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VIA HAND DELIVERY

CLIENT/MATTER NUMBER
045152-0101

Honorable Richard G. Niess
Dane County Circuit Court, Branch 9
Dane County Courthouse
215 South Hamilton Street, Room 5103
Madison, Wisconsin 53703

Re: *State of Wisconsin v. Abbott Labs., et al.*
Case No. 04-CV-1709

Dear Judge Niess:

Enclosed for filing is an original and one copy of Defendants' Reply in Support of a Motion to Sever, or in the Alternative, for Separate Trials, with accompanying exhibits. Please file stamp the copy and return it to our waiting messenger. All counsel of record have been served with a copy of the Motion via Lexis Nexis File & Serve.

Sincerely yours,

FOLEY & LARDNER LLP

Matthew D. Lee

Enclosures

cc: All Counsel of Record by LexisNexis File & Serve (w/enclosures)

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has failed to point to a single transaction or occurrence or series of transactions or occurrences from which each of its five claims against each of the 36 Defendants arises, and does not dispute the vast differences between the marketing, pricing and reporting practices of each of the 36 Defendants.

Finally, Plaintiff's opposition muddies the distinctions between the two issues before the Court. The Court must first determine whether Plaintiff's claims against each Defendant must be severed from its claims against the other Defendants because those claims do not arise from the same transaction or occurrence. Only if the Court first determines that these claims *do* arise from the same transaction or occurrence and does not sever them, then it must decide whether separate trials should be granted to avoid the clear prejudice that would result from subjecting a single jury to individualized proof of multiple elements for multiple claims against 36 Defendants, each with very different factual situations.

I. SEVERANCE

The first issue the Court must decide is whether Plaintiff's claims against 36 companies with vastly different marketing, pricing and price reporting practices should be severed because they do not arise out of the "same transaction or occurrence or series of transactions or occurrences."¹ Tellingly, Plaintiff does not dispute that very substantial differences exist between each Defendant's practices, and does not adequately address the large body of analogous case law holding that similar claims against multiple defendants do

¹ Wis. Stat. 803.04(1)(2006); Defendants' Joint Motion to Sever, Or In the Alternative, For Separate Trials ("Motion to Sever") at 3. Plaintiff's opposition argues that joinder is proper because a "question of law or fact common to all defendants will arise in the action." Plaintiff State of Wisconsin's Opposition to Defendants' Joint Motion to Sever, Or In the Alternative, For Separate Trials ("Opposition") at 7. Whether or not this is true, Wis. Stat. 803.04(1) requires that *both* elements of joinder be met, and Plaintiff has failed to demonstrate that its claims arise out of the same transaction or occurrence.

not arise from the same transaction or occurrence. Should the Court determine that Plaintiff's claims against each Defendant indeed do not arise out of the same transaction or occurrence, or series of transactions or occurrences, these claims must be severed, and the Court need not address the separate issue of prejudice.

A. Plaintiff Does Not, and Cannot, Dispute Several of Defendants' Primary Arguments For Severance

Plaintiff's opposition perhaps is most notable for failing to address Defendants' most compelling bases for severance. Plaintiff largely ignores the plethora of directly analogous case law extensively cited and discussed by Defendants, case law that demonstrates that the claims against each Defendant do not arise out of the same transaction or occurrence or series of transactions or occurrences. Furthermore, Plaintiff does not dispute that there are significant variations between each Defendant's marketing, pricing and reporting practices, which demonstrate that the companies named in this litigation clearly are not involved in the "same transactions" with the State.

1. Plaintiff Largely Ignores Directly Relevant Case Law

Plaintiff ignores or fails to adequately address the numerous dispositive cases cited in Defendants' Motion to Sever. In particular, Plaintiff fails to distinguish the Alabama Supreme Court's recent decision reversing the trial court's decision denying the defendants' motions to sever the State of Alabama's fraudulent pricing claims against numerous pharmaceutical companies, despite the fact that Alabama's claims are virtually identical to those brought by the State of Wisconsin in this action. Plaintiff's only mention of this case mischaracterizes the grounds for that court's decision to grant severance. Defendants cited the Alabama Supreme Court's recent ruling that, "[i]n the absence of combined and concurring tortious conduct causing a single injury, the same transaction or series of transactions requires more than just similarity or coincidence—some coordination between

parties is required.”² This ruling does not assert that conspiracy is required for joinder; it does require that there be “some coordination of the parties” in the absence of “combined” conduct “causing a single injury.” Here, as in the Alabama case, there is no evidence of such “coordination.”

Plaintiff seeks to skirt the Alabama court’s ruling by simply stating, without legal support, that it does not represent “the law in Wisconsin.”³ Plaintiff, however, fails to cite a single Wisconsin case demonstrating that the Alabama Supreme Court’s interpretation of the “same transaction and occurrence” requirement should not apply with equal force to the facts of this case. In fact, the only Wisconsin case cited by Plaintiff involves the type of “concurring tortious conduct causing a single injury” cited in the Alabama decision as an alternative basis for joinder.⁴ Furthermore, the federal cases cited by Plaintiff involve either coordination of the parties or concurring conduct causing a single injury.⁵

² Motion to Sever at 4, citing *Ex Parte Novartis Pharmaceuticals Corporation*, No. 1060224, 2007 WL 1576114, *6 (Ala. June 1, 2007).

³ Opposition at 13.

⁴ *Ex Parte Novartis*, 2007 WL 1576114 at *6. See *Kluth v. General Cas. Co. of Wisconsin*, 178 Wis.2d 808, 817-18, 505 N.W.2d 442, 446 (Wis. App. 1993) (denying a motion to sever in a case involving two separate car accidents where plaintiff has claimed that the combined conduct of the two defendants caused a single injury). The *Kluth* court specifically noted: “This is not to say that in every case in which there are separate accidents the plaintiff may join all defendants. However, when the injuries are alleged to be indivisible, or to have been aggravated in another accident, then joinder is permissible.” *Id.* at 819. The present case does not involve a single, indivisible injury caused by concurrent actors, nor does it allege an aggravation of a single injury; rather, it alleges 36 separate albeit similar injuries caused by 36 separate actors.

⁵ See *United States v. Mississippi*, 380 U.S. 128, 133 (1965) (in which the joined parties were all instrumentalities of the state implementing a state-created system of discrimination)(cited in Opposition at 13); *In re Vitamins Antitrust Litigation*, 2000 WL 1475705, *17 (D.D.C. 2000) (denying severance of conspiracy claims) (improperly cited in Opposition at 14); *City of New York v. Joseph L. Balkan, Inc.*, 656 F.Supp. 536, 540-541 (E.D.N.Y. 1987) (in which a single injury to the structural integrity of a sewer system is alleged as a result of the concurring conduct of several defendants) (cited in Opposition at 14 and distinguished in *Novartis*); *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 839 (11th Cir.1990) (plaintiffs alleged that the defendants took part in a similar scheme that was maintained either by conspiracy or contract; joinder was proper where connections between parties arose out of a series of transactions initiated by defendant Land Bank) (cited in Opposition at 14).

Plaintiff improperly attempts to analogize this case to several civil rights cases in which federal courts allowed joinder of parties implementing state-enacted discriminatory practices. Plaintiff relies heavily on the Supreme Court's 1965 decision in *United States v. Mississippi*, reversing a lower court's order dismissing a complaint alleging "a long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi..."⁶ Although that case primarily involved the United States' standing to challenge the validity of state laws, the court also held that the joinder of individual Mississippi state voting registrars was proper because they "were alleged to be carrying on activities which were part of a series of transactions or occurrences the validity of which depended to a large extent upon 'question(s) of law or fact common to all of them.'"⁷

Mississippi is easily distinguished from the present case, because it involved a "clear nexus between all of the discriminating individuals that justified joining all of the parties into a single case, namely, a state-wide discriminatory voting registration law that each county enforced as an instrumentality of the state. It is precisely this sort of uniform policy-maker--the State of Mississippi--that Plaintiffs are lacking in the present case."⁸ Similarly, in *Mosely v. General Motors Corp.*, another case heavily relied upon by the State, the court found a sufficient nexus to join the enforcers of a "company-wide policy purportedly designed to discriminate against blacks in employment,"⁹ which again presupposes a "uniform policy-maker," noticeably absent in the present action.

⁶ *Mississippi*, 380 U.S. at 135.

⁷ *Id.* at 143.

⁸ *Wynn v. National Broadcasting Co., Inc.*, 234 F.Supp.2d 1067, 1080 (C.D. Cal. 2002) (distinguishing *Mississippi* and severing employment discrimination claims brought against 50 separate entities in the television industry; noting that the "fact that defendants were members of a common industry did not warrant joinder of all defendants in single action.").

⁹ 497 F.2d 1330, 1334 (1974).

Plaintiff's claims against the 36 defendants here are far more analogous to those in *Nassau County Ass'n of Ins. Agents v. Aetna Life & Casualty Co.*, in which the Second Circuit affirmed the district court's dismissal on the basis of misjoinder of an action joining 164 defendant insurers who allegedly terminated their relationships with plaintiff insurance agents for unlawful reasons.¹⁰ Despite the *Nassau County* plaintiffs' allegations of identical wrongdoing by each defendant, the court found no right to relief arising from the same transaction or series of transactions, because the defendants' actions "were separate and unrelated, with terminations occurring at different times for different reasons with regard to different agents."¹¹ Not surprisingly, Plaintiff relegates *Nassau County* and numerous other relevant federal cases interpreting the "same transaction or occurrence" requirement to a single footnote, dismissively stating that these cases "present unique facts quite different than the present case."¹² This brief and wholly inadequate discussion fails to distinguish the body of case law on this issue, which overwhelmingly demonstrates that joinder is inappropriate where, as here, the only connection between a plaintiff's claims are that the Defendants are part of the same industry.

2. *Plaintiff Does Not, and Cannot, Dispute the Vast Differences Between the Marketing, Pricing and Price Reporting Practices of Each Defendant*

Plaintiff fails to present *any evidence* contradicting the fact that each Defendant markets and prices its products differently from each other Defendant, and reports separately from each other Defendant. Instead, Plaintiff attempts to discredit expert witness Dr. Gregory Bell, a respected industry expert with 15 years experience in the

¹⁰ 497 F.2d 1151, 1154 (2d Cir. 1974) (dismissing the plaintiffs' claims for failure to comply with the federal rules, and noting that "[t]he misjoinder here, resting on thousands of unrelated transactions, is such a gross abuse of procedure that dismissal ... is warranted.").

¹¹ *Id.*

¹² Opposition at 15 n.5.

field,¹³ claiming that he has no specific knowledge of the precise price reporting practices of many of the Defendants.¹⁴ In fact, Dr. Bell's affidavit stated that "the price reporting practices differ among the Defendants and may vary over time,"¹⁵ he never represented that he had extensive knowledge as to every Defendant's practices at all relevant times.¹⁶ Indeed, an important point raised in Defendants' Motion to Sever is that it is impossible for one person, be they industry expert or jury member, to keep track of each of the 36 Defendants' price reporting practices over the several years at issue in this lawsuit.

The Court need only look to the affidavits attached to Defendants' Motion to Sever, the comments of United States District Court Judge Patti Saris¹⁷ and the recent testimony of First DataBank employee Patricia Kay Morgan,¹⁸ all of which confirm Dr. Bell's observations. Although Plaintiff attempts to discredit Dr. Bell, the State fails to produce a single expert witness, affidavit or other evidence of its own to contradict his opinion, and, perhaps most importantly, does not dispute any of the substantive factual issues regarding the vast differences between each Defendant's marketing, pricing and reporting practices

¹³ See Deposition of Gregory Bell, August 17, 2007 ("Bell Deposition") at 16:9 (excerpts attached as Exh. A); Dr. Bell's CV (attached to Defendants' Motion to Sever).

¹⁴ See Opposition at 17 (citing Bell's deposition).

¹⁵ See Bell Affidavit ¶ 6 (attached to Defendants' Motion to Sever).

¹⁶ "I'm not aware of the price reporting practices of every company or of every defendant. I am aware of the price reporting practices of some of them, and that they differ and vary over time." Bell Deposition at 59:10-13. When asked about the basis for his assertion that price reporting practices differ among defendants, Dr. Bell testified: "Well, certainly my general experience in the industry refers to that, companies that I've worked with. I'm aware different labeler codes for different products lead the price reporting services to deciding on different mark-ups. And I articulated some of the specifics around I think it was three examples making the point that price reporting practices do differ among defendants with respect to branded products, generic products, over time; physician administered, self-administered, et cetera." Bell Deposition at 207:5-15.

¹⁷ See Motion to Sever at 10 (including several comments made by Judge Saris regarding the significance of the differences between each Defendant in AWP litigation).

¹⁸ See Deposition of Patricia Kay Morgan, August 27, 2007 ("Morgan Deposition") at 49:4-17; 54:12-23; 87:2-6; 132:10-21; 162:8-12; 164:11-16 (excerpts attached as Exh. B)(Ms. Morgan, a long-time employee of First DataBank, testified that different manufacturers supplied First DataBank with different types of data, and that First DataBank's markups varied from NDC to NDC and from company to company).

discussed in Defendants' individual affidavits.¹⁹ In light of these vast differences between the marketing, pricing and reporting practices of each Defendant, it is clear that they did not participate in the "same transaction or occurrence or series of transactions or occurrences" with the State of Wisconsin.

B. Plaintiff Misapplies the Standard For Joinder

As Defendants' Motion To Sever established, Wisconsin's joinder rule requires that a plaintiff's claims against multiple defendants must arise "out of the *same* transaction, occurrence or series of transactions."²⁰ If this element is not met, Plaintiff's claims must be severed and pursued individually against each defendant. Plaintiff does not dispute that this is the legal standard for joinder,²¹ but fails to apply this standard properly to the facts of the case, improperly asserting that arguably similar but separate transactions involving each of the Defendants satisfy the "same transactions" requirement. Plaintiff erroneously argues that the only requirement for joinder of claims against multiple defendants is that these claims be "logically related," and fails to explain or properly apply this test to the facts here. Finally, Plaintiff attempts to mischaracterize statements and conduct of Defendants as support for its erroneous conclusion that its claims arise out of the same transaction or occurrence.

¹⁹ It should be noted that Plaintiff's arguments against severance only focus on two of the five counts alleged against each Defendant in its Complaint—Plaintiff's opposition makes no argument as to the propriety of joinder as to its unjust enrichment claims or as to its claims under Wis. Stat. §49.49 and Wis. Stat. § 133.05. Plaintiff conveniently ignores the numerous allegations contained in its Complaint that go well beyond alleged publication of false prices. See, e.g., Complaint ¶¶ 1, 34, 41, 49, 50, 54, 56, 57, 88, 94, and 98. Plaintiff attempts to ignore the relevance of the differences in Defendants' marketing and pricing practices, erroneously implying that a showing of "an industry-wide practice of false pricing" would be sufficient to establish liability, despite the fact that each of Plaintiff's claims requires individualized proof of several elements for each defendant for each subject drug listed in the Complaint. See Opposition at 7; Motion to Sever at 11 n.48.

²⁰ Motion to Sever at 3, citing Wis. Stat. §803.04(1)(emphasis added).

²¹ Opposition at 3.

1. *Difference between “same” and “similar” transactions*

Plaintiff’s primary argument against severance of its claims hinges on the misconception that the allegedly similar but separate transactions or occurrences involving each Defendant constitute a sufficient nexus for joinder. But, the “same transaction or occurrences” standard requires “more than just similarity or coincidence.”²² Although Plaintiff asserts without evidentiary support that “[t]he transmissions of pricing data by First DataBank to Wisconsin certainly constitute ‘a series of transactions or occurrences’ in which the defendants participated *together* by providing false pricing information[,]”²³ in fact, none of the Defendants are involved in the transactions between First DataBank and the State of Wisconsin.²⁴ As the affidavits in support of Defendants’ Motion demonstrate, Defendants separately report information to First DataBank and other pricing compendia, a fact Plaintiff does not dispute. First DataBank, which is neither a party to this lawsuit nor in any way related to any defendant, subsequently compiles this information and publishes data to EDS, which in turn publishes it to Wisconsin.²⁵ While the series of transactions between each individual Defendant and First DataBank are arguably similar, they are not the “same” series of transactions, as required by Wis. Stat. §803.04(1).

2. *Improper application of “logically related” standard*

Plaintiff’s misconceptions regarding the “same transaction and occurrence” requirement are nowhere more apparent than in its erroneous argument that any “logically

²² *Ex Parte Novartis*, 2007 WL 1576114, *6.

²³ Opposition at 12.

²⁴ First DataBank does not report information directly to the State of Wisconsin for reimbursement purposes. First DataBank reports information to EDS (a private company that contracts with the State of Wisconsin) which then applies various filters and pricing algorithms to this data before sending it to Wisconsin. See Deposition of Kimberly Smithers, August 15, 2007 at 35:14-37:17 (excerpt attached as Exh. C).

²⁵ First DataBank applies different “markups” to pricing data submitted by different manufacturers to determine its AWP’s, and manufacturers “didn’t have direct influence over those markups.” Morgan Deposition at 42:10-20.

related” claim can be joined under Wisconsin law. Plaintiff’s confusion stems from language used by some federal courts in interpreting the “same transaction and occurrences” requirement; however, Plaintiff has taken this phrase out of context. While the “logically related” test, primarily used to determine joinder of counterclaims under Fed. R. Civ. P. 13(a), has been mentioned by some courts in the context of Rule 20(a), the “logically related” requirement is not intended to supplant the “same transaction and occurrences” requirement.²⁶ It is also telling that the only Wisconsin case Plaintiff cites in its discussion of this “logically related” language does not support the proposition that any logically related claim can be joined, but merely states that “‘subject matter relatedness’ of the events constituting a claim should be an important factor in determining the propriety of joinder.”²⁷

Even if Plaintiff had correctly interpreted the law, its claims against each of the 36 Defendants are not “logically related” for the purpose of joinder. It appears that Plaintiff has mistakenly interpreted the “logically related” language used by some courts in the context of joinder to encompass any *similar* claim, regardless of whether it arises from the *same* transaction or occurrence.²⁸ As noted by the Supreme Court of Alabama in explaining why fraudulent pricing claims against different Defendants are not logically related for the

²⁶ See, e.g., *Mosely*, 497 F.2d at 1333-34 (mentioning that claims must be logically related to be joined, but basing its decision on the “same transaction and occurrences” holding in *Mississippi*, which does not even mention a “logically related” test).

²⁷ *Kluth*, 178 Wis.2d at 818, 505 N.W.2d at 446 (cited in Opposition at 10).

²⁸ See *DIRECTV, Inc. v. Collins*, 2007 WL 1964953, *2 (S.D. Ohio 2007) (finding misjoinder of numerous defendants who allegedly intercepted the same satellite signal; stating that the transactions are no more “logically related” than two separate purchases of milk from the same grocery store.); *Strandlund v. Hawley*, 2007 WL 984268, *3 (D. Minn. 2007) (“The Court discerns no logical relationship between the incidents alleged in plaintiffs’ complaint; they occurred on different days, under different circumstances, in different places, and with different actors.”); *Wilson v. ABN Amro Mortg. Group* 2005 WL 3508658, *4 (D.D.C. 2005) (holding that a “tangential relationship” between two claims is not enough to make them “logically related” for the purposes of joinder; and stating “as far as the record indicates, the alleged misconduct of [one group of] defendants has absolutely no bearing on whether the [other] defendants engaged in independent wrongdoing that would entitle plaintiff to recover damages from them, as well.”).

purpose of joinder, “to be reasonably related, the actions must involve more than just similar goods for a similar purpose.”²⁹ Thus, Plaintiff’s reliance on this “logically related” language is misplaced—in the present action, Plaintiff’s allegations that multiple defendants made different representations to First DataBank and/or the State of Wisconsin are inadequate to establish that Plaintiff’s claims are logically related for the purposes of joinder.

3. *Plaintiff Mischaracterizes Statements Made By Defendants’ Counsel*

Plaintiff also argues that a letter from Defendants’ counsel expressing concern that rulings on summary judgment motions pending against two individual Defendants may affect the other Defendants— a concern specifically arising out of Plaintiff’s misjoinder of its claims against the 36 Defendants in one action—supports its erroneous conclusion that the claims in this action arise from the same transaction or occurrence.³⁰ The fact that Defendants took steps to protect themselves from a potentially binding decision³¹ by raising this issue to the Court in no way constitutes acquiescence in the improper joinder that has occurred. Plaintiff’s misjoinder and premature summary judgment attempt compelled Defendants to act, ensuring that no summary judgment decision would preempt the important severance questions presently at issue. Plaintiff ignores the fact that Mr.

²⁹ *Ex Parte Novartis*, 2007 WL 1576114 at *5-6 (citing the “logical relationship” language in *Moore*).

³⁰ Opposition at 15.

³¹ As stated in Mr. Conley’s Letter, Wisconsin law “suggests that a defendant in an action that is not named a party on the motion may be bound by the courts decision.” Letter from William M. Conley to Hon. Richard G. Niess, June 25, 2007 (Pltfs. Exh. 1)(citing *In Estate of Rille v. Physicians Insurance Co.*, 2007 WI 36, ¶ 91, -- Wis. 2d --, 728 N.W.2d 693). Because Defendants’ Motion to Sever had not yet been decided, and each of the 36 Defendants were “defendants in an action” at the time of Mr. Conley’s letter, Defendants acted to protect their rights to take discovery.

Conley's letter specifically mentions Defendants' intent to file a Motion to Sever, and asserts that "the facts as to each Defendant are unique."³²

II. SEPARATE TRIALS³³

Only if the Court first determines that Plaintiff's claims arise out of the same transaction or occurrence, and that severance is *not* required under Wisconsin law, must it consider whether to exercise its discretion to grant separate trials for each Defendant to avoid the clear prejudice that attends mingling evidence on multiple elements of five counts against 36 Defendants before a single jury.³⁴ Contrary to Plaintiff's assertion, a decision to grant separate trials is not premature (if the Court denies Defendants' motion to sever), because Plaintiff's pending summary judgment motions will not change that (1) individualized proof must be presented against each Defendant, and (2) the differences between each Defendants' practices render decisions on liability and damages too complex for a single jury to fairly decide. Finally, despite Plaintiff's misrepresentations that certain Defendants favor a "grouping approach" to trial, grouping Defendants for trial would not eliminate the prejudice that would result from presenting complicated evidence regarding multiple Defendants to a single jury—each Defendant must be tried separately to ensure fairness.

³² Letter from William M. Conley to Hon. Richard G. Niess, June 25, 2007.

³³ Defendants' request for separate trials is *in the alternative*, if the Court denies their Motion to Sever. If the Court grants the Motion to Sever, it need not decide the issue of separate trials. To the extent that Plaintiff desires that one or more Defendant be "grouped" for a single trial, then the burden is on Plaintiff to move the Court for a consolidation for trial purposes. *See Ex Parte Novartis*, 2007 WL 1576114 at *7-8 (noting that "the availability of consolidated trials ... after a finding of misjoinder under Rule 20 is well settled.") (Justice Lyons, concurring).

³⁴ *See* Wis. Stat. §803.04(4) (the Court may order separate trials to prevent prejudice); Wis. Stat. 805.05(2).

A. The Policies Behind Wisconsin's Joinder Rule Support Separate Trials

Much of Plaintiff's argument against the Court's discretionary granting of separate trials in this action rests on the policies behind the Wisconsin's joinder rule, which Plaintiff erroneously asserts would be thwarted by severing the claims against these 36 defendants. However, Plaintiff largely ignores the crucial policy consideration of fundamental fairness to the parties. Wisconsin and federal courts have held that the "[r]ules governing permissive joinder should be interpreted to allow 'the broadest possible scope of action consistent with fairness to the parties.'"³⁵ When the interests of judicial efficiency are outweighed by the potential prejudice to a party arising from the possibility of factual and legal confusion on the part of the jury, severance is warranted.³⁶ Discussion of this potential for jury confusion, outlined in detail in Defendants' Motion to Sever, is noticeably absent from Plaintiff's discussion of the policies behind the joinder rule.³⁷

Plaintiff has presented no evidence or expert support of its own challenging Defendants' demonstration of the numerous differences between their marketing, pricing and reporting practices of the various Defendants, and the clear prejudice that would result if a single jury is tasked with the job of making individualized determinations of liability for each element for each of Plaintiff's five counts against each of the 36 Defendants named. As Dr. Bell testified, these differences between the Defendants "render impractical any

³⁵ *Kluth*, 178 Wis.2d at 818, 505 N.W.2d at 446 (emphasis added); *Intercon Research Associates, Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 58 (7th Cir. 1982) ("Requiring Dresser Industries to participate as a defendant in this action would have been unfair for several reasons."); *Ula-Lisa v. Waukesha County*, 2006 WL 2252909, *1 (E.D.Wis. 2006).

³⁶ See *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000)(upholding the trial court's order granting severance on the basis of potential prejudice to defendant).

³⁷ See Motion to Sever at 11-12. It should also be noted that Plaintiff completely ignores the comments of United States District Judge Patti Saris (the only judge who has actually presided over an AWP trial of multiple defendants) regarding the need to try these cases company-by-company. See *Id.* at 10, 12, 13.

joint evaluation of liability or damages.”³⁸ Dr. Bell is a widely respected industry expert and therefore his opinion on the impracticality of subjecting a single jury to evidence regarding 36 vastly different companies is highly relevant. That Dr. Bell is not a lawyer, and consequently is not familiar with all of the legal elements of Plaintiff’s claims (as Plaintiff argues), is completely irrelevant. In fact, Plaintiff will need to prove numerous elements against each individual defendant for each of its five counts, and the proof of these elements may hinge on each defendant’s business, marketing and reporting practices.³⁹ The opinions of both Dr. Bell, a respected industry expert with 15 years experience in the field, and United States District Court Judge Patti Saris, who is intimately familiar with the elements required to prove similar AWP claims, establish that the multiple differences between defendants render AWP litigation involving multiple defendants too complex to handle in one trial.⁴⁰ Indeed, just recently, Judge Saris again reiterated the confusion of trying multiple defendants in one trial:

“Let me just say to plaintiffs, I know you want to put three defendants up because you want to move this case. It is too confusing. It was so confusing to me doing Track One with all the different drugs, but Amgen has five drugs. It's just too confusing to a jury. We're going to do one drug.”⁴¹

“I’m not sure I can try them all at once, simply because I think it's confusing for a jury to keep track of all of them.”⁴²

Plaintiff has cited no authority to cast doubt on these opinions.

Plaintiff’s brief mention of fairness concerns— suggesting that separate trials would “significantly impair[] the plaintiff’s case” because “Plaintiff intends to show an industry-

³⁸ Bell Affidavit ¶ 9.

³⁹ See Motion to Sever at 11 n.48.

⁴⁰ See Motion to Sever at 10, 12-13 (citing various comments made by Judge Saris in connection with AWP litigation).

⁴¹ Transcript of Hearing at 11:3-8, *In re Pharmaceutical Industry* (D. Mass. August 27, 2007) (excerpts attached as Exh. D).

⁴² *Id.* at 28:17-29:3.

wide practice of false pricing”⁴³— demonstrates precisely why fairness dictates the need for separate trials. Plaintiff’s repeated assertion that it intends to attempt to “show an industry-wide practice” exposes its preference for misleading a jury with a homogenized narrative, rather than exacting and individualized proof. Such a strategy surely is not “consistent with fairness” to Defendants.⁴⁴

In addition, Plaintiff argues that the State would be prejudiced by separate trials, but fails to provide any support beyond the bald assertion that its resources are too limited to conduct separate trials.⁴⁵ Whether or not these trials are consolidated, Plaintiff will have to prove each element of each claim against each defendant. Defendants’ rights should not be subverted -- nor should a jury be given an impossible task -- because the State finds it inconvenient to follow through on the large and unwieldy case it commenced. As Judge Krueger pointed out, it is the Plaintiff that chose to sue too many different companies, and it must live with the inevitable consequences of that decision.⁴⁶ Moreover, Defendants have acknowledged the benefit to conducting coordinated discovery between the separate cases, and have expressed a willingness to continue to do so.⁴⁷ Plaintiff has produced no evidence demonstrating that separate trials for each Defendant following coordinated discovery would significantly increase the cost of this litigation.

Finally, Plaintiff mischaracterizes Defendants’ statements and conduct in this case, asserting: “Indeed, joinder is consistent with the defendants’ own conduct in this case to

⁴³ Opposition at 7.

⁴⁴ See *Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1375 (9th Cir. 1980) (noting that trial courts should consider the motives of the party requesting joinder in determining whether such joinder would comport with the principles of fundamental fairness).

⁴⁵ See Opposition at 6.

⁴⁶ See Order Denying Sharing Motion at 3, *State of Wisconsin v. Amgen, et al.*, No. 04 CV 1709 (November 29, 2005) (attached as Exh. E); see also Decision and Order Denying Plaintiff’s Motion to Amend Protective Order to Allow Sharing of Confidential Discovery Documents at n.1, *State of Wisconsin v. Amgen, et al.*, No. 04 CV 1709 (August 15, 2007), where this Court notes that “Judge Krueger’s point remains—plaintiff set the table.”

⁴⁷ See Motion to Sever at 3 n.10.

date. As the Court is aware, defendants consistently have acted in a joint and uniform manner with respect to motions and discovery practice, culminating in the joint motion at issue.”⁴⁸ Defendants have agreed to some unified discovery and motions practice to avoid duplicative, costly and time-consuming repetition of certain limited issues common to all defendants, and firmly believe that some coordination should continue as the parties complete discovery.⁴⁹ However, Defendants have never represented to Plaintiff that they will assert uniform defenses—in fact, each Defendant will assert individualized, specific defenses,⁵⁰ stemming from the wide variety of business, marketing and reporting practices discussed at length in Defendants’ Motion to Sever, the Affidavit and testimony of Gregory Bell and the 20 affidavits of individual defendants attached to the Motion to Sever.

B. A Decision To Grant Separate Trials Is Not Premature

Plaintiff erroneously argues that it would be premature for the Court to exercise its discretion to order separate trials for each Defendant while its summary judgment motions against three Defendants are pending. However, there is no need for the Court to wait until after deciding Plaintiff’s summary judgment motions to decide on severance or separate trials. Plaintiff’s summary judgment motions involve only two of Plaintiff’s five counts— regardless of the outcome of Plaintiff’s motions, the other three counts require individualized proof for each element for each Defendant. And, even if Plaintiff is successful on certain matters of law at issue in its summary judgment claims against these three Defendants, individualized factual determinations will still be required for each Defendant, which raises the same concerns about prejudice and jury confusion outlined above.

⁴⁸ Opposition at 9.

⁴⁹ Motion to Sever at 3 n.10.

⁵⁰ Motion to Sever at 12.

The cases cited by Plaintiff in support of its request to delay ordering separate trials are easily distinguished from the present case. The court in *Kluth*, which did indeed hold that the argument for separate trials based on jury confusion was premature, based its decision on the fact that no discovery had yet been taken in that case, specifically stating that “[i]f discovery, for example, reveals that jury confusion is possible or likely-and there are numerous scenarios where we could envision that happening-the trial court should again consider the issue and grant or deny the motion based on the status of the case at that time.”⁵¹ In the present case, two years of discovery have produced more than ample evidence demonstrating the inevitable confusion that will result if Defendants are tried together.

C. Defendants Should Not Be Grouped

Finally, the Court should not group Defendants for trial as requested by Plaintiff,⁵² because such grouping would fail to eliminate the prejudice to Defendants. As Judge Saris noted, *each* Defendant is entitled to an individualized determination on the merits of its own defenses,⁵³ and even a bench trial involving only four Defendants was “confusing enough.”⁵⁴ It should be noted that Plaintiff’s proposed groupings would involve more than four defendants, and one grouping would involve ten.⁵⁵

Furthermore, the Alabama Supreme Court cautioned that any order grouping defendants for trial must “identify the reasoning upon which any clusters of defendants are

⁵¹ *Kluth*, 178 Wis.2d at 821-822, 505 N.W.2d at 447.

⁵² See Opposition at 19-21.

⁵³ Transcript of Settlement Conference at 30 *In re Pharmaceutical Industry* (D. Mass. May 22, 2007) (attached to Defendants’ Motion to Sever); Transcript of Hearing at 11:3-8, 28:17-29:3, *In re Pharmaceutical Industry* (D. Mass. August 27, 2007).

⁵⁴ Transcript of Hearing at 55, *In re Pharmaceutical Industry* (D. Mass. July 3, 2007) (attached to Defendants’ Motion to Sever).

⁵⁵ See Opposition at 20-21 (suggesting that Defendants be grouped according whether they sell generic drugs, brand-name drugs, both generic and brand-name drugs or specialty drugs).

created for resolution of this proceeding....”⁵⁶ While Plaintiff suggests that Defendants should be grouped according to “the general nature of their business,”⁵⁷ it provides no evidence to support its claims, nor does it account for the individual marketing, pricing and reporting practices of each Defendant, and therefore does not provide sufficient evidentiary support or reasoning for such groupings.

Apparently lacking a substantive basis for its effort to join individual claims against distinct defendants in a single case, Plaintiff attempts to support its position by misrepresenting the position of one defendant, Novartis Pharmaceuticals Corporation (“NPC”) regarding Plaintiff’s improper joinder and severance. Fabricating a “Novartis approach” based on a mischaracterization of a letter from NPC’s counsel to the Special Masters in *State of Alabama v. Abbott Labs, et al.*, Plaintiff suggests to the Court that NPC supports joint trials of the State’s individual claims against individual defendants.⁵⁸ Nothing could be further from the truth.

To the contrary, the “Novartis approach” is, and always has been, that these cases involve individual claims against individual Defendants and should be tried separately, and NPC’s letter to the Special Masters fully supports that approach. Indeed, as Plaintiff well knows, NPC vindicated its view in Alabama, where the Alabama Supreme Court unanimously adopted the true “Novartis approach” and severed all of the cases that had been misjoined by the Alabama Attorney General.⁵⁹

NPC’s letter on its face exposes the fallacy of Plaintiff’s position. The very first paragraph of NPC’s letter states that any joint trials in the Alabama case would deprive

⁵⁶ *Ex Parte Novartis*, 2007 WL 1576114 at *8 (Justice Lyons, concurring).

⁵⁷ Opposition at 20.

⁵⁸ Opposition at 20-21 (citing letter from Saul P. Morgenstern to Simeon F. Penton, Esq. and Jimmy B. Pool, Esq., November 3, 2006 (“Morgenstern Letter”) (Pltfs. Exh. 3)).

⁵⁹ See *Ex parte Novartis*, 2007 WL 1576114.

defendants there – as here – of due process and create an “evidentiary and procedural nightmare.”⁶⁰ Indeed, as the letter itself made clear, NPC’s purpose in sending the letter was to illustrate for the Special Masters the significant differences among the various defendants’ business models and the impracticalities of *any* proposed trial groupings.⁶¹ Nothing in the letter changed or contradicted the fact that Alabama’s individual claims there – as do Plaintiff’s individual claims here – rest on distinct transactions that are individual to each defendant. There, as here, proof of one defendant’s actions will neither prove nor disprove whether any other defendant acted in a manner contrary to Wisconsin law. All such proof will do in common trials is confuse a jury, as the federal judge presiding over similar cases in Boston has concluded on multiple occasions.⁶²

CONCLUSION

The State of Wisconsin has misjoined the 36 Defendants in this action because its claims do not arise from the same transaction or occurrence, or series of transactions and occurrences. In addition, the numerous, complex differences between each Defendant’s business, marketing and price reporting practices, combined with the individualized proof required for each element of each of the State’s claims, render it impossible for a single jury to make a fair decision as to the liability of 36 different companies in a single trial. Therefore, the State’s claims against each Defendant must be severed.

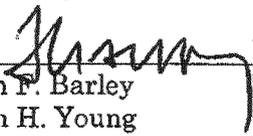
⁶⁰ Morgenstern Letter.

⁶¹ *Id.* Similarly disingenuous is Plaintiff’s suggestion that NPC was advocating a “logical approach to grouping the defendants for trial” by enclosing with its letter a chart identifying most of the Alabama defendants by the general nature of the business they conduct. Opposition at 20. To the contrary, as the letter plainly stated, NPC offered the letter and chart in order to demonstrate to the Special Masters “why and how Plaintiff’s proposed groupings are inappropriate[.]” and in the hope that they would find the information “helpful in understanding the differences among the Defendants and the considerable problems inherent in the approach proposed by [Alabama].” Morgenstern Letter. Thus, Plaintiff’s attempt to credit NPC with Plaintiff’s own suggestion of separate trial groupings based on the general nature of Defendants’ business is wholly unfounded.

⁶² See Transcript of Hearing at 11, 28-29, *In re Pharmaceutical Industry* (D. Mass. August 27, 2007).

September 14, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2007, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

/s/ Jennifer A. Walker

Jennifer A. Walker

EXHIBIT A

Bell, Ph.D., Gregory K.

August 17, 2007

Boston, MA

Page 1

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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

----- x

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., et al.,

Defendants.

----- x

VIDEOTAPED DEPOSITION OF GREGORY K. BELL, Ph.D.

Friday, August 17, 2007

9:07 a.m. through 3:27 p.m.

Ropes & Gray

One International Place

Boston, Massachusetts

:

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14 ALSO PRESENT:

15 Jason Lachapelle, Videographer

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I N D E X

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
GREGORY K. BELL, Ph.D.				
(By Mr. Barnhill)	11			
(By Mr. Edwards)		205		

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
Exhibit Bell 001	Second amended complaint	12
Exhibit Bell 002	Affidavit of Dr. Bell	14
Exhibit Bell 003	Compilation of affidavits	201

1 with some or all of these defendants?

2 A. I'm not sure what you mean by "a previous
3 relationship."

4 Q. Have you done work for some or all of these
5 defendants prior to completing this affidavit?

6 A. Yes.

7 Q. All right. Over what period of time have
8 you done work for these defendants?

9 A. I suppose maybe going back as long as 15
10 years. At one time or another I might have done
11 work for one of the defendants.

12 Q. What company or business do you work with or
13 for?

14 A. I'm executive vice president at CRA
15 International.

16 Q. And CRA is what?

17 A. It's an economics and management consulting
18 firm.

19 Q. All right. And does your company do work
20 for these defendants apart from your own work for
21 these defendants?

22 A. Yes, I believe it has.

1 say -- I need my glasses here -- in the third
2 sentence, "First, the price reporting practices
3 differ among the Defendants and may vary over time."
4 Do you see that?

5 A. Yes.

6 Q. Okay. And I take it, to make that assertion
7 you went about and found out what the price
8 reporting practices of the defendants were; is that
9 correct?

10 A. I'm not aware of the price reporting
11 practices of every company or of every defendant. I
12 am aware of the price reporting practices of some of
13 them, and that they differ and vary over time.

14 Q. So this sentence, to accurately read, would
15 say, "First, the price reporting practices among the
16 Defendants about which I have knowledge may vary
17 over time"?

18 A. I'm perfectly happy with the sentence as
19 written.

20 Q. Okay. Would you take a look at the
21 defendants in this case?

22 A. Sure.

1 questions I was just articulating.

2 Q. Right. You recall Mr. Barnhill asking you
3 questions on that sentence?

4 A. Right, going through each of the defendants
5 and asking me --

6 Q. Right. And then he took you through each of
7 the defendants and asked you whether you could tell
8 him what the particular price reporting practices
9 were of each of those particular defendants?

10 A. Correct.

11 Q. Do you recall that?

12 A. I do.

13 Q. And on some you knew, on some you didn't
14 know, and on some you said you didn't recall. Fair?

15 A. Right. I could not recall the specifics of
16 that particular company, which is not to say that --
17 I'm generally aware obviously of different price
18 reporting practices. It's just that I can't, as I
19 sit here, say, well, exactly how it is that Amgen
20 does it or how it is that Abbott does it.

21 Q. Well, I think you've largely anticipated my
22 next question, but let me ask it anyhow. In light

1 of that testimony, what is the basis for your
2 statement in this affidavit that the price reporting
3 practices differ among the defendants and may vary
4 over time?

5 A. Well, certainly my general experience in the
6 industry refers to that, companies that I've worked
7 with. I'm aware different labeler codes for
8 different products lead the price reporting services
9 to deciding on different mark-ups. And I
10 articulated some of the specifics around I think it
11 was three examples making the point that price
12 reporting practices do differ among defendants with
13 respect to branded products, generic products, over
14 time; physician administered, self-administered, et
15 cetera.

16 MR. EDWARDS: That's it. Thank you.

17 MR. BARNHILL: Dr. Bell, it was nice
18 meeting you. Thanks for coming. I expect to see
19 you in the future.

20 THE VIDEOGRAPHER: Going off the record.
21 This marks the end of Videotape No. 4 in the
22 deposition of Gregory K. Bell, Ph.D. the time is

EXHIBIT B

1 IN THE CIRCUIT COURT OF
2 MONTGOMERY COUNTY, ALABAMA

3 -----x

4 STATE OF ALABAMA, :

5 Plaintiff, :

6 vs. : Case No.: CV-05-219

7 ABBOTT LABORATORIES, INC., : Judge Charles Price

8 et al. :

9 Defendants. :

10 -----x

11 UNITED STATES DISTRICT COURT

12 DISTRICT OF MASSACHUSETTS

13 -----X

14 In re: PHARMACEUTICAL :

15 INDUSTRY AVERAGE WHOLESAL : MDL No. 1456

16 PRICE LITIGATION : Civil Action No.

17 : 01-12257-PBS

18 THIS DOCUMENT RELATES TO: :

19 :

20 ALL ACTIONS :

21 -----X

22 DEPOSITION OF PATRICIA KAY MORGAN

23 August 27, 2007

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 -----X

4 THE COMMONWEALTH OF MASSACHUSETTS : CIVIL ACTION NO.

5 Plaintiff, : 03-CV-11865-PBS

6 v. :

7 MYLAN LABORATORIES, INC., et al. :

8 Defendants. :

9 -----X

10

11 IN THE DISTRICT COURT

12 TRAVIS COUNTY, TEXAS

13 201ST JUDICIAL DISTRICT

14 -----x

15 THE STATE OF TEXAS, ex rel, :

16 VEN-A-ACARE OF THE FLORIDA :

17 KEYS, INC. :

18 Plaintiffs, : CAUSE NO.

19 vs. : D-1-GV-07-001259

20 SANDOZ, INC. f/k/a GENEVA :

21 PHARMACEUTICALS INC., et al. :

22 -----x

23

1 IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

2 STATE OF MISSOURI

3 ----- x

4 STATE OF MISSOURI, ex rel, :

5 JEREMIAH W. (JAY) NIXON, :

6 Attorney General, :

7 and :

8 MISSOURI DEPARTMENT OF SOCIAL :

9 SERVICES, DIVISION OF MEDICAL : Case No.

10 SERVICES, : 054-1216

11 Plaintiffs, : Division No. 31

12 vs. :

13 DEY INC., DEY, L.P., MERCK KGaA, :

14 EMD, INC., WARRICK :

15 PHARMACEUTICALS CORPORATION, :

16 SCHERING-PLOUGH CORPORATION, and :

17 SCHERING CORPORATION, :

18 Defendants. :

19 ----- x

20

21

22

23

1 COMMONWEALTH OF KENTUCKY

2 FRANKLIN CIRCUIT COURT - DIV. I

3 -----X

4 COMMONWEALTH OF KENTUCKY, ex rel. : CIVIL ACTION NO.

5 GREGORY D. STUMBO, Attorney General: 04-CI-1487

6 Plaintiff, :

7 v. :

8 ALPHAPHARMA, INC., et al. :

9 Defendants. :

10 -----X

11

12 DEPOSITION OF PATRICIA KAY MORGAN

13

14 DATE TAKEN: August 27, 2007

15 TIME: 1 p.m. - 6:25 p.m.

16 PLACE: 401 East Jackson Street

17 Suite 2225

18 Tampa, Florida 33602

19

20 Stenographically Reported by:

21 PATTY CARLSON

22 Registered Professional Reporter

23 Certified Realtime Reporter

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1 MR. BARNHILL: I'm not taking a position on
2 this. My position is the deposition isn't long
3 enough for us to ask the questions that we want,
4 and we're not bound by the protective order.

5 MS. TORGERSON: There is an answer pending
6 still.

7 MR. EDWARDS: Can you read the question back.

8 (The question was read by the reporter.)

9 A. That's correct.

10 Q. And is it also correct that First
11 DataBank did not let the manufacturer control the
12 AWP field?

13 A. That's correct.

14 Q. And the manufacturers did not control the
15 markups that First DataBank used to determine AWP's?

16 MR. KERN: Objection; vague and ambiguous,
17 lacks foundation. Go ahead.

18 A. The markups were based on our wholesaler
19 survey. They didn't have direct influence over
20 those markups.

21 Q. And I just want to direct your attention
22 to your prior testimony at Page 309, Line 4, where
23 you were asked a question -- this is the prior

1 DataBank created to describe WAC?

2 A. I'm not sure who created it, but it was
3 the term that we used to describe WAC.

4 Q. And is it correct that First DataBank
5 generally gets WACs from manufacturers?

6 MR. KERN: Objection; outside the scope.

7 A. Generally, yes.

8 Q. And in some cases when the manufacturers
9 did not provide a WAC, First DataBank would try to
10 obtain a WAC from another source such as a
11 wholesaler or a pharmacy?

12 MR. KERN: Objection; outside the scope.

13 Q. Is that correct?

14 A. We attempted to obtain some WACs from a
15 wholesaler utilizing the information that was
16 transmitted from the manufacturer to the
17 wholesaler.

18 Q. In other words, there had to be some
19 proof that it was the manufacturer's WAC, such as a
20 price list with the manufacturer's name on it?

21 MR. KERN: Objection; misstates prior
22 testimony. Objection, outside of the scope.

23 MR. EDWARDS: I didn't mean to misstate the

1 A. That's correct.

2 Q. Now, is it also correct that with the
3 exception of two companies, Bayer and TAP, during
4 the time that you were at First DataBank no
5 manufacturer reported average sales prices or ASPs
6 to First DataBank?

7 MR. KERN: Lacks foundation. Go ahead.

8 MS. THOMAS: Objection to form.

9 A. That's incorrect.

10 Q. That's incorrect?

11 A. Yes.

12 Q. Which manufacturers reported ASPs to
13 First DataBank?

14 A. It's been more than two years since I
15 left, and my big goal when those came in was to get
16 them off to our attorneys as soon as possible. The
17 other company that comes to mind -- there may have
18 been others, but I remember AstraZeneca sending in
19 ASPs.

20 Q. Do you remember anybody else sending in
21 ASPs?

22 MS. THOMAS: Objection.

23 A. I don't recall.

1 had been dwindling.

2 As of that point in time to my knowledge only
3 Abbott Laboratories had a difference between their
4 direct and their WAC price. The other
5 manufacturers that had direct price were using a
6 one-price policy whereby WAC and direct were equal.

7 Q. Then if you skip down below there is a
8 slide relating to suggested wholesale price. Do
9 you recall what you said about that?

10 A. Again, it's a data element or a field
11 provided by First DataBank, and it is the suggested
12 wholesale price when a manufacturer, a drug
13 company, suggests an AWP. It is populated only
14 when it is provided. It is acceptable for it to be
15 a blank or no value or it could have zeros in it
16 should a manufacturer stop suggesting a wholesale
17 price. It may or may not agree with the surveyed
18 AWP or the Blue Book price. It could be higher; it
19 could be lower. At that point in time the trend
20 appeared to be for manufacturers to no longer
21 suggest AWP's.

22 Q. And there is a slide relating to baseline
23 price. What do you recall saying about that?

1 DataBank would tell them; correct?

2 A. Bob James is with McKesson. There is no
3 request here from a manufacturer for a markup.

4 Q. Let me ask it a different way. Did First
5 DataBank communicate to drug manufacturers what the
6 markup would be from AWP -- from WAC to AWP?

7 A. Only --

8 MR. KAVANAUGH: Object to form.

9 A. -- if they ask.

10 Q. Would the markup differ from drug to drug
11 and NDC to NDC for each company?

12 A. Possible.

13 Q. Tell me what you mean by that.

14 A. You're defining it now from your original
15 question down to per one company; correct?

16 Q. Correct.

17 A. Recognize that in today's world companies
18 are multi-divisional. Okay? It was not unusual
19 for prescription and OTC products to have different
20 markups and not all companies were on a markup.
21 Some of them were on suggested.

22 Q. In all of the discussions of markups I've
23 heard about a 20 percent markup and a 25 percent

1 get suggested wholesale prices or a publication

2 that says "average wholesale price" from

3 manufacturers; is that correct?

4 MR. KERN: I'll object as to asked and

5 answered and outside of the scope to the extent

6 that the direct examination was outside of the

7 scope of the protective order.

8 A. We receive a lot of information from

9 manufacturers. We may receive a suggested

10 wholesale price. We may receive average wholesale

11 price. We receive package inserts, labels, NDC

12 numbers. There's a lot of information.

13 Q. Right. I'm just talking about prices.

14 Let's confine our testimony to just prices. You

15 may get suggested wholesale prices and average

16 wholesale prices as well as wholesale nets from the

17 manufacturers such as Bristol; is that correct?

18 A. We may.

19 MR. KERN: Mr. Barnhill, when you get a

20 chance, I would like to take a break.

21 MR. EDWARDS: Let me just object to the form

22 of the question too.

23 MR. KERN: If you see a natural pause coming

1 up --

2 MR. BARNHILL: It's a natural pause anyplace.

3 MR. KERN: Great. Let's take a five-minute

4 break. Thank you very much.

5 (Recess from 4:45 p.m. to 4:53 p.m.)

6 EXAMINATION

7 BY MR. CARTER:

8 Q. I want to show you Exhibit Morgan 019 and

9 ask you if you can identify this as your

10 declaration in support of the opposition to

11 Bristol-Myers Squibb Company's motion to compel

12 your deposition.

13 A. That's what this is.

14 Q. Your declaration; correct?

15 A. Yes.

16 Q. And everything that you put in that

17 declaration is true and correct to the best of your

18 knowledge; correct?

19 A. That's correct.

20 Q. Very good.

21 MR. CARTER: Back to you.

22 MR. BARNHILL: Okay.

23 EXAMINATION

1 BY MR. BARNHILL:

2 Q. I think we were talking about other
3 contacts or other information sent to First
4 DataBank by manufacturers, and I think we were just
5 talking about the fact that many manufacturers send
6 average wholesale prices or suggested wholesale
7 prices, and I think you said that's correct. Is
8 that right?

9 A. I don't recall that. I wouldn't agree
10 with the word "many."

11 Q. Your testimony is that the manufacturers
12 do not send average wholesale prices or suggested
13 wholesale prices to First DataBank?

14 MR. KERN: Objection, misstates prior
15 testimony.

16 A. Some do; some don't.

17 Q. Which ones do and which ones don't?

18 MR. KERN: Let me interpose really quickly.
19 I'm going to object as outside the scope. Just so
20 you understand, this is largely due to the
21 objections that Mr. Edwards' testimony was outside
22 of the scope. I understand that you're
23 cross-examining on a broad number of things that he

EXHIBIT C

1 STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

2 -----

3 STATE OF WISCONSIN,

4

5 Plaintiff,

6 v. Case No. 04-CV-1709

7 AMGEN, INC., et al.,

8

9 Defendants.

10 -----

11

12 VIDEO DEPOSITION of KIMBERLY A. SMITHERS,

13 taken at the instance of the Defendants, under and

14 pursuant to the provisions of Chapter 804.05 of the

15 Wisconsin Statutes, and the acts amendatory thereof

16 and supplementary thereto, before me, KIM M.

17 PETERSON, CM, Registered Professional Reporter and

18 Notary Public in and for the State of Wisconsin, at

19 17 West Main Street, Madison, Wisconsin, on the 15th

20 day of August, 2007, commencing at 9:34 o'clock in

21 the forenoon.

22

1 APPEARANCES

2

3 ARCHIBALD CONSUMER LAW OFFICE

4 1914 Monroe Street

5 Madison, Wisconsin 53711

6 By MR. P. JEFFREY ARCHIBALD, ESQ.

7 Appeared on behalf of the Attorney

8 General of the State of Wisconsin.

9

10

11 HOGAN & HARTSON,LLP

12 111 South Calvert Street

13 Suite 1600

14 Baltimore, Maryland 21202

15 By MR. STEVEN F. BARLEY, ESQ.

16 and MS. JENNIFER WALKER, ESQ.

17 Appeared on behalf of the Defendant

18 Amgen, Inc.

19

20

21

22 (CONTINUED)

1 words, I assume that the information that EDS

2 gets is in electronic form?

3 A. Correct, it is electronic.

4 Q. And that's been the case for how long?

5 A. Since 1993, I believe.

6 Q. Okay. And before that how did it

7 receive the information?

8 A. I don't have any experience before

9 that.

10 Q. Okay. So before that it could have

11 been electronic or it could have been some other

12 form. You just can't speak to that.

13 A. I can't speak to it.

14 Q. All right. So the electronic

15 information is provided to EDS directly from

16 First DataBank?

17 A. That is my understanding.

18 Q. Is that electronic information about

19 AWP's provided directly to the State by First

20 DataBank?

21 A. The State does not receive anything

22 directly from First DataBank.

1 Q. The information that is received from
2 First DataBank is then loaded into the, I think
3 you said MMIS database?

4 A. Into the MMIS reference file. I do
5 want to clarify, it is not a direct load. There
6 is a process to load it.

7 Q. You know what my next question's going
8 to be. What's that process?

9 A. I can tell you quite comfortably what
10 today's process is. I'm not sure I can speak to
11 the historical processes.

12 Q. Why don't you tell -- Before you
13 describe it, what timeframe are we talking about?
14 How far back are you familiar with the process?

15 A. I'm familiar with the process
16 comfortably for my current position, 12 years.

17 Q. All right.

18 A. What we do with -- What EDS does with
19 the information received from EDS -- or from
20 First DataBank, excuse me, is they filter the
21 components that we need for the MMIS reference
22 file. So there's more data included in that file

1 sent from First DataBank than what we use for
2 processing claims against.

3 So we filter what is needed, and then
4 we also apply a pricing algorithm depending on
5 the type of drug that it is; brand versus
6 generic, innovator versus noninnovator, that type
7 of thing, and then that is what's loaded to the
8 reference file for claims to interface with.

9 Q. And when you say interface with, you
10 mean that is what the State has access to?

11 A. That is what the State has access to
12 and what claims use to process.

13 Q. So the State -- The data that the State
14 has access to is data that has already been
15 filter by EDS and for which a pricing algorithm
16 has been applied?

17 A. Yes.

18 Q. Could you please describe these filters
19 for me so I can understand what they are?

20 A. I can describe some of them, but
21 without the documentation in front of me I'm not
22 sure I can give you a complete picture. One of

EXHIBIT D

1 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

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In Re:)
4 PHARMACEUTICAL INDUSTRY) CA No. 01-12257-PBS
 AVERAGE WHOLESAL PRICE) MDL No. 1456
5 LITIGATION) Pages 1 - 59

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8 HEARING
9 BEFORE THE HONORABLE PATTI B. SARIS
 UNITED STATES DISTRICT JUDGE

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13

 United States District Court
14 1 Courthouse Way, Courtroom 19
 Boston, Massachusetts
15 August 27, 2007, 9:25 a.m.

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22

 LEE A. MARZILLI
23 OFFICIAL COURT REPORTER
 United States District Court
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1 APPEARANCES:

2 For the Plaintiffs:

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4 Seattle, Washington, 98101-1090.

5 THOMAS M. SOBOL, ESQ., Hagens Berman Sobol Shapiro LLP,
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MARC H. EDELSON, ESQ., Hoffman & Edelson,
13 45 West Court Street, Doylestown, Pennsylvania, 18901.

14 JOHN A. MACORETTA, ESQ., Spector, Roseman & Kodroff,
P.C., 1818 Market Street, Suite 2500, Philadelphia,
15 Pennsylvania, 19103.

16 For the Defendants:

17 MICHAEL L. KOON, ESQ., JAMES P. MUEHLBERGER, ESQ., and
NICHOLAS PAUL MIZELL, ESQ., Shook, Hardy & Bacon, LLP,
18 2555 Grand Boulevard, Kansas City, Missouri, 64108.

19 JOSEPH H. YOUNG, ESQ., Hogan & Hartson,
111 South Calvert Street, Suite 1600, Baltimore,
20 Maryland, 21202.

21 MICHAEL DeMARCO, ESQ., Kirkpatrick & Lockhart Nicholson
Graham, LLP, State Street Financial Center, One Lincoln
22 Street, Boston, Massachusetts, 02111-2950.

23 DOUGLAS B. FARQUHAR, ESQ., Hyman, Phelps & McNamara,
P.C., 700 Thirteenth Street, N.W., Suite 1200, Washington,
24 D.C., 20005.

25 ALSO PRESENT: Various counsel (See transcript).

1 PROCEEDINGS

2 THE CLERK: In Re: Pharmaceutical Industry Average
3 Wholesale Price Litigation, Civil Action No. 01-12257, will
4 now be heard before this Court. Will counsel please identify
5 themselves for the record.

6 MR. SOBOL: Good morning, your Honor. Tom Sobol
7 for the class plaintiffs.

8 MR. BERMAN: Good morning, your Honor. Steve
9 Berman.

10 MR. WEXLER: Ken Wexler, your Honor, for the
11 plaintiffs.

12 MR. MATT: Good morning, your Honor. Sean Matt for
13 the plaintiffs.

14 MR. MACORETTA: Good morning, your Honor. John
15 Macoretta for the Plaintiffs.

16 MR. EDELSON: Good morning, your Honor. Marc
17 Edelson for the plaintiffs.

18 MS. CONNOLLY: Jennifer Connolly for the
19 plaintiffs.

20 MR. HAVILAND: Don Haviland for the plaintiffs.

21 MR. DeMARCO: Michael DeMarco, Aventis.

22 MR. MUEHLBERGER: Jim Muehlberger for Schering.
23 Good morning.

24 MR. KOON: Michael Koon for Aventis.

25 MR. YOUNG: Joseph Young, Amgen.

1 MR. MIZELL: Nick Mizell for Aventis.

2 MR. FARQUHAR: Doug Farquhar for Watson.

3 MS. TABACCHI: Tina Tabacchi for Abbott.

4 MR. ROBBEN: Philip Robben for Dey.

5 FROM THE FLOOR: (Inaudible) for Bayer.

6 MR. JACKSON: Andrew Jackson for Baxter.

7 MS. LEVY: Jessica Levy for Sicor.

8 MR. BERMAN: Dave Berman, Immunex.

9 FROM THE FLOOR: John (Inaudible), ZLB Behring.

10 MS. WITT: Helen Witt, Roxane.

11 MR. STEMPEL: Scott Stempel for Pharmacia and

12 Pfizer.

13 MR. GOBENA: Gejaa Gobena on behalf of the United

14 States.

15 (Inaudible introduction.)

16 MR. JOHNSTONE: David Johnstone, Assistant Attorney

17 General for the State of Kentucky.

18 THE COURT: Are there any other state Attorney

19 Generals here?

20 MR. WAITE: Your Honor, Bob Waite for the state of

21 Ohio.

22 MR. ARCHIBALD: Jeff Archibald representing the

23 states of Idaho, Illinois, Kentucky, and South Carolina.

24 MR. MILES: And Dee Miles for the state of

25 Mississippi.

1 MR. HOVAN: Aaron Hovan for New York City and all
2 New York counties other than Nassau and Orange.

3 THE COURT: No one's here from Massachusetts, not
4 one?

5 (Laughter.)

6 THE COURT: Okay, so you've given me an agenda, but
7 I actually don't want to deal with the class representative
8 issues first. Is there a reason why I need to? I would like
9 to actually move this forward to some of the substantive
10 issues. I'd asked that -- and I'm hoping the message got
11 out -- that we can have some of the damages issue for the
12 Track One earlier than 2:00 because I don't think we need as
13 much time as we set aside this morning. Maybe I'll be proven
14 wrong.

15 So the motion to file the Fifth Amended Complaint,
16 Mr. DeMarco?

17 MR. DeMARCO: Your Honor, just one thing before we
18 get to that. The class reps issues are important. There's a
19 mediation tomorrow and --

20 THE COURT: You know, I'll get to it later. I have
21 some views as to where I want to go with this. I spent the
22 weekend reading this stuff. And so let me just say, in
23 general I think, having had some detailed law clerk research
24 go into this, there's a case called Tarpey that allows them
25 to amend and to file under 93A. And so as far as I'm

1 case that makes sense to try and vet some of these issues
2 through. I'm sure that's not a total shock to you.

3 Let me just say to plaintiffs, I know you want to
4 put three defendants up because you want to move this case.
5 It is too confusing. It was so confusing to me doing
6 Track One with all the different drugs, but Amgen has five
7 different drugs. It's just too confusing to a jury. We're
8 going to do one drug.

9 Now, as I understand it, you raised a Seventh
10 Amendment issue about trying -- are you part of that brief,
11 trying Classes 2 and 3 separately?

12 MR. MUEHLBERGER: That was Mr. Haviland's brief I
13 believe you're referring to from last Friday.

14 THE COURT: Somewhere along the line, Aventis
15 raised it that it was a Seventh Amendment claim.

16 MR. MUEHLBERGER: In our opposition to class
17 certification, we clearly argued, in the context of a jury
18 trial, one jury has to decide every issue. We can't have one
19 jury deciding one factual issue and then having a follow-up
20 jury determine some other issue related to --

21 THE COURT: It made me think about that. So you
22 would want all three together?

23 MR. MUEHLBERGER: Well, your Honor, let me back up
24 to make sure we're clear here. First, with respect to
25 Class 1, I think the parties agree that plaintiffs do not

1 MR. KOON: This group, or a significant portion of
2 it, will be bound for New York tomorrow to talk with
3 Professor Green about how we get going. We've got five dates
4 scheduled with Professor Green between now and the middle of
5 October. I think that everybody here takes the position we
6 do have an imminent trial date. We don't know if it's going
7 to be this fall, it's going to be this winter, but I don't
8 think the notion that the Court needs to set an unreasonable
9 schedule for us to be serious about settling the cases is
10 really the way to go.

11 THE COURT: Except, you know, past is future.
12 That's what happened to me in every single one of the
13 Track One cases, except Glaxo, in fairness, except Glaxo.

14 MR. KOON: Well, it may be that you and
15 Professor Green could talk after tomorrow, after the folks
16 are there.

17 THE COURT: That might make sense because I'm still
18 thinking -- I've got November open -- I'd like to try this
19 case in November. We're going to do either a flat-out 93A
20 trial, or we'll do a national trial. And if I do a national
21 trial, I have to do a jury trial. And so I need to start
22 thinking in a very serious way about groupings. And you
23 haven't had a chance yet to look at the groupings, so I'm
24 thinking that the group that should do that are the three
25 that are the only single-source ones, which are Amgen,

1 Aventis, and Watson. And I'm not sure I can try them all at
2 once, simply because I think it's confusing for a jury to
3 keep track of all of them.

4 MR. YOUNG: I certainly agree with a jury trial,
5 your Honor. Just to add to what Mr. Koon was saying, there
6 are a number of things, and we mentioned them last time, that
7 still haven't taken place. I mean, one of them now, I
8 gather, is that there was going to be some round of briefing
9 on some of these national issues to try and help inform the
10 Court on the Class 2 and Class 3 issues, which is going to
11 put off those decisions, the certification of those classes
12 and the notice issues.

13 THE COURT: Say it again. What do you mean?

14 MR. YOUNG: Well, as I understand what the Court
15 was saying, the Court is going to be looking for some
16 additional briefing from the parties on these issues relating
17 to a national class and which state law would or wouldn't
18 apply here.

19 THE COURT: Well, let me ask you this: If I tried
20 a case even to a jury under 93A, although I'm not required
21 to because Massachusetts law gives me the discretion to,
22 suppose I were to try it to a jury on 93A, wouldn't that, if
23 you lost, create some collateral estoppel effects if there
24 was an intent to deceive and a finding of unfairness, or
25 whatever? Wouldn't that create collateral estoppel effects

EXHIBIT E

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH SEVEN

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

DECISION & ORDER

Case No. 04 CV 1709

AMGEN, et al.,

Defendants.

BACKGROUND

By last count, there were 37 pharmaceutical companies being sued by the State in this case. The administrative challenge of managing a case this size inspired the unusual step of appointing a Special Discovery Master. While graciously agreeing to such an appointment, the parties reserved for decision by this Court the issue of plaintiff's request to share discovery materials it receives from the defendants. The recipients of this sharing would be other states' "law enforcement officials who have filed lawsuits, or have authorized official investigations pending, that involve issues similar to these cases."¹ Any official receiving documents generated in this lawsuit would have to sign an agreement for no further dissemination and to submit to the jurisdiction of this Court. Apparently there are similar actions on-going or contemplated in many states, but the exact names, locations, or numbers are unknown. There currently is a "temporary protective Order" outstanding in this case, but plaintiffs seek to have it amended to permit others to have access to discovery materials. Defendants unanimously object.

¹ Plaintiff's proposed protective order, ¶ 9.

DECISION

The existence of the temporary protective Order and the assumption that some protective Order will continue is of significance. The meaning is that both sides recognize that materials provided by defendants are worthy of protection so as to keep their revelation from harming the defendants' business interests. This is a legitimate concern for any Court ruling on discovery issues. See, Wis. Stat. § 804.01(3)(a) (7).

This need for a protective Order distinguishes this case from *Earl v. Gulf & Western Manufacturing Company*, 123 Wis. 2d 200, 366 N.W. 2d 160 (Ct. App. 1985). Yet, plaintiff relies massively on the *Earl* case: "Any analysis of defendants' attempts to preclude discovery begins (and pretty much ends) with the case of *Earl*." ² However, the gist of *Earl* is that no protective Order was justified under its facts. Here, the question is the scope, not the necessity for such an Order. If *Earl* truly stands as an imprimatur for a general dissemination of materials produced in discovery, it does so for cases in which no protective Order is appropriate. This is not such a case.

Uncontroverted facts presented by defendants also undercut plaintiff's position. ³ Only a minority of Courts asked to permit sharing in drug pricing cases have done so. In those cases allowing it, far fewer defendants were involved, and in some of the states for which sharing is proposed, most of the defendants in this case are not parties. The universe into which these

² Plaintiff's reply brief at p. 2. [Citation omitted.]

³ See, footnote 7 in defendants' memorandum of law.

materials would flow is far from defined. Nonetheless, plaintiff volunteers to have this Court enforce any violations of the proposed Order by any of these unidentified potential recipients. To say this is not a task welcomed by this decision-maker is to put it diplomatically. Almost three decades at this job have shown me the futility and frustration of trying to apply contempt powers beyond state lines. The practicality of plaintiff's proposal is dubious, at best.⁴ The additional work that could be created by such enforcement is daunting, and, if required, it would do NOTHING to advance this case.

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. Just addressing the filings, issues, and disputes of the many parties relating to the issues in this lawsuit is enough work, even if this Branch did not have hundreds of other cases. While reaping the advantages of putting so many defendants in one lawsuit, plaintiff also wants to share what it learns with other jurisdictions and have this Court monitor how that is done. Defendants' point is well taken that this dissemination is well-beyond the proper purposes of discovery. Other than creating extra work and knotty legal issues, such sharing does nothing to promote resolution of this case.

⁴ This section also includes consideration of defendants' example of the impact of such sharing on other Courts' discovery Orders (see, pp. 4-5 of their memorandum of law) and of the possibility of varying affect of Freedom of Information statutes.

There is a time-honored precept favoring the efficient administration of justice that guides the work of trial Courts. Expanding the Court's duties to include policing the individual actions of non-parties of unknown numbers and geographical locations is not consistent with that precept. Plaintiff's proposal has the potential for stretching the duties of this state trial Court far beyond its capabilities.

Outside counsel for plaintiff are already part of the litigation team in similar cases in Illinois and Kentucky, and they argue that this involvement makes "restrictions on information sharing between these states a practical impossibility."⁵ Not only is this argument unique, it is also soundly countered by defendants:

... attorneys represent multiple clients all of the time and are prohibited from using information they learn about a client in one case to assist a client in a different case. Prohibiting plaintiff's counsel from sharing information it learns in the Wisconsin case with its clients in other cases is effectively no different than what attorneys must do regularly, making it far from impractical or "bizarre." Moreover, the fact that the Kentucky and Illinois attorneys general hired the same outside counsel as the State of Wisconsin in separate cases should not have any bearing on defendants' rights with respect to the confidentiality of their information. Allowing plaintiff to share information may make plaintiff's counsel's job easier, but this ease should not be at the expense of protecting defendants' confidential materials.⁶

If outside counsel cannot follow this Court's protective Order, consideration should be given as to whether they should remain as counsel in this case. Clearly the rights of so many defendants to a protective Order should not

⁵ Plaintiff's reply memorandum, p. 1.

⁶ Defendants' memorandum, footnote 4, p. 6.

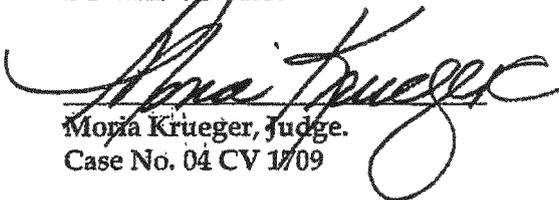
hinge on the identity of the lawyers the plaintiff selected to help it prosecute this case.

ORDER

1. Plaintiff's motion to be allowed to share materials produced by defendants pursuant to discovery in this case is DENIED.
2. The Temporary Qualified Protective Order entered on May 11, 2005 is now the governing Protective Order in this case.

Dated this 29th day of November 2005 at Madison, Wisconsin.

BY THE COURT:


Moria Krueger, Judge.
Case No. 04 CV 1709

CC:
Attorney General Peggy A. Lautenschlager
Attorney Charles Barnhill
Attorney Beth Kushner*
Attorney John C. Dodds
Attorney Scott A. Stempel
The Honorable William F. Eich

*Attorney Kushner is requested to share copies of this document with counsel with the rest of the defendants.