

§802.03(2). In opposition to defendants' motion to dismiss, plaintiff concedes that it relies upon "group pleading" allegations of wrongdoing against all defendants (Plaintiff's Mem. at 41-42), and does not even attempt to argue that the Amended Complaint specifically pleads fraud-based claims against Dey with the requisite particularity. Nor could plaintiff possibly do so, inasmuch as the Amended Complaint is virtually bereft of allegations of wrongdoing against Dey, save for a reference to another lawsuit brought by Dey and a mention of a single Dey drug in an exhibit. In an apparent attempt to distract attention from the deficiencies of its Amended Complaint regarding Dey, plaintiff merely resorts to mud-slinging, empty rhetoric and citation to purported "evidence" that plaintiff did not include in its Amended Complaint.

The only drug as to which the Amended Complaint actually attempts to allege wrongdoing by Dey is metaproteranol sulfate. *See* Amended Complaint, Ex. B. In its individual memorandum in support of its motion to dismiss, Dey addressed the bare allegations of the Amended Complaint with respect to metaproteranol sulfate, and noted that the documents attached to the Amended Complaint demonstrate that plaintiff did not reimburse for metaproteranol sulfate on the basis of Dey's AWP. Dey Mem. at 3. In its opposition to the motion to dismiss, plaintiff makes no attempt to dispute this. Nor does plaintiff specifically address metaproteranol sulfate at all. Thus, plaintiff implicitly concedes that the only drug as to which any alleged wrongdoing is attributed to Dey in the Amended Complaint was not actually reimbursed by Wisconsin based on AWP. Indeed, plaintiff elsewhere acknowledges that "some drugs' reimbursement does not depend on AWP," but claims – without any basis – that this is "irrelevant." Plaintiff's Mem. at 29. Inasmuch as the Amended Complaint demonstrates that plaintiff did not reimburse metaproteranol sulfate on the basis of Dey's AWP, and the Amended Complaint fails to allege wrongdoing by Dey with respect to any Dey drugs, the Amended

Complaint should be dismissed as to Dey in its entirety.

Plaintiff's assertions regarding Dey in its opposition brief highlight the impropriety of plaintiff's attempt to engage in "group pleading" in its Amended Complaint, and show why the Amended Complaint must be dismissed for lack of particularity as to Dey. For example, plaintiff asserts that each Defendant misleadingly represented the price of "all of its drugs, all of the time." Plaintiff's Mem. at 42. Yet, in its individual opposition brief (though, notably, not in its Amended Complaint) plaintiff asserts that it will show that Dey's "Ipratropium [bromide]" was reimbursed "until 2001" by reference to the AWP set by Dey (Plaintiff's Ind. Memo at 9), implicitly conceding that from 2001 on, that drug was not reimbursed by reference to Dey's AWP. Plaintiff also asserts in its individual opposition memo, though again not in the Amended Complaint, that certain unspecified Dey drugs were reimbursed "at various times" (none of which is specified by Plaintiff in its Amended Complaint or in its opposition to the motion to dismiss) based on allegedly false AWP (*id.*), implicitly conceding that, at various other times, Dey's drugs were not reimbursed based on AWP. In addition, plaintiff concedes that there were "Dey drugs which were reimbursed upon a MAC figure determined by Wisconsin" (Plaintiff's Ind. Mem. at 9). The Amended Complaint contains no allegations of wrongdoing relating to MAC, and any claims relating to drugs that were reimbursed based upon MAC should be dismissed.

Dey is entitled to specificity as to the "who, what, when, where and how" of the purported fraud that plaintiff futilely attempts to allege in its Amended Complaint. Plaintiff acknowledges that it is the sufficiency of the allegations of the Amended Complaint that is at issue on this motion to dismiss. Plaintiff's Ind. Mem. at 10. Because those allegations fail to provide the necessary specificity to state a claim against Dey, the Amended Complaint should be

dismissed as against Dey. See *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) (“[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.”).

**PLAINTIFF FAILS TO SHOW THAT DEY’S ACTION AGAINST FIRST
DATABANK HAS ANY RELEVANCE TO THIS ACTION**

Plaintiff’s assertion that a lawsuit Dey initiated against publishers First DataBank and Medi-Span (the “FDB Action”) in California is relevant to this case is misplaced. Dey initiated the FDB Action because FDB and Medi-Span began applying a methodology to calculate Dey’s AWP that was different from that used to report AWP’s for all of Dey’s competitors. Dey brought the FDB Action to ensure that it was being treated the same as other manufacturers, on a level playing field. Plaintiff’s assertions in its opposition memorandum concerning the FDB Action (Plaintiff’s Ind. Mem. at 9) do nothing to bolster its inadequate Amended Complaint because they provide no support for any assertion that Dey or any of the other defendants in this action engaged in a fraudulent scheme regarding AWP. Simply put, the allegations of the FDB Action have nothing to do with drug reimbursement by the State of Wisconsin, and are irrelevant to this action.

CONCLUSION

For the foregoing reasons, as well as those set forth in Dey’s Memorandum of Law, and Defendants’ Memorandum of Law and Reply Memorandum of Law in Support of their Joint Motion to Dismiss the Amended Complaint, Dey respectfully requests that plaintiff’s Amended Complaint be dismissed in its entirety and with prejudice as against Dey.

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Respectfully submitted,

A handwritten signature in cursive script that reads "John M. Moore".

By: _____

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