

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., ET AL.,

Defendants.

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Case No.: 04 CV 1709

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR A PROTECTIVE ORDER STAYING DISCOVERY UNTIL
THE COURT RULES ON DEFENDANTS' PENDING MOTION TO DISMISS**

The defendants, by their respective attorneys, submit this Memorandum of Law in Support of their Motion for a Protective Order Staying Discovery until the Court rules on Defendants' Pending Motion to Dismiss.

INTRODUCTION

Defendants moved on January 20, 2005 to dismiss the Amended Complaint on several different grounds that, if granted, would dispose of all claims in this case or would sharply narrow its scope.

A week later, the State of Wisconsin (“plaintiff” or the “State”) issued identical interrogatories and requests for production of documents to “All Defendants.”¹ Among other things, the State has demanded that each defendant produce documents containing fourteen different pieces of information about “each sales transaction” that occurred anywhere in the country over the past twelve years for all drugs each defendant has manufactured.² This request alone would likely reach millions of documents and masses of electronic data for each defendant. In addition, the State’s requests demand that each defendant separately identify every computer “data file” from the past twelve years that “contains a price” for any of those drugs.³ The requests then direct each defendant to have responsive hardcopy documents converted into a “searchable” electronic format – presumably at defendants’ expense.

The State’s sweeping discovery should be stayed until this Court determines whether this case will move forward at all, and if so, in what form. Every factor relevant to whether a Court should stay discovery at this threshold stage favors issuing a stay:

- Defendants have moved to dismiss the Amended Complaint on several grounds that would dispose of all of the State’s claims, including grounds that cannot be cured through amendment and that would terminate the litigation.

¹ Although addressed to “All Defendants,” the certificate of service for the State’s discovery requests indicates that several defendants were in fact not served.

² See Plaintiff’s First Set of Document Requests to All Defendants (hereinafter “Pltf’s Doc. Reqs.”), Request #1 (attached as Exhibit A).

³ See Plaintiff’s First Set of Interrogatories to All Defendants (hereinafter “Pltf’s Interrogs.”), Interrogatory #2 (attached as Exhibit B).

- Even if the Amended Complaint is not dismissed in its entirety, the State will only be able to pursue its claims if it can plead them with particularity with respect to specific drugs as required under Wis. Stat. § 802.03(2). Replacing the State’s generalized and undifferentiated allegations with particularized allegations of fraud concerning specific drugs would narrow the scope of this litigation, and of discovery.
- Defendants’ motion challenges the legal sufficiency of the Amended Complaint. The State has already filed its opposition, and fact discovery directed at the merits of the State’s claims is not needed to resolve the threshold questions of law that are raised in defendants’ motion.
- The State’s discovery requests are sweeping and would impose a significant burden on defendants, and, as written, almost guarantee time-consuming collateral disputes over the scope of discovery.
- The State will not be prejudiced by a temporary stay.

We show below that the Court can and should issue a temporary stay postponing discovery until the pending motion to dismiss has been decided.⁴

ARGUMENT

I. The Court Has Broad Discretion To Stay Discovery Until It Has Ruled On Defendants’ Motion To Dismiss And Should Exercise That Discretion To Conserve The Resources Of The Parties And The Court.

Wisconsin law empowers a court upon a showing of “good cause” to “make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Wis. Stat. § 804.01(3)(a). “Circuit courts have broad discretion in determining whether to limit discovery through a protective order” issued under § 804.01. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 232, 594 N.W.2d 370, 380 (1999). “A circuit court properly exercises its discretion if it examines the relevant facts, applies the proper standard of

⁴ Defendants preserve all of their objections to the pending discovery requests.

law and, using a rationale process, reaches a conclusion that a reasonable judge could reach.” *Id.* at 233, 594 N.W.2d at 380-81.

When a potentially dispositive motion is pending, courts routinely issue a temporary stay of discovery until the motion has been decided. “A stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.” *Chavous v. Dist. of Columbia*, 201 F.R.D. 1, 2 (D.D.C. 2001) (internal quotation and citation omitted) (construing Fed. R. Civ. P. 26(c)). Wisconsin appellate courts rely on federal cases construing Fed. R. Civ. P. 26(c) when reviewing motions such as this one that seek a protective order under Wis. Stat. § 804.01(3)(a). See, e.g., *State ex rel. Mitsubishi Heavy Indus. Am., Inc. v. Circuit Court*, 2000 WI 16, ¶ 37 n.8, 233 Wis. 2d 1, 25 n.8, 605 N.W. 2d 868, 880 n.8 (2000) (“Wis. Stat. § 804.01(3)(a) (regarding protective orders) is comparable to Federal Rules of Civil Procedure Rule 26(c)”) (Abrahamson, C.J., concurring); *Swan Sales Corp. v. Schlitz Brewing Co.*, 126 Wis. 2d 16, 30 n.26, 374 N.W. 2d 640, 648 n.26 (Ct. App. 1985) (noting that Fed. R. Civ. P. 26(c) is “the federal analog” of the Wisconsin discovery statute); *State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 309 N.W.2d 28 (Ct. App. 1981) (relying on federal cases to analyze a request for a protective order under Wis. Stat. § 804.01(3)(a)). Courts typically weigh several factors to determine whether discovery should be stayed in a particular case until a pending motion to dismiss has been decided.

First, courts consider whether the pending motion, if granted, could narrow the scope of the lawsuit or dispose of it altogether. “It is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.” *Anderson v. U.S. Atty’s Office*, No. Civ. A. 91-2262-LFO, 1992 WL 159186 at *1

(D.D.C. June 19, 1992); *see also Am. Booksellers Ass'n v. Houghton Mifflin Co.*, No. 94 Civ. 8566, 1995 WL 72376 at *1 (S.D.N.Y. Feb. 22, 1995) (protective order provisions authorize trial courts “to stay merits discovery where resolution of a preliminary matter may dispose of the whole action”). Moreover, even if only “portions of [the complaint] are dismissed, needless and extensive document production may be avoided” through a temporary stay. *Anderson v. Airco, Inc.*, No. Civ. A. 02C-12-091 HDR, 2004 WL 2828208 at *2 (Del. Super. Feb. 23, 2004) (staying discovery pending decision on motion to dismiss). If possible, therefore, “any legally unsupported claim that would unduly enlarge the scope of discovery should be eliminated before the discovery stage.” *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997); *see also Weisman v. Mediq, Inc.*, No. Civ. A. 95-1831, 1995 WL 273678 at *2 (E.D. Pa. May 3, 1995) (“a stay is proper where the likelihood that such motion may result in a narrowing or outright elimination of discovery outweighs the likely harm to be produced by the delay”). For these reasons it is “settled that entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of the court’s discretion.” *Nichols v. Baptist Mem’l Hosp., Inc.*, No. 02-2561-MAV, 2004 WL 2905406 at *2 (W.D. Tenn. April 2, 2004) (citations omitted).

Second, courts assess whether the plaintiff needs the requested discovery in order to respond to the pending motion. As a rule, “[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief” should “be resolved before discovery begins.” *Chudasama*, 123 F.3d at 1367. The reason is that “[s]uch a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true.” *Id.* Accordingly, because “neither the parties nor the court have any need for discovery before the court rules on the motion,” *id.*,

discovery prior to a decision on a pending motion to dismiss is seldom appropriate. *See Landry v. Air Line Pilots' Ass'n Int'l AFL-CIO*, 901 F.2d 404, 435 (5th Cir. 1990) (explaining that “no discovery was needed to resolve the motions to dismiss [for failure to state a claim]. Such motions are decided on the face of the complaint.”) (affirming motion to stay); *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (“since the appellants’ complaint did not raise factual issues that required discovery for their resolution, the district court did not abuse its discretion in staying discovery pending a hearing on the motion to dismiss”).⁵

Third, courts evaluate the breadth of the discovery that has been sought and the likely cost to the defendant of complying with discovery, some or all of which may shortly turn out to be moot. *See Spencer Trask Software and Info. Svcs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (“Two related factors a court may consider in deciding a motion for a stay of discovery are the breadth of discovery sought and the burden of responding to it”). The burden imposed on the defendant factors into the calculus because “[s]hould the [defendants] prevail on their motions to dismiss, no discovery would be necessary and any production of documents would have been a useless and wasteful effort.” *In re Harrah's Entm't, Inc. Sec. Litig.*, No. 95-3925, 1997 WL 40640, at *2 (E.D. La. Feb. 3, 1997). In assessing this factor, courts should consider the range of burdens that could be avoided if the dismissal motion is successful in whole or in part:

These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests,

⁵ *Cf. Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 505 (4th Cir. 1999) (affirming a stay of discovery pending the trial court’s ruling on defendant’s motion to dismiss, and explaining that the only way that plaintiff “could possibly have been entitled to [pre-motion to dismiss] discovery” was if the defendant’s motion to dismiss “had attacked the factual basis for jurisdiction”) (emphasis added).

advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged.

Chudasama, 123 F.3d at 1367 (ruling that the trial court abused its discretion when it failed to stay discovery pending a ruling on defendant's motion to dismiss); *see also Am. Booksellers Ass'n*, 1995 WL 72376, at *1 (staying discovery because "[t]he discovery sought by plaintiffs is very broad and to require defendants to respond to it at this juncture, when their motion to dismiss may be granted, would be extremely burdensome"); *Sprague v. Brook*, 149 F.R.D. 575, 578 (N.D. Ill. 1993) ("The sole result of such discovery, pending resolution of [defendant's] motion [to dismiss], would be cost and inconvenience, which would impose an undue burden on the time and resources of the [defendant]").

Fourth, courts weigh whether the plaintiff will be prejudiced if discovery is postponed until the pending motion is decided. As a rule, "[a] stay pending determination of a dispositive motion that potentially eliminates the entire action will neither substantially nor unduly delay the action, should it continue." *Spencer Trask*, 206 F.R.D. at 368. Courts therefore routinely reject the argument that a temporary stay pending a ruling on a motion to dismiss would unduly prejudice the party seeking discovery. *See, e.g., Patterson v. U.S. Postal Svc.*, 901 F.2d 927, 929 (11th Cir. 1990) (rejecting plaintiff's argument that the trial court's stay of discovery pending a ruling on defendant's motion to dismiss or for summary judgment "prejudiced [plaintiff's] defense against the motion"); *Weisman*, 1995 WL 273678, at *2 (granting stay pending ruling on defendant's motion to dismiss, and observing that "I do not find that plaintiff will be prejudiced by a stay in any significant way.").

Using similar reasoning, the Court of Appeals for District I affirmed a temporary stay of discovery in a situation analogous to the one presented in this case. In *Swan Sales Corp. v.*

Schlitz Brewing Co., the Court of Appeals upheld a trial court's order postponing the plaintiff's discovery into defendant's alleged unlawful overpricing until the defendant's motion to dismiss (which the trial court converted to a motion for summary judgment) had been decided. 126 Wis. 2d 16, 374 N.W.2d 640 (Ct. App. 1985). Key to the Court of Appeals' analysis was that "the overpricing issue was irrelevant for the purposes of that motion." *Id.* at 29, 374 N.W.2d at 647. The Court of Appeals acknowledged that "[t]here is a slim chance that broadened discovery might have led to evidence bearing on the summary judgment issues," but reasoned that "there is a great chance that broad discovery would be a waste of time, since summary judgment for [the defendant] would moot the remaining issues." *Id.* Emphasizing that "[p]ostponement of discovery . . . is not tantamount to denial of discovery," the Court of Appeals ruled that the trial court had properly exercised its discretion when it entered a temporary stay. *Id.*⁶

We show below that all of the factors relevant to assessing a request for a stay pending a ruling on a dispositive motion support a stay here.

II. All Of The Pertinent Factors Support A Temporary Stay Of Discovery Until Defendants' Pending Motion To Dismiss Has Been Decided.

Because protective order requests are fact-specific by nature, "[t]he question [for the trial court] is whether the particular burden and expense is justified in the particular case." *Vincent & Vincent, Inc. v. Spacek*, 102 Wis. 2d 266, 272, 306 N.W.2d 85, 88 (Ct. App. 1981) (reversing trial court's denial of protective order under Wis. Stat § 804.01). Applying the factors identified above to the facts in this case confirms that a temporary stay of discovery is warranted here.

⁶ *Cf. Tietsworth v. Harley-Davidson, Inc.*, 2003 WI App. 75, ¶ 7, 261 Wis. 2d 755, 760, 661 N.W. 2d 450, 452 (Ct. App. 2003) (observing that "Harley moved to dismiss the complaint and stay discovery pending resolution of the motion to dismiss" and "the trial court granted Harley's motion to stay discovery") (affirming dismissal of complaint), *rev'd on other grounds*, 2004 WI 32, 270 Wis. 2d 146, 677 N.W. 2d 233 (Wis. 2004) (reinstating claims on the merits).

First, defendants have moved to dismiss the Amended Complaint on grounds that would either dispose of the entire action or, at a minimum, would sharply narrow its scope. Multiple defects in the Amended Complaint could not be cured through amendment. For example: (i) the State cannot remedy its failure to plead causation consistent with its duty to this Court in the face of the large volume of publicly-available government documents to the contrary; (ii) the State cannot remedy the fact that its claims are barred by applicable statutes of limitation; and (iii) Wisconsin's filed rate doctrine bars the State's claims as a matter of law.

Second, even if the complaint were not dismissed in its entirety, the Court's resolution of the motion to dismiss could significantly narrow the scope of permissible discovery. Defendants manufacture hundreds of different drugs that are classified into approximately 65,000 different NDCs. The Amended Complaint simply lumps all of them together through undifferentiated allegations addressed to "all" or "virtually all" of defendants' drugs. As explained in the defendants' motion, the State's core claims cannot proceed under section 802.03(2) unless this boilerplate language is supplemented by particularized allegations – the "who, what, when and where" for each defendant and each drug as to which the State can allege facts in support of its claims.

As set forth in the joint and individual briefs supporting defendants' motion to dismiss, the State impermissibly attempts to litigate about the price reporting of virtually every drug sold during the last twelve years by the entire U.S. pharmaceutical industry, and seeks to do so by making factual allegations that relate to only a small subset of defendants and drugs (mostly drugs covered by Medicare Part B).⁷ There is obviously a major difference between a case concerning a limited list of drugs and defendants and a case concerning virtually every drug sold

⁷ The plaintiff seeks documents from all defendants generated within the last twelve years, plus any documents that "relat[e]" to that twelve-year period regardless of when they were created. *See* Exh. A, Plaintiff's First Doc. Req., Definition #3.

during the last twelve years. Should the Court require the State to plead the sort of particularized allegations concerning specific drugs that the law requires, the scope of permissible discovery would narrow correspondingly. Thus, even a ruling on defendants' motion to dismiss that permits the plaintiff to replead would likely render the State's current discovery requests – which appear to sweep up every drug that every defendant manufactures – significantly overbroad. Because granting defendants' motion to dismiss may either dispose of the case in its entirety or substantially narrow its scope, a temporary stay of the State's sweeping discovery requests is warranted.

Third, the discovery that the State has sought is not necessary to resolve the issues raised in defendants' motion to dismiss. Defendants' motion to dismiss challenges the *legal sufficiency of the allegations* in the complaint. The State's discovery requests, in contrast, seek discovery on the *merits of the State's claims*. The voluminous sales and marketing merits discovery that the State has sought concerns whether the State can prove its case at trial, not whether the Amended Complaint should survive a motion to dismiss for failure to state a claim. In fact, not once in its 50-page opposition brief does the State claim that it needs discovery to respond to defendants' motion. Because the discovery that the State has sought is irrelevant to the pending motion, discovery should be stayed. *See Swan*, 126 Wis. 2d at 29, 374 N.W.2d at 647 (discovery into defendant's alleged overpricing was properly stayed because "the overpricing issue was irrelevant for the purposes of [the pending dispositive] motion").

Fourth, the breadth of the State's requests, and the cost that would be required to respond to them, support a temporary stay until the threshold legal challenges are decided. By means of

sweeping definitions of “National Sales Data”⁸ and “Targeted Drugs,”⁹ the State has effectively demanded virtually all sales and marketing data for every sales transaction anywhere in the United States for every drug that every defendant has manufactured in the past twelve years. The State has further demanded that each defendant identify every computer file that “contains a price” for any of defendants’ drugs.¹⁰ Just searching for, identifying, collecting, copying, reviewing and producing all of these documents and data would impose an enormous cost on each of the defendants. In addition, the State would multiply that burden by demanding that most hardcopy documents be electronically scanned into a “searchable” electronic format.¹¹ The State’s far-reaching requests virtually guarantee that there will be disputes over the scope of discovery and foreshadow the potential need for court involvement in this process. The burden on defendants – and potentially on this Court – that would be required to deal with these discovery requests should await a ruling on the dispositive motions. *See Swan*, 126 Wis. 2d at 29, 374 N.W.2d at 647 (noting that the requested discovery might turn out to be “a waste of time” if defendant’s dispositive motion was granted).

⁸ “National Sales Data” is defined as: “for each sales transaction involving the Targeted Drugs”: “a. transaction date; b. transaction type; c. your product number; d. product description; e. package description; f. NDC; g. NDC unit quantity; h. NDC unit invoice price; i. NDC unit WAC (assigned by you); j. contract price; k. invoice price; l. customer name, identification number, address and class of trade; m. all paid or distributed Incentives; n. all accrued Incentives calculated at any time identifying the amount of the accrual, its nature or type, the date of the accrual, and other information sufficient to identify as particularly as possible each sales transaction giving rise to the accrual.” (See Exh. A, Pltf’s Doc. Reqs., Definition #6.)

⁹ “Targeted Drugs” is defined as “those drugs manufactured by you which have total utilization under the Medicaid and Medicare Part B programs exceeding \$10,000 during [the past twelve years] in the state of Wisconsin.” (See Exh. A, Pltf’s Doc. Reqs., Definition #9.)

¹⁰ “Identify each electronic database, data table, or data file that you now maintain or have maintained during [the past twelve years] in the ordinary course of business which contains a price for a Targeted Drug. For each such data entity, identify, describe, or produce the following: [listing five separate categories of information].” (Exh. B, Pltf’s Interrogs., Interrogatory #2.)

¹¹ Apparently for its own convenience, the plaintiff has demanded that all “National Sales Data” and other categories of “printed documents” be digitally converted to and produced in “searchable Adobe Acrobat portable document format (.pdf).” (Exh. A, Pltf’s Doc. Reqs. at p. 4.)

Finally, the State will suffer no prejudice if its discovery requests are temporarily stayed until the defendants' motion to dismiss is decided. Plaintiff has filed its opposition and defendants' reply is due on April 19, 2005. Defendants' motion seeks a stay only until the Court has ruled on whether this case will move forward (and if so, in what form). Neither discovery deadlines, nor a trial date, have been set. Furthermore, the State has not requested a preliminary injunction or other time-sensitive interim relief, and it has never claimed that any exigency exists with respect to its claims. A temporary stay will not prejudice the State. *See Swan*, 126 Wis. 2d at 29, 374 N.W.2d at 647 (“[p]ostponement of discovery . . . is not tantamount to denial of discovery”).

CONCLUSION

For the reasons above, defendants respectfully request that the Court stay discovery pending the Court's decision on defendants' motion to dismiss the Amended Complaint.

Dated this 23rd day of March, 2005.

Respectfully submitted,

By:



Daniel W. Hildebrand
DEWITT ROSS & STEVENS, S.C.
2 East Mifflin Street, Suite 600
Madison, WI 53703
Tele: (608) 255-8891
Fax: (608) 252-9243

Frederick G. Herold
DECHERT, LLP
975 Page Mill Road
Palo Alto, CA 94022
Tele: (650) 813-4800
Fax: (650) 813-4848

Mark H. Lynch
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
Tele: (202) 662-6000
Fax: (202) 662-6291
*Attorneys for Defendant SmithKline Beecham Corp.
d/b/a GlaxoSmithKline*

Signing on behalf of all Defendants

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.: 04CV1709
Unclassified Civil: 30703

ABBOTT LABORATORIES, ET AL.,

Defendants.

**PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS TO ALL DEFENDANTS**

To: See Attached Service List

PLEASE TAKE NOTICE that the Plaintiff requires the Defendants to produce within thirty (30) days hereof at the offices of the Wisconsin Attorney General, Wisconsin, Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857 Attn: Cynthia Hirsch and Miner, Barnhill & Galland, P.C., 44 East Mifflin Street, Suite 803, Madison, WI. 53703 Attn: Charles Barnhill a copy of each of the following described Documents pursuant to Rule 804.09:

DEFINITIONS

As used in these Document Requests, the following terms shall have the meanings set forth below:

1. The term "Average Manufacturer Price" or "AMP" means the price you report or otherwise disseminate as the average manufacturer price for any Pharmaceutical that you report for purposes of the Medicaid program, pursuant to 42 U.S.C. § 1396r-8.
2. The term "Chargeback" means any payment, credit or other adjustment you have provided to a purchaser of a drug to compensate for any difference between the purchaser's acquisition cost and the price at which the Pharmaceutical was sold to another purchaser at a contract price.
3. The term "Defined Period of Time" means from January 1, 1993 to the present and Documents relating to such period even though created before that period.

4. The term "Document" means any writing or recording of any kind, including, without limitation, agendas, agreements, analyses, announcements, audits, booklets, books, brochures, calendars, charts, contracts, correspondence, facsimiles (faxes), film, graphs, letters, memos, maps, minutes (particularly Board of Directors and/or Executive Committee meeting minutes), notes, notices, photographs, reports, schedules, summaries, tables, and telegrams, in any medium, whether written, graphic, pictorial, photographic, electronic, emails, phonographic, mechanical, taped, saved on computer disc, hard drives, data tapes, or otherwise, and every non-identical copy. Different versions of the same Document, such as different copies of a written record bearing different handwritten notations, are different Documents within the meaning of the term as used. In case originals or original non-identical copies are not available, "Document" includes copies of originals or copies of non-identical copies as the case may be.

5. The term "Incentive" means anything of value provided to a customer which would lower the consideration paid for a drug, regardless of the time it was provided (for example, at the time of invoicing, shipment, or payment, or monthly, quarterly, annually, or at any other time or on any other basis) and regardless of its name. The term "Incentive" therefore includes, but is not limited to, payments or proposed payments in cash or in kind, Chargebacks, credits, discounts such as return to practice discounts, prompt pay discounts, volume discounts, on-invoice discounts, off-invoice discounts, rebates such as market share rebates, access rebates, or bundled drug rebates, free goods or samples, credits, administrative fees or administrative fee reimbursements, marketing fees, stocking fees, conversion fees, patient education fees, off-invoice pricing, educational or other grants, research funding, payments for participation in clinical trials, honoraria, speaker's fees or payments, patient education fees or consulting fees.

6. The term "National Sales Data" means data sufficient to identify for each sales transaction involving the Targeted Drugs the following information:

- a. transaction date;
- b. transaction type;
- c. your product number;
- d. product description;
- e. package description;
- f. NDC;
- g. NDC unit quantity;

- h. NDC unit invoice price;
- i. NDC unit WAC (assigned by you);
- j. contract price;
- k. invoice price;
- l. customer name, identification number, address and class of trade;
- m. all paid or distributed Incentives;
- n. all accrued Incentives calculated at any time identifying the amount of the accrual, its nature or type, the date of the accrual, and other information sufficient to identify as particularly as possible each sales transaction giving rise to the accrual.

7. The term "Pharmaceutical" means any drug or other product, whether sold by you, or any other manufacturer, which requires a physician's or other prescriber's prescription, including, but not limited to, "biological" products such as hemophilia factors and intravenous solutions.

8. The term "Spread" is used to refer to the difference between the actual acquisition cost or purchase price of a Pharmaceutical (paid by purchasers of the Pharmaceuticals) and the reimbursement rate paid by third party payors (to purchasers of the Pharmaceuticals) for the Pharmaceutical. Third party payors include the Medicare program, Medicaid program, and private insurance. Thus, the Spread is the gross profit actually or potentially realized by the purchasers of the Pharmaceuticals for those Pharmaceuticals ultimately paid for by third party payors.

9. The term "Targeted Drugs" means those drugs manufactured by you which have total utilization under the Medicaid and Medicare Part B programs exceeding \$10,000 during the Defined Period of Time in the state of Wisconsin.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All National Sales Data for each Targeted Drug during the Defined Period of Time. *

REQUEST NO. 2: All Documents containing AMPs as reported or calculated by you for the Targeted Drugs OR a spread sheet or database showing all reported and calculated AMPs for each Targeted Drug over the Defined Period of Time which lists when such AMPs were reported or calculated, and the quarter to which each AMP applies.*

REQUEST NO. 3: All Documents created by you, or in your possession, that discuss or comment on the difference (or Spread) between any Average Wholesale Price or Wholesale Acquisition Cost and the list or actual sales price (to any purchaser) of any of defendants' Pharmaceuticals or any Pharmaceuticals sold by other manufacturers. Documents which merely list the AWP or WAC price and

the list or actual sales price without further calculation of the difference, or without other comment or discussion of or about the spread between such prices are not sought by this request.

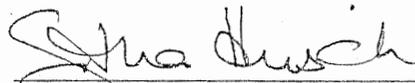
REQUEST NO. 4: All Documents containing an average sales price or composite price identified by you in response to Interrogatory No. 1 of Plaintiff's First Set of Interrogatories to All Defendants.*

REQUEST NO. 5: All Documents sent to or received from First DataBank, Redbook and Medi-span regarding the price of any Targeted Drug.

REQUEST NO. 6: All Documents in your possession prepared by IMS Health regarding a Targeted Drug or the competitor of a Targeted Drug regarding pricing, sales or market share.

*Documents are to be produced in electronic format with all documentation required to identify files and fields by name, content, and format, and explanations for all coded data. Acceptable electronic format for documents which in their native form are organized as word processing documents, or printed documents other than tabular reports, (documents comprised principally of text, or of a combination of text and graphics) is searchable Adobe Acrobat portable document format (.pdf). Acceptable electronic format for documents which in their native form are organized as spreadsheets is Microsoft Excel format (.xls). Acceptable electronic format for documents which in their native form are comprised principally of tabular data, or tabular reports with fixed column widths or field lengths is fixed-field ASCII text (.txt). Acceptable electronic format for documents which in their native form are comprised principally of electronic data in one or more data tables, files, or other data entities, is delimited ASCII text (.csv).

Dated this 27 day of January, 2005.



One of Plaintiff's Attorneys

PEGGY A. LAUTENSCHLAGER
Attorney General
State Bar #1002188

MICHAEL R. BAUER
Assistant Attorney General
State Bar #1003627

CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

FRANK D. REMINGTON
Assistant Attorney General
State Bar #1001131

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0332 (MRB)
(608) 266-3861 (CRH)
(608) 266-3542 (FDR)

CHARLES BARNHILL
State Bar #1015932

WILLIAM P. DIXON
State Bar #1012532

ELIZABETH J. EBERLE
State Bar #1037016

Miner, Barnhill & Galland, P.C.
44 East Mifflin Street, Suite 803
Madison, WI 53703
(608) 255-5200

Attorneys for Plaintiff,
State of Wisconsin

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

Branch 7

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04CV1709

Unclassified Civil: 30703

ABBOTT LABORATORIES, ET AL.,

Defendants.

PLAINTIFF'S FIRST SET OF INTERROGATORIES TO ALL DEFENDANTS

TO: See Attached Service List

PLEASE TAKE NOTICE that the Plaintiff requires the Defendants to provide an answer within thirty (30) days hereof at the offices of the Wisconsin Attorney General, Wisconsin, Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857 Attn: Cynthia Hirsch and Miner, Barnhill & Galland, P.C., 44 East Mifflin Street, Suite 803, Madison, WI 53703 Attn: Charles Barnhill to this First Set of Interrogatories pursuant to Rule 804.08:

DEFINITIONS

As used in these Interrogatories, the following terms shall have the meanings set forth below:

1. The term “**Average Manufacturer Price**” or “**AMP**” means the price you report or otherwise disseminate as the average manufacturer price for any Pharmaceutical that you report for purposes of the Medicaid program, pursuant to 42 U.S.C. § 1396r-8.

EXHIBIT B

2. The term "**Chargeback**" means any payment, credit or other adjustment you have provided to a purchaser of a drug to compensate for any difference between the purchaser's acquisition cost and the price at which the Pharmaceutical was sold to another purchaser at a contract price.

3. The term "**Defined Period of Time**" means from January 1, 1993 to the present and Documents relating to such period even though created before that period.

4. The term "**Document**" means any writing or recording of any kind, including, without limitation, agendas, agreements, analyses, announcements, audits, booklets, books, brochures, calendars, charts, contracts, correspondence, facsimiles (faxes), film, graphs, letters, memos, maps, minutes (particularly Board of Directors and/or Executive Committee meeting minutes), notes, notices, photographs, reports, schedules, summaries, tables, and telegrams, in any medium, whether written, graphic, pictorial, photographic, electronic, emails, phonographic, mechanical, taped, saved on computer disc, hard drives, data tapes, or otherwise, and every non-identical copy. Different versions of the same Document, such as different copies of a written record bearing different handwritten notations, are different Documents within the meaning of the term as used. In case originals or original non-identical copies are not available, "Document" includes copies of originals or copies of non-identical copies as the case may be.

5. The term "**Incentive**" means anything of value provided to a customer which would lower the consideration paid for a drug, regardless of the time it was provided (for example, at the time of invoicing, shipment, or payment, or monthly, quarterly, annually, or at any other time or on any other basis) and regardless of its name. The term "Incentive" therefore includes, but is not limited to, payments or proposed payments in cash or in kind, Chargebacks, credits, discounts such as return to practice discounts, prompt pay discounts, volume discounts, on-invoice discounts, off-invoice discounts, rebates such as market share rebates, access rebates, or bundled drug rebates, free goods or samples, credits, administrative fees or administrative fee reimbursements, marketing fees, stocking fees, conversion fees, patient education fees, off-invoice pricing, educational or other grants, research funding, payments for participation in clinical trials, honoraria, speaker's fees or payments, patient education fees or consulting fees.

6. The term "**National Sales Data**" means data sufficient to identify for each sales transaction involving the Targeted Drugs the following information:

- a. transaction date;
- b. transaction type;

- c. your product number;
- d. product description;
- e. package description;
- f. NDC;
- g. NDC unit quantity;
- h. NDC unit invoice price;
- i. NDC unit WAC (assigned by you);
- j. contract price;
- k. invoice price;
- l. customer name, identification number, address and class of trade;
- m. all paid or distributed Incentives;
- n. all accrued Incentives calculated at any time identifying the amount of the accrual, its nature or type, the date of the accrual, and other information sufficient to identify as particularly as possible each sales transaction giving rise to the accrual.

7. The term “**Pharmaceutical**” means any drug or other product, whether sold by you, or any other manufacturer, which requires a physician’s or other prescriber’s prescription, including, but not limited to, “biological” products such as hemophilia factors and intravenous solutions.

8. The term “**Spread**” is used to refer to the difference between the actual acquisition cost or purchase price of a Pharmaceutical (paid by purchasers of the Pharmaceuticals) and the reimbursement rate paid by third party payors (to purchasers of the Pharmaceuticals) for the Pharmaceutical. Third party payors include the Medicare program, Medicaid program, and private insurance. Thus, the Spread is the gross profit actually or potentially realized by the purchasers of the Pharmaceuticals for those Pharmaceuticals ultimately paid for by third party payors.

9. The term “**Targeted Drugs**” means those drugs manufactured by you which have total utilization under the Medicaid and Medicare Part B programs exceeding \$10,000 during the Defined Period of Time in the state of Wisconsin.

INTERROGATORIES

INTERROGATORY NO. 1: Have you ever determined an average sales price or other composite price net of any or all Incentives for a Targeted Drug during the Defined Period of Time? If so, for each Targeted Drug for which you have made such a determination, identify:

- (a) the beginning and ending dates of each period applicable to each such determination;

- (b) the applicable class(es) of trade for which each determination was made;
- (c) each average sales price or composite price determined;
- (d) the person(s) most knowledgeable regarding the determinations;
- (e) the methodology used to determine such prices;
- (f) your purpose(s) in making such determinations;
- (g) whether you disclosed any average sales price or composite price so determined to any publisher, customer, or governmental entity. If so, identify each publisher, customer or governmental entity to whom each such price was disclosed and the corresponding date of the disclosure; and
- (h) whether any such average sales price or composite price was treated as confidential or commercially sensitive financial information.

INTERROGATORY NO. 2 Identify each electronic database, data table or data file that you now maintain or have maintained during the Defined Period of Time in the ordinary course of business which contains a price for a Targeted Drug. For each such electronic data entity, identify, describe or produce the following:

- (a) the name or title of each such database, data table, or data file;
- (b) the software necessary to access and utilize such data entities;
- (c) describe the structure of each database, data table or data file identified in response to Request No. 2(a) above and identify all files or tables in each such database, data table or data file. For each such file or table, identify all fields and for each field describe its contents, format and location within each file or table record or row.
- (d) the current or former employee(s) with the most knowledge of the operation or use of each data entity identified above; and
- (e) the custodian(s) of such data entity.

INTERROGATORY NO. 3 Describe each type of Incentive you have offered in conjunction with the purchase of any Targeted Drug. For each such Incentive, identify:

- (a) the type(s) of Incentive(s) offered for each Targeted Drug;
- (b) the class(es) of trade eligible for each Incentive;
- (c) the general terms and conditions of each Incentive; and
- (d) the beginning and ending dates of each period during which the Incentive was offered.

INTERROGATORY NO. 4

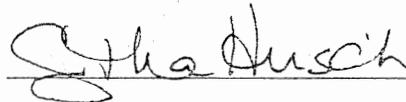
Describe in detail how you determined each price you used in the ordinary course of business of each Targeted Drug for each year during the Defined Period of Time and identify the person(s) most knowledgeable in making such determinations for each Targeted Drug for each year.

INTERROGATORY NO. 5

Have you ever included in your marketing of a Targeted Drug to any customer reference to the difference (or spread) between an AWP or WAC published by First DataBank, Redbook or Medi-span and the list or actual price (to any customer) of any Targeted Drug? If so, provide the following information for each Targeted Drug:

- a. the drug name and NDC;
- b. the beginning and ending dates during which such marketing occurred;
- c. the name, address and telephone number of each customer to whom you marketed a Targeted Drug in whole or in part by making a reference to such difference(s) or spread(s); and
- d. identify any document published or provided to a customer which referred to such difference(s) or spread(s).

Dated this 27 day of January, 2005.



One of Plaintiff's Attorneys

PEGGY A. LAUTENSCHLAGER
Attorney General
State Bar #1002188

MICHAEL R. BAUER
Assistant Attorney General
State Bar #1003627

CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

FRANK D. REMINGTON
Assistant Attorney General
State Bar #1001131

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0332 (MRB)
(608) 266-3861 (CRH)
(608) 266-3542 (FDR)

CHARLES BARNHILL
State Bar #1015932

WILLIAM P. DIXON
State Bar #1012532

ELIZABETH J. EBERLE
State Bar #1037016

Miner, Barnhill & Galland, P.C.
44 East Mifflin Street, Suite 803
Madison, WI 53703
(608) 255-5200

Attorneys for Plaintiff,
State of Wisconsin