moreover, even when properly viewed as precedent, Your Honor should not apply that ruling here. As Your Honor knows, the arguments advanced by Sandoz herein were not

presented in the context of Pfizer's motion. Rather, that motion focused on the fact that the Court had not yet decided the motion to dismiss. In contrast, Sandoz' motion rests on the fact that the Court has granted, in part, Defendants' motion to dismiss and has required Plaintiff to file a new complaint (which it still has not yet done and has requested more time to do).

Second, as Your Honor noted, "Pfizer offer[ed] no real argument on the point [that the Notice was ambiguous and overly broad] and has supplied no references to affidavits or other proofs in support of its motion." (See Pfizer Ruling (Olszowka Reply Aff. Ex. 31 ) at 5.) In contrast, Sandoz has demonstrated multiple ambiguities and other flaws in the Topics themselves, and has shown how Plaintiff's attempts at clarification only exacerbate these ambiguities. (See supra, pp. 12-14.) Sandoz has also set forth in detail the burden imposed by Plaintiff's flawed notice. (See Sandoz Opening Mem. at 4-5, 11-12; Olszowka Aff. ¶¶ 5, 23-29.)

**C. Sandoz' Corporate Designees Should Not Be Required To Appear in Wisconsin**

Plaintiff has also refused to engage in further negotiations as to the location of any deposition of Sandoz' corporate designees, arguing that Your Honor's April 27, 2006 ruling in connection with the location of the Merck deposition ("the Merck ruling") applies also to Sandoz. (Pl.' Mem. at 13-14.) While for the reasons set forth above, supra pp. 11-17, Your Honor should strike Plaintiff's Deposition Notice in its entirety, making any incipient dispute as to location moot, at Plaintiff's insistence and to avoid any claim of waiver, Sandoz will address this issue now. As shown below, as a factual matter, because Sandoz has only scant contact with Wisconsin, Your Honor's analysis contained in the Merck ruling does not apply to Sandoz.

**1. Sandoz does not "transact business" in Wisconsin**

As Your Honor knows, the Merck ruling rested on a determination that the company was "transacting business" in Wisconsin as that term is used in Wis. Stat. § 804.05(3)(b)(6), notably that Merck appeared to have sales employees located in the state. (See Merck Ruling (Olszowka

Reply Aff. Ex. 32) at 5 (“There is no question that Merck maintains sales representatives in Wisconsin[.]”); see also Pl. Mem. in Resp. to Exception of Merck, May 17, 2006 (Olszowka Reply Aff. Ex. 33) at 1 (“Merck—which does millions of dollars of business annually in Wisconsin through agents actively working in Wisconsin’); id. at 3 (“[Merck] does not dispute that it transacts business in person in Madison through its sales force”).) Sandoz, however, does not have any sales offices or sales personnel located in Wisconsin, and as further demonstrated in the affidavit of Frank S. Prybeck, the Company’s Director of Contract of Administration, submitted herewith Sandoz has only nominal links of any type to Wisconsin.

It is undisputed that Sandoz is located outside the state. (Pl. Am. Compl., November 1, 2004 ¶18(b).) Further, as set forth in Mr. Prybeck’s affidavit, company records show that Sandoz (i) does not have sales personnel located in Wisconsin, (ii) Sandoz does not have a registered agent in Wisconsin, and (iii) Sandoz is not registered to do business in Wisconsin. (See Affidavit of Frank Prybeck, dated June 1, 2006 ¶10.) Company records also show that Sandoz product shipments to Wisconsin addresses amount to only about 1.7% of the company’s total shipments. (Id. ¶7.)

Based on these facts, Sandoz cannot be said to be actively conducting business in Wisconsin so as to warrant application of the Merck ruling. Moreover, that Sandoz does not “transact business” is consistent with the use of this term as it appears in Wis. Stat. § 180.1501 governing whether a corporation must obtain a certificate of authority to transact business in the state. Subsection 180.1501(2) expressly lists those activities that do not constitute “transacting business”, which include soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts; and transacting business in interstate commerce. See Wis. Stat. §§ 180.1501(2)(f) and

(k) (emphasis added). See also Fields v. Peyer, 75 Wis. 2d 644, 657-59, 250 N.W.2d 311, 318-19 (1977) (soliciting orders not sufficient to constitute transacting business under the predecessor to section 180.1501); House of Stainless, Inc. v. Marshall and Ilsley Bank, 75 Wis. 2d 264, 266-68, 249 N.W.2d 561, 563-64 (1977) (holding under the predecessor to section 180.1501 that entering into contracts in Wisconsin which were not in force until approved outside the state does not constitute “transacting business” in the state).

**2. Discretionary considerations favor holding the deposition at Sandoz’ principal place of business**

Should Your Honor conclude that, despite its minimal connection to Wisconsin, Sandoz is transacting business under subsection 804.05(3)(b)(6), Your Honor should exercise the discretionary authority of subsection 805.05(3)(b)(1) and conclude that as a matter of fairness and efficiency, Sandoz’ corporate designees should not be required to travel to Wisconsin for a deposition.

It is apparent that multiple designees likely will be required to respond to Plaintiff’s Notice of Deposition. Indeed, by Plaintiff’s measure, at least three Sandoz employees would be required, including the person(s) “with responsibility for corresponding with the compendia”; a person to testify regarding prices paid by certain customers; and, a person “to testify about how the AMPs are calculated.” (Pl. Mem. at 14-15.) However, as Your Honor recognized in the Merck Ruling, a deposition in Wisconsin would require at least two days time from each Sandoz employee, one for travel and one for the deposition. (See April 27, 2006 Decision and Order (Olszowka Reply Aff. Ex. 32) at 5 n.4.) Thus, given that with reasonable accommodation by the parties, the Sandoz depositions could be arranged to occur seriatim over a three-day stretch, it would be more efficient and less costly for Plaintiff to send one counsel to New Jersey to conduct them then to have Sandoz send three witnesses, at least, to Wisconsin.

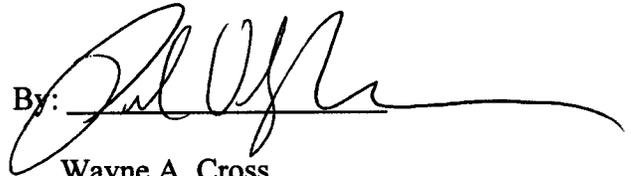
**CONCLUSION**

For the reasons set forth above, and in Sandoz' other submissions, Your Honor should enter an order granting its request for an adjournment of its obligations to respond to Plaintiff's discovery, and accordingly, deny Plaintiff's cross-motion to compel discovery as moot.

Alternatively, should Your Honor choose to address the issues presented by Plaintiff's cross-motion, it should strike Plaintiff's notice of deposition as overbroad and enter an order that any deposition of a Sandoz corporate designee occur in New Jersey.

Dated: New York, New York  
June 5, 2006

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