

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., *et al.*,

Defendants.

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**PLAINTIFF STATE OF WISCONSIN'S OPPOSITION  
TO DEFENDANTS' JOINT MOTION TO SEVER, OR  
IN THE ALTERNATIVE, FOR SEPARATE TRIALS**

**Introduction**

There are two main issues raised by Defendants' Joint Motion to Sever, or in the Alternative, for Separate Trials ("Defendants' Joint Motion"). The first issue is whether joinder of the defendants in this case is proper under Wisconsin's permissive joinder statute, Wis. Stat. § 803.04(1), where:

- (a) the State of Wisconsin's complaint alleges that defendants have "engage[d] in an unlawful scheme" to publish false drug prices and thereby cause Wisconsin and its citizens to pay inflated prices for prescription drugs;
- (b) *all* defendants have contributed to the publication of "average whole prices" ("AWPs") that are substantially higher than the actual average prices at which wholesalers sell drugs to pharmacies and physicians;
- (c) the claims against defendants involve common evidence (relating to Wisconsin's Medicaid program and Medicare Part B beneficiaries, the operations of pricing services such as First DataBank, and the nature and meaning of pricing terms such as AWP and WAC), as well as common legal theories;
- (d) defendants are engaged in continuing acts and practices which constitute a "series of transactions and occurrences" which are logically related by defendants' common course of conduct (reporting false and inflated prices) and common purpose (systematically inflating the payments to providers made by the Wisconsin Medicaid program and Medicare Part B beneficiaries); and
- (e) the policies underlying the permissive joinder statute – efficiency, conserving judicial resources, avoiding duplicative litigation, and expediting the resolution of disputes – will be furthered by joinder of these defendants.

As shown below, the requirements of § 803.04(1) have been fully met, and joinder of these defendants is proper. Contrary to defendants' narrow and erroneous reading of § 803.04(1), the claims against defendants in this case involve a "series of transactions and occurrences" which are logically and fundamentally related.

The second issue raised by defendants' motion is whether, in the event this Court denies defendants' motion to sever and keeps this matter joined, the Court should nevertheless carve the case into 36 separate trials as defendants suggest (Defs.' Jt. Mot. at 11); or, whether there is a better approach to managing and streamlining the trial. We believe there is a much better approach: the Court should exercise its authority under Wis. Stat. § 805.05(2) to further "convenience[,],...expedition [and] economy" at trial by grouping or "tracking" the defendants for trial based upon the general nature of the business they conduct. This approach would minimize the duplicative presentation of evidence, conserve the resources of the Court and the parties, facilitate the jurors' understanding of the facts and issues, and expedite the resolution of this matter. Our general proposal for logically grouping the defendants for trial is set forth herein.

We submit, however, that decisions regarding the specific details of trial are premature in light of the State's pending motions for summary judgment. It remains to be seen which claims against which defendants will be left for trial after the Court rules on these motions.

Accordingly, as discussed below, we believe the Court should: (a) deny defendants' motion to sever; (b) postpone ruling on defendants' alternative motion for separate trials until after the Court decides the State's summary judgment motions; and (c) at an appropriate future date, exercise its authority under § 805.05(2) to group or "track" the defendants for trial based upon the general nature of their business.

### **Overview and Summary of Defendants' Motion**

This case involves an unlawful scheme by the defendant drug companies to cause Wisconsin and its citizens to pay inflated prices for prescription drugs. (Second Amended Complaint ¶ 1). As alleged in the complaint filed by the State of Wisconsin (the "State"), "[t]he scheme involves the publication by defendants of phony 'average wholesale prices,' which then

become the basis for calculating the cost at which 'providers' – the physicians, clinics, and pharmacies who provide these prescription drugs to patients – are reimbursed by Wisconsin." (*Id.* ¶¶ 1, 66, 71). The publication of false and inflated AWP means that these providers pocket windfall profits at Wisconsin's expense. (*Id.* ¶¶ 1, 30, 41). The complaint further alleges that the defendants "attempt to profit from this scheme by using the lure of these windfall profits competitively to encourage providers to buy more of their drugs instead of competing in the market place solely on the basis of legitimate factors[.]" (*Id.*) The State alleges that each of the defendants is liable under each of the five counts asserted in this action. (*Id.* ¶¶ 79-100).

Although there are 36 defendants, this is a simple case: a defendant's liability is based upon whether it did or did not make false statements about its drug prices. Under Wis. Stat. § 100.18(1), it is unlawful to publish a price that is untrue, deceptive or misleading. Under Wis. Stat. § 100.18(10)(b), it is a deceptive act to represent a price as a wholesale price when retailers are paying less. As set forth in the State's motions for summary judgment, liability attaches as a result of defendants' participation in the publication of false average wholesale prices which caused Wisconsin to overpay providers to the tune of hundreds of millions of dollars.<sup>1</sup> The State's claims against these defendants are not novel; in addition to Wisconsin, more than 20 other states, the U.S. Department of Justice and several New York counties have sued the drug manufacturers for their conduct in reporting false prices.

Pursuant to Wisconsin's permissive joinder statute, Wis. Stat. § 803.04(1), a group of defendants may be joined in one action if "there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Wis. Stat. § 803.04(1). The State, relying on § 803.04(1), joined all defendants in the complaint in view of defendants' participation in a common scheme

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<sup>1</sup> The State thus far has filed motions for summary judgment against Sandoz, Inc. and Johnson & Johnson, Inc. and its subsidiaries under §§ 100.18(1) and 100.18(10)(b). The State also alleges that the conduct of each defendant violates Wis. Stat. § 133.05, which prohibits the secret payment of rebates, refunds, commissions or unearned discounts, and Wis. Stat. § 49.49(4m)(a)(2), which prohibits making false statements for use in the determination and calculation of payment by the Wisconsin Medicaid program.

involving the "same...series of transactions or occurrences," as well as the numerous common questions of law and fact. Joinder of the defendant pharmaceutical companies in one action is the general practice followed in most of the AWP cases pending in the state courts.

Three years after Wisconsin filed its complaint, and after three attempts to remove this case to the federal multi-district litigation pending in Boston,<sup>2</sup> defendants filed this motion to sever or, in the alternative, for a separate trial for each defendant. Defendants' motion is narrowly focused on the "series of transactions or occurrences" requirement of § 803.04(1). With respect to the statute's other requirement – the existence of a "question of law or fact common to all defendants" – the defendants are noticeably silent. While defendants assert in a footnote that they do not concede the existence of *any* common fact or legal question (Defs.' Jt. Mot. at n. 11), their motion provides no discussion of the issue.

Defendants make two main arguments in support of their interpretation of the "series of transactions or occurrences" language of § 803.04(1). First, defendants argue that the statute requires an alleged conspiracy or joint action between the parties. According to defendants, without such an alleged conspiracy, § 803.04(1) does not permit joinder. (Defs.' Jt. Mot. at 3-5). Secondly, defendants argue that variations in some of defendants' business practices forecloses joinder under § 803.04(1). (*Id.* at 6-9). In the alternative, defendants seek 36 separate trials even if the Court denies their motion to sever. Defendants' contentions, each of which lacks merit, are addressed below.

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<sup>2</sup> *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action No. 01-12257-PBS (D. Mass.).

## Argument

### I. THE STATE HAS FULLY SATISFIED THE REQUIREMENTS GOVERNING PERMISSIVE JOINDER UNDER WIS. STAT. § 803.04(1).

#### A. The U.S. Supreme Court, Wisconsin Supreme Court and Wisconsin Court of Appeals have emphasized that permissive joinder is "strongly encouraged" to promote judicial economy, prevent duplicative trials, and expedite the resolution of disputes.

The Supreme Court of Wisconsin has instructed that "heavy emphasis" should be placed on "the public policy which is to be served by the liberal construction of joinder statutes – that a closely related and unified controversy should be decided in a single lawsuit." *City of Madison v. Hyland, Hall & Co.*, 73 Wis.2d 364, 382, 243 N.W.2d 422, 431-32 (Wis. 1976). The *Hyland, Hall* Court noted the "havoc to our legal system if closely related actions arising out of a single group of facts are tried in a multiplicity of lawsuits." *Id.*

Likewise, the Wisconsin Court of Appeals has instructed that Wisconsin's permissive joinder statute, Wis. Stat. § 803.04(1), which is patterned after Fed.R.Civ.P. 20, "should be interpreted broadly," *Kluth v. General Cas. Co. of Wisconsin*, 178 Wis.2d 808, 817, 505 N.W.2d 442, 446 (Wis.App. 1993), in order to accomplish the underlying purposes of the statute: promoting judicial economy, avoiding multiple trials presenting identical or similar issues, and expediting the final determination of disputes. *Id.*, 178 Wis.2d at 818, 505 N.W.2d at 446; *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974); 7 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1652 (2001). There is a presumption in favor of joinder: the Court of Appeals in *Kluth*, quoting the U.S. Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 724, and n. 10 (1966), stated that, "[r]ules governing permissive joinder should be interpreted to allow `the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.'" *Kluth*, 178 Wis.2d at 818, 505 N.W.2d at 446 (emphasis added); *see also, Hohlbein v. Heritage Mut. Ins. Co.*, 106 F.R.D. 73, 78 (E.D. Wis. 1985) (noting that joinder rule "should be liberally interpreted" and allowing joinder where four employees alleged a pattern of misrepresentation, fraud and breach of promise

by employer during job interviews for various positions over two and one-half years).<sup>3</sup> Substantial discretion is granted to the trial court in determinations regarding joinder. *Leverence v. U.S. Fidelity & Guar.*, 158 Wis.2d 64, 94-95, 462 N.W.2d 218, 231 (Wis. App. 1990) (trial court properly exercised its discretion under Wis. Stat. § 803.04 to join claims of occupants of allegedly defective prefabricated homes), *overruled on other grounds*, 193 Wis.2d 317, 532 N.W.2d 735 (Wis. 1995); *Insolia v. Philip Morris Inc.*, 186 F.R.D. 547, 548-549 (W.D. Wis. 1999) (noting trial court's "broad discretion to determine when joinder or severance are appropriate").

It is beyond question that the policies underlying the joinder statute – promoting trial convenience, conserving resources, avoiding duplication, and expediting resolution of disputes – strongly favor joinder of these claims and conducting trials in clusters of defendants. There are 36 defendant companies; carving this matter into 36 cases with 36 separate trials is completely antithetical to the principles of trial economy and efficiency. Unfortunately, the resources of the State and this Court are too limited to conduct 36 trials *seriatim* on the same basic issues. *See Kluth*, 178 Wis.2d at 819, 505 N.W.2d at 446 ("multiple trials involving similar or identical issues...would be contrary to the purpose of sec. 803.04"); *Hohlbein*, 106 F.R.D. at 78 ("unmistakable purpose for the [joinder] Rule is to promote trial convenience through the avoidance of multiple lawsuits, extra expense to the parties, and loss of time to the Court and the litigants appearing before it"). Moreover, the public interest is served by an early resolution of this dispute, especially given that the State seeks injunctive relief to prevent defendants from continuing to inflate the cost of Medicaid reimbursement borne by the taxpayers. Defendants' assertion that "separate trials would not prejudice the State" (Defs.' Jt. Mot. at 11) is simply wrong.

In addition to promoting trial economy and expediting resolution, there are other important policies furthered by joinder. For example, the *Manual for Complex Litigation, Fourth* recommends that, in evaluating the appropriateness of severance, the court should

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<sup>3</sup> Because Wis. Stat. 803.04(1) is patterned after Fed.R.Civ.P.. 20(a), this Court may be guided by cases interpreting the federal rule. *Kluth*, 178 Wis.2d at 817-18, 505 N.W.2d at 446.

consider "the potential for unfairness if the result is to prevent a litigant from presenting a coherent picture to the trier of fact." *Id.* at § 11.632. Where, as here, the plaintiff intends to show an industry-wide practice of false pricing, piecemeal litigation significantly impairs the plaintiff's case. The *Manual* further cautions against severing litigation when "severance would create a risk of inconsistent adjudication," *id.* – a clear danger where 36 trials are proposed. As is clear from the complaint, the State in this action seeks systemic, industry-wide reform of defendants' unlawful pricing practices. Inconsistent adjudications would frustrate those efforts. In this respect, the rationale for joinder of all defendants here is similar to the rationale underlying *mandatory* joinder under Wis. Stat. § 803.03(1): that is, joinder is necessary because, "in the [parties'] absence complete relief cannot be accorded among those already parties." *Id.*

In light of these important policies favoring joinder, severance should be granted only if the requirements of permissive joinder have not been met. *Puricelli v. CNA Insurance Co.*, 185 F.R.D. 139, 142 (N.D.N.Y. 1999). As shown below, all of the requirements of § 803.04(1) are satisfied.

**B. There are a multiplicity of questions of law and facts "common to all defendants," easily satisfying this prong of § 803.04(1).**

Section 803.04(1) requires only that "*any* question of law or fact common to all defendants will arise in the action." (emphasis added). Thus, a single common fact or legal question is sufficient to satisfy this prong of the statute.

In fact, there are a multiplicity of common questions of law and fact that tie these defendants together, the foremost and overriding being that the State alleges that *all* defendants are engaged in a scheme to publish false prices which are the basis for calculating the State's reimbursement to pharmacies and other providers. In light of this common allegation, there will be common evidence presented as to each defendant, including evidence relating to:

- (1) Wisconsin's Medicaid program and the manner in which the State reimburses providers;
- (2) the nature and operations of businesses, such as First DataBank and Redbook, that publish pricing information; and

(3) the nature and meaning of AWP, WAC and other pricing terms.

Moreover, the legal theories as to defendants' liability are common, as the State alleges that each of the defendants is liable under each of the five counts alleged in the complaint. (Second Am. Compl. ¶¶ 79-100). As detailed in the State's summary judgment motions, defendants' conduct in publishing false wholesale prices violates, *inter alia*, Wis. Stat. § 100.18(1) which prohibits publishing a price that is untrue, deceptive or misleading, and § 100.18(10)(b), which prohibits representing a price as a wholesale price when retailers are paying less.

Recognizing these common issues of law and fact, defendants' counsel recently wrote to this Court to advise that, in light of the pending summary judgment motions against Johnson & Johnson, Inc. and Sandoz, Inc., the *other* defendants are concerned about the "risk of issue preclusion" and that they "could be bound by certain factual or mixed legal and factual determinations made by the Court in deciding these two motions." (Letter of William M. Conley to Hon. Richard G. Niess, June 25, 2007 ("Conley letter"), attached as Ex. 1). Mr. Conley's recent letter is inconsistent with defendants' refusal to concede that there are common issues of law and fact in this action. At the very least, Mr. Conley's letter demonstrates the strong factual and legal ties that bind the claims against these defendants.<sup>4</sup>

**C. The State's claims against defendants arise out of the same "series of transactions or occurrences."**

The sole basis for defendants' motion to sever or for separate trials is defendants' restrictive and erroneous interpretation of the "series of transactions or occurrences" requirement of § 804.04(1). Before addressing the particulars of defendants' contentions, we set forth guiding principles which the courts have followed in giving meaning to the "transactions or occurrences" language of § 804.04(1) and Fed.R.Civ.P.. 20(a) upon which it is patterned. Two principles, in particular, have been recognized: *first*, the importance of effectuating the policies underlying permissive joinder; and *second*, joining claims that are logically related.

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<sup>4</sup> Not only are the State's claims against each defendant common, but the defendants' main asserted defense in this action – that they are absolved from liability because the State "knew" that the reported AWPs were inflated – is a common defense, and is a further reason that severance should be denied.

**1. In giving meaning to the "transactions and occurrences" language, this Court should be guided by the purposes underlying the permissive joinder statute.**

In determining whether claims arise from the same "series of transactions or occurrences" and thus warrant joinder, courts have taken a flexible, case-by-case approach. *Insolia*, 186 F.R.D. at 549 ("case by case approach is generally pursued"); *Puricelli*, 185 F.R.D. at 142 (same); *see also*, 7 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1653 (2001). Moreover, as U.S. District Judge Crabb of the Western District of Wisconsin has observed, the policies underlying permissive joinder should serve as a guide in determining whether the "transactions and occurrences" requirement has been met:

The permissive joinder doctrine is animated by several policies, including the promotion of efficiency, convenience, consistency, *see Hohlbein v. Heritage Mutual Ins. Co.*, 106 F.R.D.73, 78 (E.D. Wis. 1985), and fundamental fairness. *See Intercon [Research, Etc. v. Dresser Industries*, 696 F.2d 53] at 57-58 [7th Cir. 1982)]. These policies, not a bright-line rule, should govern whether the "same transaction" requirement imposed by Rule 20 has been satisfied. *See James Wm. Moore et al., Moore's Federal Practice* § 20.05[1] (3d ed. 1999).

*Insolia*, 186 F.R.D. at 549; *see also*, 7 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1653 (2001) ("[t]he transaction and common question requirements prescribed by Rule 20(a) are not rigid tests. They are flexible concepts used by the courts to implement the purpose of Rule 20 and therefore are to be read as broadly as possible whenever doing so is likely to promote judicial economy").

The policies underlying permissive joinder mentioned by Chief Judge Crabb – "efficiency, convenience, consistency...and fundamental fairness" – strongly favor joinder of these claims and conducting trials in clusters of defendants, especially given: (a) the number of defendants; (b) the common facts and legal claims; (c) the overwhelming and unnecessary drain on the Court and parties of conducting "multiple trials involving similar or identical issues," *Kluth*, 178 Wis.2d at 819, 505 N.W.2d at 446; and (d) the public interest in resolving this dispute in an expeditious manner. Indeed, joinder is consistent with the defendants' own conduct in this case to 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.

**2. The claims against defendants arise from the same "series of transactions and occurrences" because they are *logically related*.**

Further, in determining whether claims arise from the same "series of transactions or occurrences," courts in Wisconsin and elsewhere have asked whether the claims at issue are *logically related*. *Kluth*, 178 Wis.2d at 818, 505 N.W.2d at 446 ("subject matter relatedness" is "an important factor"); *Mosley*, 497 F.2d at 1333, citing 7 C. Wright, *Federal Practice and Procedure* § 1653 (1972) ("all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence"); *Insolia*, 186 F.R.D. at 549 (courts applying this test ask "whether there is a logical relationship between the operative facts and claims of a lawsuit"); *McClernon v. Source International, Inc.*, 701 F. Supp. 1422, 1425 (E.D. Wis. 1988) (the "ultimate question" is whether the claims are "logically related"); *Puricelli*, 185 F.R.D. at 142 (the phrase "transaction or occurrence" "encompasses 'all logically related claims'"); *Disparte v. Corporate Executive Board*, 223 F.R.D. 7, 10 (D.D.C. 2004) ("[t]he logical relationship test is flexible").

As noted by the Eighth Circuit in *Mosley v. General Motors Corp.*, 497 F.2d at 1333, the "logical relationship" test derives from the Supreme Court's analysis in *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926), in which the Court interpreted the terms "transactions or occurrences" as used in the context of Rule 13(a) counterclaims:

"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

"Accordingly, the analogous interpretation of the terms as used in Rule 20 would permit all 'logically related claims' by or against different parties to be tried in a single proceeding." *Blesedell v. Mobil Oil Co.*, 708 F. Supp. 1408, 1421 (S.D.N.Y. 1989) (allowing joinder and holding that a "company-wide policy purportedly designed to discriminate against females...arises out of the same series of transactions or occurrences"); *see also, Alexander v. Fulton County*, 207 F.3d 1303, 1324 (11th Cir. 2000) (applying logical relationship test and affirming joinder where "[p]laintiffs' claims stem from the same core allegation that they were subject to a systemic pattern or practice of race-based discrimination"); *MyMail, Ltd. v. America*

*Online, Inc.*, 223 F.R.D. 455, 456-57 (E.D. Tex. 2004) (applying logical relationship test and allowing joinder of defendant corporations alleged to have infringed patent); *M.K. v. Tenet*, 216 F.R.D. 133, 141-42 (D.D.C. 2002) (holding that "alleged repeated pattern of obstruction of counsel by the defendants against the plaintiffs is 'logically related'...[and] establishes an overall pattern of policies and practices aimed at denying effective assistance of counsel to the plaintiffs").

In the present case, the State's claims against defendants arise from a logically-related "series of transactions and occurrences." Put simply, the logical nexus of the claims against the defendants is the unlawful scheme alleged in the complaint to publish phony prices in order to cause Wisconsin and its citizens to pay inflated reimbursement for prescription drugs. (Second Am. Compl. ¶ 1). Defendants are allegedly engaged in continuing acts and practices which constitute a "series of transactions or occurrences" which are logically related by common facts (reporting false prices) and questions of law (whether these false prices give rise to liability).

In this respect, the present case is similar to *United States v. Mississippi*, 380 U.S. 128 (1965), in which the U.S. Department of Justice brought voting rights claims against the State of Mississippi and six individual county registrars, among others, alleging discriminatory enforcement of the voter registration laws in violation of federal constitutional and statutory rights. Five of the county registrars moved for severance and separate trials which the district court granted on the ground that the complaint asserted "nothing more than individual torts committed by them separately" against different African-American voter registration applicants in each county. 380 U.S. at 142. The Supreme Court reversed, holding that joinder was proper – even though no conspiracy claims were alleged – because "[t]hese registrars 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.'" *id.* at 143; *see also, Mosley*, 497 F.2d at 1333 (Eighth Circuit points to *Mississippi* holding as in accord with the "logical relationship" test that was articulated by the Supreme Court in *Moore v. New York Cotton Exchange* for determining whether claims arise from the same transaction). Like the

registrars in *Mississippi* who allegedly "had acted and were continuing to act as part of a state-wide system" to deprive citizens of their voting rights, 380 U.S. at 142, the defendant companies in the present case have acted as part of a statewide, unlawful scheme to cause Wisconsin to pay inflated prices for prescription drugs.

Finally, not only are the defendants' actions logically related, there is, in fact, an *actual* series of transactions in which defendants directly participated together. As described in the complaint, the defendant companies participate in the publication by First DataBank and other price compendiums of AWP's that Wisconsin relies upon to estimate the provider's acquisition cost of defendants' drugs. (Second Am. Compl. ¶¶ 32-40). On a weekly basis, First DataBank sends its updated AWP's for thousands of drugs to EDS, a company with which Wisconsin contracts to electronically process on a real-time basis claims for drugs prescribed, or administered to, Wisconsin Medicaid participants. (*Id.* ¶¶ 35-38). Wisconsin relies upon the accuracy of this data in meeting its obligation to pay providers no more than the estimated actual acquisition cost of the drugs. *See*, 42 C.F.R. § 447.331.

The 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. First DataBank did not transmit each of the defendants' prices to the State individually, or in isolation from the rest, but together, and repeatedly, over the months and years relevant to this case. Consequently, there is more than a logical relationship between defendants' actions; *there is in fact* a series of transactions and occurrences in which defendants participated.

In light of this fundamental commonality and logical relationship between the claims against defendants, as well as the existence of an actual "series of transactions" in which defendants participated, the requirements of § 803.04 are satisfied and joinder is appropriate.

## **II. DEFENDANTS NARROWLY AND ERRONEOUSLY INTERPRET THE "SERIES OF TRANSACTIONS OR OCCURRENCES" REQUIREMENT IN A MANNER INCONSISTENT WITH WISCONSIN LAW AND THE PURPOSES UNDERLYING THE PERMISSIVE JOINDER RULE.**

In support of their restrictive reading of the "series of transactions and occurrences" language, defendants make two main arguments: (a) that joinder requires an alleged conspiracy or joint action between the parties; and (b) that variations in some of defendants' business practices forecloses joinder. Neither argument carries weight.

### **A. Joinder under § 803.04(1) does not require allegations of conspiracy.**

Defendants' first argument rests upon their attempt to import a conspiracy requirement into the "series of transactions or occurrences" language of § 803.04. According to defendants, the courts are "reluctant" to allow permissive joinder absent "allegations that defendants conspired or acted jointly." (Defs.' Jt. Mot. at 3-4). For this proposition, defendants rely heavily on *Ex parte Novartis Pharmaceuticals Corporation*, No. 1060224, 2007 WL 1576114 (Ala. June 1, 2007), in which the Alabama Supreme Court held that joinder requires "some coordination between parties." *Id.* at \*6.

That is not the law in Wisconsin, however. For example, in *Kluth v. General Cas. Co. of Wisconsin*, 178 Wis.2d at 811-12, 505 N.W.2d at 443-44, the Court of Appeals of Wisconsin held that it was proper under § 803.04 to join in one complaint actions against two independent defendants who were involved in separate automobile accidents with the plaintiff that occurred approximately one and one-half years apart. Notwithstanding the absence of any conspiracy or joint action between the alleged tortfeasors, and the distinct incidents at issue, the Court of Appeals concluded that joining the two independent defendants in the complaint was permissible because plaintiff alleged commonality of an injury and aggravation by the tortfeasors. *Id.*

Nor is conspiracy or joint action a prerequisite to joinder under the federal courts' interpretation of Fed.R.Civ.P.. 20(a). As discussed above, the Supreme Court in *United States v. Mississippi* held that joinder of the six independent county registrars was proper in light of their "common purpose," 380 U.S. at 143-44, even though their liability did not depend on any

allegation or finding of conspiracy or concerted joint action. As Chief Judge Hogan of the U.S. District Court for the District of Columbia has noted, while "[s]everance is generally disallowed" in conspiracy cases, "[c]ourts *also* consistently deny motions to sever where plaintiffs allege that defendants have engaged in a *common scheme or pattern of behavior*." *In re Vitamins Antitrust Litigation*, 2000 WL 147505, \* at 75-76 (D.D.C. 2000) (emphasis added).

An example of such a common scheme and pattern of behavior is presented in *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536 (E.D.N.Y. 1987), where the court explicitly rejected the argument proffered by defendants here. The City of New York's complaint alleged that each of 14 plumbing and excavating contractors bribed corrupt city sewer inspectors to evade inspection regulations. Two of the defendants moved for severance on the ground that "the complaint allege[d] that each defendant contractor schemed separately with the sewer inspectors" without coordinated action, thereby failing to satisfy the "series of transactions and occurrences" requirement. *Id.* at 549. In rejecting defendants' argument and denying the motion to sever, the court found that,

The alleged fraud on the City and its citizens, the corruption of the sewer inspectors and the injury to the City's sewer system can reasonably be viewed as "ultimate factual occurrences" rendering it fair to require the contractors to defend against the City's action jointly. *Hall [v. E.I. Du Pont De Nemours & Co., Inc.]*, 345 F.Supp. 353, 381 (E.D.N.Y. 1972)]. In any event, by alleging systemic corruption of its Bureau of Sewers and the sewer inspectors, the City has adequately alleged that the acts the contractors allegedly committed were part of a series of occurrences of similar types and with similar purposes.

*Id.*; see also, *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 839 (11th Cir. 1990) (in RICO and usury action, "trial court had ample basis for joining" several defendant savings and loan institutions that had each purchased the loans at issue on the secondary market).

Defendants' attempt to import a conspiracy requirement into the "series of transactions or occurrences" language is inconsistent with the "logical relationship" test enunciated by the Supreme Court in *Moore* for determining whether claims arise from the same series of transactions. Furthermore, such a "conspiracy rule" posits precisely the type of "bright-line rule" that Judge Crabb warned should not govern interpretation or application of the "transactions and occurrences" requirement. *Insolia*, 186 F.R.D. at 549. Indeed, the interpretation urged by

defendants is directly at odds with the basic principles guiding the courts' collective approach to permissive joinder: avoiding duplicative litigation, expediting resolution, and furthering the convenience of the court and parties. *Id.* ("These policies, not a bright-line rule, should govern whether the 'same transaction' requirement imposed by Rule 20 has been satisfied.")

In the event, however, that this Court finds that the degree of defendants' coordination is one factor to be weighed in determining whether joinder is appropriate, then defendants' common conduct in this case actually *favours* joinder. In this respect, defendants' motion ignores and misconstrues the State's complaint. Defendants ignore that the State *does* specifically allege that defendants have engaged in a common, industry-wide "scheme" to publish false prices and to cause Wisconsin to reimburse providers at inflated rates. (Second Am. Compl. ¶¶ 1, 30, 40, 43, 50-60). The complaint alleges that defendants are adhering to a common course of conduct, with a common purpose. (*Id.*) Indeed, while defendants may not have met in dark alleys to plot and conspire, the phony pricing scheme would not have worked without the cooperation of all defendants. For defendants to suggest that the "series of transactions and occurrences" at issue in this case are "unrelated" (*see* Defs.' Jt. Mot. at 6), or the result of "coincidence" (*id.* at 4), ignores the complaint and the basic thrust of the State's allegations.

It is worth noting, moreover, that defendants' argument is inconsistent with their counsel's recent letter to the Court raising their concern that "Defendants could be bound by certain factual or mixed legal and factual determinations made by the Court in deciding" the pending motions for summary judgment against two of the defendants. (*See* Conley letter at 1). Defendants' counsel would not have made such a representation to this Court if, in fact, the series of transactions at issue in this case were "unrelated" or "coincidental."<sup>5</sup>

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<sup>5</sup> In contrast to the present case, in the cases cited by defendants at footnote 22, the courts found the claims at issue insufficiently related to warrant joinder. For example, in *Rappaport v. Spielberg*, 16 F.Supp.2d 481 (D.N.J. 1998), the court found joinder inappropriate where a self-described "aspiring writer and film-maker," acting *pro se*, sued parties as diverse as Steven Spielberg, Time-Warner, Pizza Hut, Nabisco, the *Washington Post*, Coca-Cola, several movie studios and CBS Broadcasting, among others, claiming that defendants had appropriated his work through "industrial espionage." *See also*, *Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2nd Cir. 1974) (joinder inappropriate where there was "no connection at all between the practices engaged in by each of the 164 defendants"). Similarly, the television pirating cases, such as *Tele-Media Co. Of Western Conn.* (continued...)

**B. Variations in some of defendants' business practices does not render joinder "impractical," contrary to the opinion of the drug companies' consultant.**

Defendants next argue against joinder on the grounds that there are different categories of drugs at issue (*i.e.*, patented brand name vs. generic drugs; self-administered drugs ("SADs") vs. physician-administered drugs ("PADs")), with consequent variations in the pricing, marketing and sales of the drugs. (Defs.' Jt. Mot. at 7). Defendants rely upon an affidavit from a drug company consultant, Gregory Bell, Ph.D.,<sup>6</sup> who opines that, because of these variations in business methods, joinder of the defendants is "impractical." (Affidavit of Gregory K. Bell ("Bell Aff.") ¶¶ 6-9 (attached as Ex. A to Defs.' Jt. Mot.); Defs.' Jt. Mot. at 8).

While these variations in business practices ultimately may be useful to the Court in determining how to group the defendants for trial, *see* Part III.B., *infra*, such dissimilarities are in no way a basis for severing this matter into 36 separate cases. Indeed, many courts addressing this issue have held that the presence of material dissimilarities between the parties does not foreclose joinder, as long as there is a *common pattern of conduct*. *See, Leverence*, 158 Wis.2d at 95, 462 N.W.2d at 231 (motion to sever denied "in spite of significant dissimilarities among the various claims"); *Hohlbein*, 106 F.R.D. at 78 (motion to sever denied even though "[a]dmittedly, there are several, material dissimilarities between the substantive allegations of the four plaintiffs"); *Puricelli*, 185 F.R.D. at 142 ("The presence of material dissimilarities between the substantive allegations of the joined plaintiffs does not automatically bring such claims outside the 'same transaction or occurrence' language"); *Fong v. Rego Park Nursing Home*, 1996 WL 468660 (E.D.N.Y. 1996) (not reported in F. Supp.) (motion to sever denied despite the fact

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(...continued)

*v. Antidormi*, 179 F.R.D. 75 (D.C. Conn. 1998) and the DIRECTV cases, present unique facts quite different than the present case. Rather than corporations involved in an industry-wide scheme, the pirating cases typically involved individuals acting independently to surreptitiously intercept paid TV programming without knowledge of the other individual defendants' existence. *See, e.g., DIRECTV v. Loussaert*, 218 F.R.D. 639 (S.D. Iowa 2003) (none of the seven individual defendants, who lived in different towns in Iowa, "knew of the others' transactions or purposes").

<sup>6</sup> An economist and management consultant, Dr. Bell devotes approximately half of his professional time to providing consulting services to the pharmaceutical industry. (Transcript of Deposition of Gregory K. Bell, Aug. 17, 2007, at 20-21 (excerpt attached as Ex. 2)).

that joined plaintiffs "held different positions [with employer] and were terminated at different times under and different circumstances").

Here, the suggested distinctions drawn in Dr. Bell's affidavit concerning defendants' pricing, sales and marketing practices are overshadowed by one overriding commonality that is at the very center of this case (and which Dr. Bell's affidavit ignores): the defendants reported false drug prices. This holds true regardless of whether the drugs were SADs or PADs, brands or generics, or reimbursed by MAC or FUL. This common pattern of conduct – which is the logical nexus that is the basis for joinder, as well as the basis for defendants' liability in this case – is in no way disputed by Dr. Bell's affidavit. In fact, Dr. Bell testified at his recent deposition that he has long been aware of the fact that "the reported AWP may, in fact, be in excess of the acquisition cost of a particular product by a retail pharmacy." (Transcript of Deposition of Gregory K. Bell, Aug. 17, 2007, at 98-99 ("Bell Dep.") (excerpt attached as Ex. 2).

Notwithstanding this common pattern of conduct, Dr. Bell opines and defendants argue that the differences in defendants' marketing and price reporting practices make joinder "impractical." (Bell Aff. ¶ 9; Defs. Jt. Mot. at 7-9). The basis for Dr. Bell's opinion, however, was cast into considerable doubt by his recent deposition testimony. Dr. Bell either had no specific knowledge of, or was unable to recall, the price reporting practices of 33 out of the 36 defendants. (Bell Dep. at 59-79).<sup>7</sup> Dr. Bell also conceded that he is "not familiar with all of the legal elements that are necessary to prove plaintiff's case" (*id.* at 108), nor does he know what facts the State needs to put in evidence, nor what evidence the State will present at trial (*id.* at 166). Dr. Bell's self-professed unfamiliarity with the elements of Wisconsin's claims or how it will prove these claims at trial renders him a very poor judge of whether or not joinder of the State's claims against defendants is "impractical." His opinion on this point is essentially a shot in the dark, and should be disregarded.

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<sup>7</sup> Dr. Bell was asked at his August 17, 2007 deposition about the price reporting practices of each defendant named in the Second Amended Complaint. This exchange, as well as the other relevant pages of Dr. Bell's deposition transcript, are attached as Exhibit 2.

In actuality, Wisconsin's claims and the evidence needed to prove them are straightforward and well-suited for joint evaluation. Defendants are liable under Wis. Stat. § 100.18(1) for publishing a price that is untrue, deceptive or misleading, and are liable under Wis. Stat. § 100.18(10)(b) for representing a price as a wholesale price when retailers are paying less. The fact that published AWP's significantly exceed the prices actually paid by retail pharmacies is not in serious dispute, as evidenced by Dr. Bell's testimony to that effect (*see* Bell Dep. at 98-99), and defendants' own representations in this case. (*See, e.g.*, Johnson & Johnson's Reply Memorandum ("J&J Reply Memorandum") in Support of their Motion for a Protective Order at 4-8 (admitting that "pharmacies do not purchase at AWP", and that, although the J&J defendants establish AWP's by marking up the selling price to wholesalers by 20%, the "prices paid by retail pharmacies are close to the prices at which the J&J Defendants sell to wholesalers") (attached as Ex. 12 to Wisconsin's Amended Motion for Partial Summary Judgment on Liability Against Johnson & Johnson, filed July 2, 2007)).<sup>8</sup> In light of the State's common legal claims against the defendants, and the common evidence it will present to establish those claims, joinder is both appropriate and practical.

For the foregoing reasons, joinder under § 803.04(1) is proper, and the Court should deny defendants' motion to sever and for a separate trial for each defendant.

### **III. THE COURT SHOULD DENY DEFENDANTS' MOTION, IN THE ALTERNATIVE, TO CONDUCT 36 SEPARATE TRIALS IN THIS MATTER.**

#### **A. Defendants' request for 36 trials is premature, unnecessary and wasteful.**

Defendants argue in the alternative that, in the event this Court denies defendants' motion to sever and keeps this matter joined, the Court nevertheless should carve the case into 36 separate trials. (Defs.' Jt. Mot. at 11). Defendants' motion should be denied for several reasons.

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<sup>8</sup> The J&J defendants conceded in the above-referenced reply brief that "*it is common knowledge in the industry*" that "wholesalers sell to retailers at very thin margins" – *i.e.*, that the wholesalers' markup, or "margin," is very thin. (J&J Reply Memorandum at 8) (emphasis added). Given the wholesaler's thin markup, as contrasted to the 120% markup used by J&J to report its AWP's (*id.* at 4-5), it is no wonder that the J&J defendants concede that they "understand that pharmacies do not purchase at AWP." (*Id.* at 6).

First, defendants' motion is premature. Although we believe this case already is simple and straightforward, it may get simpler as it progresses through the discovery and summary judgment stages. Presently, there are motions for summary judgment pending against two defendants. As defendants' counsel, Mr. Conley, noted in defendants' recent letter to the Court, the Court's determinations on "certain factual or mixed legal and factual" issues in ruling on those pending motions could bind the other defendants. (See Conley letter at 1). As such, it has yet to be determined which claims against which defendants will remain for trial. Thus, we believe that the Court should postpone ruling on defendants' alternative motion for separate trials until after the Court decides the State's pending summary judgment motions. See, e.g., *Kluth*, 178 Wis.2d at 821-22, 505 N.W.2d at 447 (affirming denial of motion to sever, and noting that argument regarding jury confusion was "premature" at early stage of litigation); *Hohlbein*, 106 F.R.D. at 79 (denying motion to sever, and noting that "as the case proceeds to trial" appropriate orders may be entered to ensure clear presentation to jury).

More fundamentally, defendants' motion for 36 separate trials is unnecessary, wasteful, and contrary to the purpose of the permissive joinder statute. If the Court finds that joinder is appropriate to further the policies underlying § 803.04(1) and therefore denies defendants' motion to sever, it would make little sense to then follow defendants' suggestion to carve this matter into 36 pieces and thereby undermine the very policies that warrant joinder. See *Kluth*, 178 Wis.2d at 819, 505 N.W.2d 442 at 446 ("If separate suits were granted, the result would be multiple trials involving similar or identical issues. This would be contrary to the purpose of sec. 803.04").

**B. The Court should manage the trial by grouping or "tracking" defendants for trial based upon the general nature of their business.**

We respectfully submit that there is a much better approach to trial management in this case. While keeping this matter joined, this Court can and, we believe, should exercise its broad discretion under Wis. Stat. § 805.05 to manage the trial proceedings by grouping or "tracking" defendants in a logical manner for trial. Such a "tracking" approach will streamline this case and

further the goals of judicial economy and trial convenience, as well as address defendants' concerns about the risk of juror confusion.

Defendants agree that, in the event that their motion to sever is denied, the Court has the discretion under Wis. Stat. § 805.05(2) to conduct more than one trial in this action. (*See* Defs.' Jt. Mot. at 11). Section 805.05(2), which is substantially similar to Fed.R.Civ.P.. 42(b), authorizes a court to conduct a separate trial "of any number of claims" in order to "further[ ]...convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy." Additionally, the permissive joinder statute, § 803.04(4), provides that a court "may order separate trials or make other orders to prevent delay or prejudice." *See also Kluth*, 178 Wis.2d at 818, 505 N.W.2d at 446.

In the present case, one logical approach to grouping the defendants for trial is by the general nature of the business they conduct. As indicated in the affidavit of defendants' expert, Dr. Bell, some companies focus on manufacturing and marketing brand-name drugs, while others focus primarily on generic products. (Bell Aff. ¶ 8; *see also*, Defs.' Jt. Mot. at 7). Additionally, some companies manufacture both brand and generic drugs (*see, e.g.*, Affidavit of Andrew Boyer, Senior Vice President of Watson Pharma, Inc., ¶¶ 7-8 (attached as Ex. S to Defs.' Jt. Mot.)), and some companies manufacturer so-called "specialty" drugs (such as biologics). (*See* Bell Dep. at 38-39 (specialty products are "a big and growing part of this industry").) In fact, such an approach to grouping defendants for trial was suggested by counsel for defendant Novartis Pharmaceutical Corp. in *State of Alabama v. Abbott Labs, et al.* In discussions regarding proposed trial groupings, Novartis's counsel provided a chart identifying the defendant drug companies (and their affiliates) based upon the general nature of their business: brand-name manufacturers, generic manufacturers, mixed brand-name and generic manufacturers, and specialty brands. (Letter from Saul P. Morgenstern, Esq., to Simeon F. Penton, Esq. and Jimmy B. Pool, Esq., November 3, 2006 (attached as Ex. 3)).

The "Novartis approach" makes sense in the present case for several reasons. First, witnesses and evidence are likely to be similar for companies engaged in the same general type of

business, and thus grouping defendants for trial in this manner would streamline the parties' presentation of evidence. This approach also would facilitate the jurors' understanding of the evidence. Furthermore, the substantive legal and evidentiary issues are likely to be similar, and such a tracking approach would facilitate the Court's resolution of these common issues.

Dr. Bell's affidavit and deposition testimony provide support for this approach. At his deposition, Dr. Bell noted that "the price reporting practices in general of generic companies are different from brand companies[.]." (See Bell Dep. at 62). In his affidavit, Dr. Bell explains that, "for single-source products (those that are still patent protected or otherwise available from only one company, typically the innovating company that brought the product to market), pharmaceutical manufacturers set and generally transact at a list price, often referred to as the product's Wholesale Acquisition Cost, or WAC." (Bell Aff. ¶ 12). He further notes that, "[f]or brand-name drugs, AWP reported by First DataBank is generally higher than WAC, often by a given ratio such as 1.2 or 1.25," although that ratio can vary. (Id. ¶ 13). The business models relevant for multi-source, generic drugs, on the other hand, are different as a consequence of the increased price competition among generic manufacturers. (Id. ¶¶ 27-30, 47; see also, Affidavit of David R. Gaugh, Vice President and General Manager of Ben Venue Laboratories, Inc., ¶¶ 8-9 (attached as Ex. J to Defs.' Jt. Mot.) (noting that "[p]rice competition is fierce" in the generic market which "almost invariably drives down the market price of Ben Venue's generic products dramatically over time" and that "[c]ompetition in the brand name pharmaceutical market is very different")).

## Conclusion

For the foregoing reasons, the Court should deny defendants' motion to sever and for a separate trial for each defendant and, instead, should exercise its power under § 805.05(2) to group the defendants for trial in a logical and appropriate manner.<sup>9</sup>

Dated: August 24, 2007

Respectfully submitted,

*Robert S. Libman* by *BB*

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<sup>9</sup>Even if the Court were to grant defendants' motion to sever, however, we note that consolidation for trial into the same tracks or groups discussed above would be appropriate. The issue of consolidation is not presently before the Court. We note, however, that this Court has discretion to consolidate two or more cases for the purposes of trial in order to promote trial convenience, and reduce expense and delay. *See, Connecticut Indemnity Co. v. Prunty*, 263 Wis. 27, 30, 56 N.W.2d 540, 541-42 (Wis. 1953), *quoting Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933) ("consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another"); *Duggan v. Arnold N. May Builders, Inc.*, 33 Wis.2d 49, 146 N.W.2d 410 (Wis. 1966); *August Schmidt Co. v. Hardware Deal. Mut. F. Ins. Co.*, 26 Wis.2d 517, 133 N.W.2d 352 (Wis. 1965). It is also instructive that the justices of the Alabama Supreme Court who specially concurred in *Ex parte Novartis Pharmaceutical Corporation* explicitly recognized that, "[t]he availability of consolidated trials under Rule 42(a) after a finding of misjoinder Rule 20 is well settled." -- So.2d --, 2007 WL 1576114, at \*7-8 (Ala. June 1, 2007), *citing* 9 Wright & Miller, *Federal Practice and Procedure* § 2382 (2d ed. 1995). The specially concurring justices provided guidance to the trial court regarding the creation of "clusters of defendants" for the purposes of resolving that case. *Id.*

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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, Room 5103  
215 South Hamilton Street  
Madison, Wisconsin 53703

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

Dear Judge Niess:

I am writing to advise you of a scheduling issue that the Defendants anticipate will need to be addressed at the June 26 status conference.

As the Court is aware, the State has filed motions for partial summary judgment against two Defendants — Johnson & Johnson, Inc. (“J&J”) and Sandoz, Inc. (“Sandoz”). Since the last status conference, the Defendants have considered the potential impact of at least three Wisconsin appellate court opinions, including a decision issued this spring by the Wisconsin Supreme Court, that could be read to compel other Defendants to respond to the State’s motions for summary judgment or run the risk of issue preclusion. *See In Estate of Rille v. Physicians Insurance Co.*, 2007 WI 36, -- Wis. 2d --, 728 N.W.2d 693; *Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 592 N.W.2d 5 (Ct. App. 1998); *Daughtry v. MPC Systems, Inc.*, 2004 WI App. 70, 272 Wis. 2d 260, 679 N.W.2d 808 (Ct. App. 2004).

The Defendants also recognize that, even without the risk of issue preclusion, in deciding the two pending summary judgment motions, the Court’s determination of certain purely legal issues may affect other Defendants and, therefore, these Defendants would like to be heard on those issues.<sup>1</sup> There is also a possibility that the other Defendants could be bound by certain factual or mixed legal and factual determinations made by the Court in deciding these two motions. Accordingly, these other Defendants feel compelled to respond to the two motions.

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<sup>1</sup> By submitting oppositions to the State’s motions against J&J and Sandoz, the Defendants, however, do not waive their right to submit defendant-specific facts should the State subsequently file separate motions for summary judgment against them. As the Defendants will demonstrate in their motion for severance, which will be filed on July 16, 2007, the facts as to each Defendant are unique.

BOSTON  
BRUSSELS  
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JACKSONVILLE

LOS ANGELES  
MADISON  
MILWAUKEE  
NEW YORK  
ORLANDO

SACRAMENTO  
SAN DIEGO  
SAN DIEGO/DEL MAR  
SAN FRANCISCO  
SILICON VALLEY

TALLAHASSEE  
TAMPA  
TOKYO  
WASHINGTON, D.C.



Honorable Richard G. Niess  
Dane County Circuit Court, Branch 9  
June 25, 2007  
Page 2

The situation is further complicated because discovery of the State and third-parties is ongoing and is far from complete. The law suggests that, because a defendant in the action that is not a named party on the motion may be bound by the court's decision, that party has a right to conduct discovery and introduce evidence in response to a summary judgment motion. *See Rille*, 2007 WI 36, ¶ 91. Likewise, other defendants also have the right to seek an extension when the motion itself is not ripe for decision under Wis. Stat. § 802.08(4). *Id.*

After reviewing the previously-referenced opinions and the pending motions against J&J and Sandoz, the other Defendants have concluded that additional discovery of the State and third-parties is needed to properly oppose the State's motions.<sup>2</sup> For example, in its motion against J&J, the State asserts facts regarding its claims processing through its fiscal agent EDS (J&J PUF 8, 10); its communications with First DataBank ("FDB"), including facts about the data and information it receives from FDB (J&J PUF 9); the nature and structure of the Wisconsin Medicaid program, including the manner in which Wisconsin Medicaid provides reimbursement to participating providers and the relevance of state maximum allowable costs or MACs (J&J PUF 8); and the nature and understanding of AWP, WAC, and other pricing terms (J&J PUF 13).

Many of these facts cannot be obtained except through discovery of the State and third parties, which is far from complete.<sup>3</sup> In particular, to respond properly to these pending motions, the Defendants need additional discovery of the State, including the completion of the State's document production and depositions of the State concerning the nature of the State's claims processing, communications with First Databank, and the State's understanding of AWP, WAC, and other pricing terms.

In addition, the Defendants need discovery from third parties. For instance, the Defendants must pursue discovery of EDS to investigate, among other things, how Medicaid claims

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<sup>2</sup> Although J&J is responding to the State's motion because it believes that there are numerous issues of fact and erroneous legal conclusions that preclude summary judgment, it agrees with the other defendants that the factual record remains largely undeveloped, and therefore joins in the request of discovery. We understand Sandoz also will be submitting a separate letter requesting a reasonable amount of time to complete certain discovery prior to filing its opposition to the State's summary judgment motion.

<sup>3</sup> The fact that the Defendants need additional discovery is not from a lack of diligence. The Defendants served discovery requests on the State well over a year ago (in February 2006). Although the State has produced some documents on a rolling basis, its document production remains substantially incomplete. In fact, just a few days ago, the State produced its first set of responsive electronic documents, with more to come. There also are many areas in which the State and the Defendants have reached or are likely to reach an impasse necessitating the resolution of discovery motions. Because of the State's very slow and incomplete production of documents, no substantive depositions have been taken of the State. The only deposition of the State taken to date has been of individuals designated by the State to testify as to the existence and location of documents responsive to Defendants' request, and the manner in which the State attempted to collect those documents.



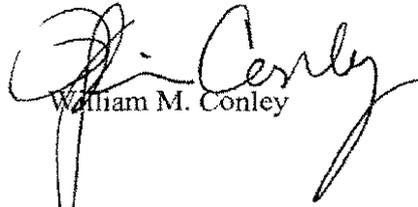
FOLEY & LARDNER LLP

Honorable Richard G. Niess  
Dane County Circuit Court, Branch 9  
June 25, 2007  
Page 3

are reimbursed by the State.<sup>4</sup> The Defendants also need to pursue discovery of First Databank concerning, among other things, its communications with the State and the nature of the data and information it provides the State.<sup>5</sup>

Accordingly, in order to facilitate the Court's efficient handling of these issues and concerns, the Defendants respectfully request that the Court (1) allow the Defendants reasonable time to complete discovery of the State and third parties before responding to the State's pending motions; (2) establish a modified briefing schedule to permit the coordination and streamlining of responses; and (3) delay issuing a decision on the State's pending summary judgment motions until after the Court has had the benefit of the other Defendants' briefing.

Very truly yours,



William M. Conley

cc: All Counsel of Record by LexisNexis File & Serve

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<sup>4</sup> Defendants anticipate serving a discovery subpoena on EDS in the next few days.

<sup>5</sup> Defendants anticipate serving a discovery subpoena on FDB in the next few days as well.

1 STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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

4 ----- x

5 STATE OF WISCONSIN,

6 Plaintiff,

7 v.

8 AMGEN, INC., et al.,

9 Defendants.

10 ----- x

11

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

13 Friday, August 17, 2007

14 9:07 a.m. through 3:27 p.m.

15 Ropes & Gray

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17 Boston, Massachusetts

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19 Reporter: Lisa A. Moreira, RDR, CRR

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## 1 INDEX

2 WITNESS: DIRECT CROSS REDIRECT RECROSS

3 GREGORY K. BELL, Ph.D.

4 (By Mr. Barnhill) 11

5 (By Mr. Edwards) 205

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## 8 EXHIBITS

9 NUMBER DESCRIPTION PAGE

10 Exhibit Bell 001-Second amended complaint 12

11 Exhibit Bell 002-Affidavit of Dr. Bell 14

12 Exhibit Bell 003-Compilation of affidavits 201

13

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1 another one.

2           Those would be the major ones, but not  
3 an exhaustive list of the ones I've worked with.

4     Q. All right. How much of your time -- what  
5 percentage of your time is spent representing  
6 pharmaceutical companies, would you say?

7           MR. EDWARDS: When you say  
8 "representing," what do you mean? Do you mean to  
9 exclude the management consulting work he does? Are  
10 you just talking about as an expert witness --

11           MR. BARNHILL: Well, we can divide it  
12 up. That's fine.

13     Q. How much of your time -- what percentage of  
14 your time has been spent representing pharmaceutical  
15 companies or defendants here as an expert witness?

16           MR. EDWARDS: Let me just object to the  
17 form of the question and use of the term  
18 "representing."

19           MR. BARNHILL: Okay.

20     Q. You may answer.

21     A. Can you give me some sort of  
22 characterization of a time frame.

1 Q. Last five years.

2 A. Five years. Ballpark estimate, 15 percent.

3 Q. And how much of your time is spent  
4 representing pharmaceutical companies in all other  
5 endeavors?

6 MR. EDWARDS: Same objection.

7 A. Maybe 30 percent.

8 Q. So a total of 45 percent of your time is  
9 spent representing pharmaceutical companies in one  
10 way or another, just approximately?

11 MR. EDWARDS: Can I have a continuing  
12 objection to the word "representing" --

13 MR. BARNHILL: Yes.

14 MR. EDWARDS: -- so I don't have to keep  
15 repeating it?

16 MR. BARNHILL: Yes.

17 A. Working with pharmaceutical companies  
18 broadly defined -- which for me "broadly defined"  
19 would include biotech companies, diagnostics  
20 companies -- yes, 45 percent doesn't strike me as an  
21 unreasonable number.

22 Q. All right. And can you tell us just

1 can come into play.

2 Q. What's the range of the mark-up as far as  
3 you know?

4 A. Well, gosh, over time it used to be -- and I  
5 believe some of this is covered in my MDL report --  
6 mark-ups for the wholesalers were larger and then  
7 they went through a period of consolidation, and the  
8 differences between the prices at which they would  
9 -- "they" being a wholesaler -- would typically  
10 acquire a product and the price at which they would  
11 typically sell that product to a retailer, that  
12 difference tended to come down.

13 On the other hand, there have been new  
14 types of products launched with some of these more  
15 specialized requirements, such as the biologics and  
16 the like, and there, you know, the margins have --  
17 well, the margins are just bigger. I don't know  
18 that it's fair to say that the margins have come up  
19 over time because 30 years ago these kinds of  
20 products weren't out there.

21 Q. All right. So you have become familiar with  
22 mark-ups that wholesalers charge retailers; is that

1 correct?

2 A. Well, I have become familiar with the  
3 difference in the price that a wholesaler might  
4 acquire a product at and the price at which the  
5 wholesaler might thereafter sell the product, and  
6 there are a number of other factors that can  
7 influence a wholesaler's total margin in terms of  
8 its total profits beyond simply the difference  
9 between those two prices.

10 Q. All right. What is your understanding in  
11 terms of the last five years in connection with the  
12 mark-up that wholesalers generally apply to the  
13 products, the drug products that they purchase and  
14 then sell to the resellers -- retailers?

15 A. Well, part of the problem is that there are  
16 so many different types of drugs.

17 Q. Well, let's put aside sort of the  
18 specialties, the biologics that you talked about.

19 A. Okay.

20 Q. Let's talk about the general mass of drugs.  
21 What is the mark-up that wholesalers are generally  
22 applying to the drugs that they purchase at WAC over

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 Q. Do you have the complaint in front of you?

2 A. Yes.

3 Q. What are the price reporting practices of

4 Amgen, Inc.?

5 A. I have no specific knowledge of Amgen's

6 price reporting practices.

7 Q. What are the price reporting practices of

8 Abbott Laboratories?

9 A. No specific knowledge of Abbott Labs' price

10 reporting practices.

11 Q. What are the price reporting practices of

12 AstraZeneca, either one of the AstraZeneca

13 defendants?

14 A. As I sit here right now, I don't recall. I

15 believe I know, but I don't recall, and that comes

16 from my work as an expert on behalf of the Track 1

17 defendants in the MDL trial that was before Judge

18 Saris about which we spoke earlier.

19 Q. Well, do you have documents that would tell

20 you what the price reporting practices of

21 AstraZeneca are?

22 A. I may well have. Again, this is something

1 that I did know, I simply don't recall or don't  
2 remember right as I sit here.

3 Q. All right. Did you familiarize yourself  
4 with the price reporting practices of AstraZeneca at  
5 the time you signed the affidavit here in this case?

6 A. I don't recall when I signed the affidavit  
7 in this case, which was just a month or two ago.

8 Q. Yes, it wasn't very long ago.

9 A. Right. Right. I don't recall specifically  
10 refamiliarizing myself with the specifics of the  
11 price reporting practices of AstraZeneca.

12 Q. All right. What are the price reporting  
13 practices of Aventis?

14 A. I -- price reporting practices of Aventis I  
15 have no specific knowledge of as I sit here, period.

16 Q. How about Baxter Healthcare Corporation, do  
17 you know the pricing -- the price reporting  
18 practices of it?

19 A. I have no specific knowledge of Baxter  
20 Healthcare's price reporting practices.

21 Q. Ben Venue, do you know the price reporting  
22 practices of it?

1       A. I do not, other than I believe this might be  
2 the first of the ones that has -- oh, Baxter might  
3 have as well; Abbott might have had as well --  
4 significant generic sales. So I am aware that the  
5 price reporting practices in general of generic  
6 companies are different from brand companies, but I  
7 don't have specific knowledge of how Ben Venue might  
8 do it.

9       Q. All right. Boehringer, either Boehringer or  
10 Roxane, do you know how -- what their price  
11 reporting practices are?

12      A. Well, this would be a company -- Roxane  
13 would be primarily generics. Boehringer Ingelheim's  
14 primarily brands. Their price reporting practices,  
15 certainly in my expectation and experience, may well  
16 differ, but I -- as I sit here, I don't -- I don't  
17 have specific knowledge of Boehringer Ingelheim's  
18 price reporting practices for either its branded or  
19 its generic products.

20      Q. All right. Bristol-Myers Squibb, what are  
21 their price reporting practices?

22      A. That is something that I testified to at the

1 MDL in front of Judge Saris, and I'm aware that  
2 Bristol-Myers Squibb does not report an AWP to the  
3 pricing companies, but instead reports what they  
4 call a wholesale list price or a WLP.

5 Q. And is that wholesale list price a price at  
6 which Bristol actually sells its product net?

7 A. Yes, I believe so, or certainly a price  
8 quite close to that.

9 Q. Dey, Inc., what are the pricing practices of  
10 Dey, Inc.?

11 A. That's another one that I believe has some  
12 generics, so, again, different from brands, but I  
13 have no specific knowledge of Dey, Inc.'s price  
14 reporting practices?

15 Q. How about Immunex, do you know what its  
16 pricing practices were actually?

17 A. It's now part of Amgen, I believe.

18 Q. Correct.

19 A. No specific knowledge of Immunex, price  
20 reporting practices.

21 Q. Right. Ivax, do you know what Ivax's price  
22 reporting practices are?

1       A. Ivax is another major generic manufacturer.  
2 It may, as well, have a brand arm, and that may be  
3 mixed in with this Ivax Corporation/Ivax  
4 Pharmaceuticals, but I have no specific knowledge of  
5 the different ways in which they might price their  
6 products.

7       Q. How about Janssen Pharmaceutical products,  
8 how do they -- what are their price reporting  
9 practices?

10      A. That, I'm afraid, is another one that as I  
11 sit here I do not specifically recall. Janssen  
12 Pharmaceutical is part of J&J or Johnson & Johnson,  
13 and as such as part -- well, actually Janssen itself  
14 may not have been part of the MDL because Remicade  
15 is Centocor and Procrit is Ortho Biotech. But I've  
16 done pricing work for Janssen, I just don't recall  
17 what their specific price reporting practices are as  
18 I sit here.

19      Q. All right. Do you know whether or not you  
20 recalled what they were when you signed your  
21 affidavit?

22      A. I did not refamiliarize myself with that

1 when I signed the affidavit.

2 Q. Johnson & Johnson, can you tell us what  
3 Johnson & Johnson's price reporting practices are?

4 A. I --

5 Q. Actually, let's skip over Johnson &  
6 Johnson --

7 A. Okay.

8 Q. -- because I have the other subsidiaries  
9 here, and we can do it that way.

10 A. All right.

11 Q. Now let's take -- the next one is McNeil-  
12 PPC, Inc. What are its price reporting practices,  
13 if you know?

14 A. I don't know the specifics of McNeil's price  
15 reporting practices.

16 Q. Merck & Company, do you know what its price  
17 reporting practices are?

18 A. I have no specific knowledge of Merck &  
19 Company's price reporting practices.

20 Q. Mylan, do you know what Mylan's price  
21 reporting practices are?

22 A. Mylan's another company. They've got a

1 large generic operation. I believe they've got some  
2 brands. I know -- at least I know that they were --  
3 they've been looking at marketing some branded  
4 products, but how their price reporting practices  
5 might differ between the generic products they have  
6 and the branded products they have, as I sit here I  
7 do not know.

8 Q. Novartis, do you know what its pricing  
9 practices are?

10 A. Novartis, I believe, reports both a or an  
11 AWP and a X manufacturer price. That's my  
12 recollection. I do not -- I don't specifically  
13 recall what they call their X manufacturer price.

14 Q. It might be -- when you say "X  
15 manufacturer," you're talking about the price at  
16 which they sell it to the wholesalers, the products?

17 A. The price at the door of the factory. It  
18 would be akin to the WLP of Bristol-Myers Squibb.

19 Q. WAC?

20 A. It might be akin to what other companies  
21 would call a WAC; i.e. wholesale acquisition cost.  
22 And Novartis may, in fact, call it WAC; it's just

1 that as I sit here I don't recall.

2 Q. Okay. But your recollection is that it  
3 reports an AWP and some X -- you call it X  
4 manufacturer price; is that correct?

5 A. That's my recollection, yes.

6 Q. Okay. Ortho Biotech, what are its pricing  
7 practices?

8 A. Ortho Biotech was one of the -- yes, was one  
9 of the companies -- well, again, with no  
10 representation as to legal entities, et cetera, et  
11 cetera, but Procrit was one of the products in the  
12 MDL in front of Judge Saris, and at the time I was  
13 aware of the price reporting practices. As I sit  
14 here, I don't recall.

15 Q. And when you signed your affidavit you had  
16 not re-refreshed your memory at that time? Or maybe  
17 you had.

18 A. On that, I simply don't recall.

19 Q. Okay. Ortho-McNeil Pharmaceutical, what are  
20 its pricing practices?

21 A. That was not part -- well, as far as I  
22 understand, that was not part -- even though a sub

1 of J&J, that was not part of the bench trial in  
2 front of Judge Saris. I have no specific knowledge  
3 -- I don't recall the extent to which I had  
4 knowledge about Ortho-McNeil's pricing practices.

5 MR. EDWARDS: Let me just interrupt you  
6 for a second. The series of questions that you're  
7 on deal with price reporting practices, but in the  
8 last question you said, "What are its pricing  
9 practices?"

10 MR. BARNHILL: Oh, I'm sorry.

11 MR. EDWARDS: You didn't include the  
12 word "reporting."

13 MR. BARNHILL: I'm sorry. That was  
14 completely --

15 MR. EDWARDS: I just want to make sure  
16 you and the witness are on the same wavelength.

17 MR. BARNHILL: That was completely  
18 inadvertent.

19 Q. Did you understand my question to be what  
20 the price reporting practices are at that time?

21 A. That is the question as I understood it, and  
22 I must admit I did not recognize the absence of the

1 word "reporting," so I had answered as if you had  
2 asked price reporting.

3 Q. That's what I thought. Okay.

4 MR. EDWARDS: I get to sit here and look  
5 over the court reporter's shoulder, so...

6 Q. How about Pharmacia, what are its price  
7 reporting practices?

8 A. Well, that would be another one as what were  
9 its price reporting practices. It's now part of  
10 Pfizer, but I have no specific knowledge of  
11 Pharmacia's price reporting practices.

12 Q. All right. And Pfizer, do you have  
13 knowledge of what its price reporting practices are  
14 or have been?

15 A. I have no specific knowledge of Pfizer's.

16 Q. And Roxane -- I think we went over Roxane.  
17 I don't know why we have it twice.

18 And Sandoz, do you know what its price  
19 reporting practices are?

20 A. Sandoz is now a sub of Novartis, and I'm  
21 certainly aware of Novartis-branded price reporting  
22 practices. As I sit here, I do not -- I do not

1 recall price reporting practices with respect to  
2 Sandoz.

3 Q. Schering-Plough, do you know what its price  
4 reporting practices are?

5 A. With respect to its Warrick subsidiary, my  
6 understanding was that it would report a price -- it  
7 would report a number to the pricing publishers upon  
8 launch of a new generic. So the Warrick subsidiary  
9 does generic products.

10 Thereafter I am not aware that it  
11 necessarily changed that price, and that's my  
12 understanding of its price reporting practices.

13 Q. Okay. Well, let me ask you a few more  
14 questions about that. The price Warrick would  
15 report, was that an AWP?

16 A. I don't specifically recall what -- how  
17 Warrick termed the price. One of the issues with  
18 the number that it reported -- I don't specifically  
19 recall how Warrick termed it. And one of the issues  
20 with generic product, of course, is that the market  
21 tends to be so volatile that it may well be the case  
22 that one -- "one" being the manufacturer -- doesn't

1 actually know at what price a particular product  
2 ended up being sold because of price protection  
3 clauses, inventory allowances, et cetera. So this  
4 was part of some of the issues around the price  
5 reporting practice of Schering -- well, of Warrick  
6 as part of Schering.

7 Q. Well, let me back up a minute. Do you know  
8 whether or not Warrick reported an AWP?

9 A. Again, I simply don't recall what they --  
10 what Warrick termed what it reported to the pricing  
11 publication.

12 Q. Do you know whether or not Warrick actually  
13 contracted with the ultimate purchasers of the  
14 product for its product?

15 A. Well, it has several products, and I am  
16 aware of some contracts with some retailers with  
17 respect to some of its products.

18 Q. All right. And so in connection with --  
19 well, do you know what products Warrick had  
20 contracts with retailers?

21 A. I believe I've seen contracts with respect  
22 to Albuterol.

1 Q. All right. And so let's just go through  
2 this, if I can. At some -- your understanding of  
3 Warrick is that it would set a price on launch; is  
4 that correct?

5 A. I just want to be clear, are we talking --  
6 well, Warrick would have a price at which it was  
7 selling the product -- which it was offering, I  
8 suppose, the product at launch, but that price may  
9 have attached to it several caveats or conditions,  
10 if you will. It could be part of a contract. It  
11 could be that there's price protection clauses built  
12 into it such that if there's immediate response from  
13 another generic manufacturer and the price changes,  
14 that there's a rebate back for the price difference.

15 So there's a host of issues that Warrick  
16 might have encountered around the launch of one of  
17 its generics, but it is my understanding at the time  
18 of the launch it did have an initial price point.

19 Q. Okay. And your understanding is that it did  
20 not change that price point over time; is that  
21 correct?

22 A. Well, what I recall is that it submitted a

1 number to the pricing authorities -- not the pricing  
2 authorities, the price reporting services.

3 Q. Like First Data Bank and Red Book?

4 A. Exactly, yes.

5 Q. Yes.

6 A. And it may well have been that thereafter  
7 that number did not change, but I'd have to go back  
8 and refresh my recollection.

9 Q. All right. And the price of Warrick's  
10 drugs, which were generics, fell over time, did they  
11 not?

12 A. It would depend on the specific generic  
13 product, and some of them can actually come back up  
14 over time, too. I mean, it just is a sort of  
15 product-specific set of circumstances.

16 Q. Well, did you do an analysis of that?

17 A. I did not do an analysis of Warrick's  
18 products specifically. This is part of my general  
19 knowledge of the operation of the generic industry.

20 Q. All right. But at least some of Warrick's  
21 drugs which it launched fell in price over time; is  
22 that correct?

1       A. Well, I think a more correct  
2 characterization is that the price of some of  
3 Warrick's products to some of its customers may have  
4 changed between the time that customer first bought  
5 the product, and -- you know, and if it were still  
6 buying the product, say, two, three, four, five, six  
7 years later that price may well have changed.

8       \*Q. I understand that, but my question's a  
9 little different, and it has to do with the generic  
10 market which generally has prices that go lower, not  
11 higher.

12               So my question to you is, did -- as far  
13 as you know, did Warrick have prices -- have  
14 products which the actual acquisition price of which  
15 went lower over time?

16               MR. EDWARDS: Object to the form.

17               THE WITNESS: Can I just have that one  
18 read back, please.

19               \*(Question read)

20               MR. BARNHILL: It's not great.

21       A. Well, again, as I indicated it certainly  
22 would not surprise me if the price of some of

1 Warrick's products, and for the purposes of this I'm  
2 assuming they're all generics, but --

3 Q. Sure.

4 A. But that some of Warrick's products to some  
5 customers declined over time in response to a  
6 competitive situation.

7 Q. All right. And at least with respect to  
8 some customers, those with whom it had retail --  
9 contracts with retailers -- strike that.

10 At least with respect to those retailers  
11 with whom it had contracts, Warrick would actually  
12 know what the price was that those retailers were  
13 paying over time; is that correct?

14 A. Not exactly. It would eventually know the  
15 net price that a particular retailer paid, but it  
16 wouldn't know that at the time that the retailer  
17 initially bought the product from Warrick because  
18 there could be these price protection clauses, there  
19 could be these potential rebates depending on how  
20 many other products the retailer carries of  
21 Warrick's --

22 Q. Sure.

1 A. -- or depending on the total sale, blah,  
2 blah, blah.

3 So they're -- so eventually, yes.

4 Q. Okay.

5 A. Warrick would -- could figure it out if they  
6 went back and traced it all the way back.

7 Q. Okay.

8 A. But it's not -- it's not necessarily  
9 something that is -- that is top of mind just  
10 because that's not the nature of the -- of the  
11 business. It's a relatively volatile business, so  
12 it's an issue of responding to market situation.

13 Q. All right. And during the time that the  
14 price dropped, it's your understanding that Warrick  
15 never changed the price it had sent initially to the  
16 price reporting services; is that correct?

17 A. A couple of things. First of all, I think  
18 what I said was that the price may well have changed  
19 with respect to a particular purchaser, and it may  
20 have changed a different amount with respect to  
21 other purchasers, so there is no, quote-unquote,  
22 price particularly as I've already indicated.

1 They're not even sure at the time that the retailer  
2 buys a product necessarily what the net price will  
3 be. So I don't think it's a fair characterization  
4 to just talk about the price.

5           Nonetheless -- I shouldn't say  
6 "nonetheless," but rather I do not specifically  
7 recall in that specific situation the extent to  
8 which Warrick did or did not change the number that  
9 it was reporting to the price reporting services.

10       Q. Okay. But don't you generally recall the  
11 practice of Warrick not to change the number that it  
12 provided the price reporting services on launch?

13       A. Well, what I recall is that there might be a  
14 period of time over which that number would not be  
15 changed. I simply, as I sit here, don't recall how  
16 long that might be the case.

17       Q. Okay. Watson, do you know what its pricing  
18 practices are, or Warrick?

19           MR. EDWARDS: Again, you said "pricing  
20 practices" as opposed to "price reporting."

21           MR. BARNHILL: Sorry. We're getting  
22 near the end of the list. I'm worn out.

1 Q. Can you tell us what Watson's price  
2 reporting practices are?

3 A. Well, Watson is another generic company by  
4 and large, but as I sit here, I do not -- I -- well,  
5 I have no specific knowledge of Watson's price  
6 reporting practices.

7 Q. And the last -- and I don't know whether  
8 it's least or not, but ZL Behring, do you know what  
9 its price reporting practices are?

10 A. Again, as I sit here I have no specific  
11 knowledge of what Behring's price reporting  
12 practices were.

13 Q. Now, you make some observations also about  
14 the prices First Data Bank published in connection,  
15 I think, with Paragraphs 11 through 14.

16 A. Oh, I'm sorry, was there --

17 Q. It's not really a question. I just wanted  
18 to focus your attention on that.

19 A. Uh-huh.

20 Q. It's fair that you say nothing.

21 How did you find out what numbers First  
22 Data Bank published in connection with your report

1 actual wholesale price of the drug which it  
2 publishes?

3 MR. EDWARDS: Object to the form of the  
4 question.

5 THE WITNESS: Could I just have that  
6 read back, please.

7 \*(Question read)

8 A. I'm certainly aware of reports about AWP  
9 that have been in government reports or the popular  
10 press or, for that matter, industry magazines. As I  
11 sit here I don't recall specific attributions of the  
12 AWP to the First Data Bank AWP as opposed to, say, a  
13 Red Book AWP or a Medi-Span AWP in any of those  
14 reports. And with respect to acquisition costs, I  
15 believe that some of those reports have looked at,  
16 for instance, the acquisition cost of retail  
17 pharmacies, and some of them may have compared that  
18 to a reported AWP.

19 Q. Were you able to conclude, from your review  
20 of these documents and reports, that First Data Bank  
21 average wholesale price consistently inflated the  
22 actual average wholesale price of those drugs?

1 MR. EDWARDS: Object to the form.

2 A. Well, I think what I've become -- well, what  
3 I am aware of and always have been aware of is that  
4 the AWP reported by the pricing services may, in  
5 certain circumstances, be greater than the  
6 acquisition cost that a pharmacy might pay for a  
7 particular product. I'm certainly aware of that.

8 Q. Right. And is that the extent of the  
9 conclusions based on the reports that you've read  
10 and the articles that you've read?

11 A. No. I believe pretty much everybody in the  
12 industry was aware of that.

13 Q. Aware of what?

14 A. That reported AWP may, in fact, be in excess  
15 of the acquisition cost of a particular product by a  
16 retail pharmacy.

17 Q. All right. And that's a conclusion that  
18 everybody in the industry drew based on your  
19 knowledge; is that correct?

20 A. That is my -- in terms of the people in the  
21 industry that I've interacted with, that is a fair  
22 characterization of my understanding of what they

1 the differing fact patterns among the defendants  
2 have an impact on liability and damage  
3 determinations; is that correct?

4 A. Just to be clear, in my considered opinion  
5 as an economist, the differing fact patterns for the  
6 different companies would have an impact on the  
7 allegations of liability and damages.

8 Q. Are you familiar with the elements necessary  
9 to prove plaintiff's case in this instance?

10 A. I'm not familiar with all of the legal  
11 elements that are necessary to prove plaintiff's  
12 case. I am aware of -- and having sat through much  
13 of the MDL proceeding -- the different types of  
14 arguments that different defendants have raised to  
15 different points being made by the plaintiffs.

16 Q. All right. Tell me what you understand the  
17 State of Wisconsin must prove to win a liability  
18 judgment on its consumer protection claims.

19 MR. EDWARDS: Objection, no foundation.

20 A. I'm not a lawyer, so I do not know exactly  
21 what the State of Wisconsin must prove. I indicate  
22 in Paragraph 4 what I understand to be some of the

1 A. Yes.

2 Q. Okay. And let me ask you this, do you have  
3 any idea of what plaintiff's evidence at this trial  
4 will be?

5 A. Not -- well, not specifically with respect  
6 to Wisconsin. There may be some depositions going  
7 on right now. If there have been depositions in  
8 this case, I've not reviewed them. I've reviewed  
9 some of the materials cited in the complaint. I'm  
10 not even sure if that's it, but the complaint, but I  
11 have no particular knowledge of the evidence that  
12 the State of Wisconsin is going to bring.

13 Q. Okay. Do you know whether -- do you know  
14 what facts the State of Wisconsin would need to put  
15 in evidence that would apply to all the defendants?

16 A. Well, I'm not a lawyer, so I don't know what  
17 they do and do not need -- "they" being the State of  
18 Wisconsin does and does not need to put into  
19 evidence. Presumably that's what you'll be doing.

20 Q. How many of the defendants actually  
21 published AWP's in one form or another, do you know?

22 A. Published themselves independently?

1 3:27. We're going off the record.

2 (Whereupon the deposition was

3 concluded at 3:27 p.m.)

4

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6

\_\_\_\_\_

7

SIGNATURE OF THE WITNESS

8

9 Subscribed and sworn to and before me

10 this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

11

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\_\_\_\_\_

14

Notary Public

15

16

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21

22

1 Commonwealth of Massachusetts

2 Suffolk, ss.

3 I, Lisa A. Moreira, Registered Diplomate

4 Reporter, Certified Real-Time Reporter and Notary

5 Public in and for the Commonwealth of Massachusetts,

6 do hereby certify that GREGORY K. BELL, Ph.D., the

7 witness whose deposition is hereinbefore set forth,

8 was duly sworn by me and that such deposition is a

9 true record of the testimony given by the witness.

10 I further certify that I am neither related to or

11 employed by any of the parties in or counsel to this

12 action, nor am I financially interested in the

13 outcome of this action.

14 In witness whereof, I have hereunto set my hand

15 and seal this 20th day of August, 2007.

16

17

18 Lisa A. Moreira, RDR, CRR

19 Notary Public

20 CSR No. 146299

21 My commission expires

22 December 25, 2009

# KAYE SCHOLER LLP

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November 3, 2006

## BY ELECTRONIC AND OVERNIGHT MAIL

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Montgomery, Alabama 36102-1709

Re: *State of Alabama v. Abbott Labs, et al.*,  
Case No. CV-2005-219 (Cir. Ct. Montgomery County)



Dear Messrs. Penton and Pool:

We, along with Capell & Howard, are counsel for Novartis Pharmaceuticals Corporation ("NPC"), a Defendant in the referenced action. In response to your request for input in connection with your obligation to provide recommendations with respect to trial structure, we submitted a letter on September 8, 2006 outlining our views with respect to the different types of businesses in which the various Defendants are engaged. As we noted in that letter, Defendants believe (i) that the Complaint misjoins them, (ii) that any joint trial would deprive them of due process of law, and (iii) that any joint trial would also most likely result in an evidentiary and procedural nightmare, because Plaintiff's proof as to each Defendant will be different and each Defendant will insist on its right to put on its own unique defenses as to each of Plaintiff's claims.

We further noted that the proposed trial groupings proffered by Plaintiff in its June 26, 2006 Motion for a Scheduling Order compound the prejudice to Defendants by ignoring altogether the differences among Defendants and aggregating for trial vastly different companies in three unwieldy and apparently random groups. In that regard, we realize that at present you may have little information about the basic nature of many of the Defendants' businesses to assist you in appreciating why and how Plaintiffs' proposed groupings are inappropriate. Without waiving any of Defendants' objections to any trial grouping in this matter, I enclose a chart that identifies most of the Defendants by the general nature of the business they conduct. I

KAYE SCHOLER LLP

Simeon F. Penton, Esq.  
Jimmy B. Pool, Esq.

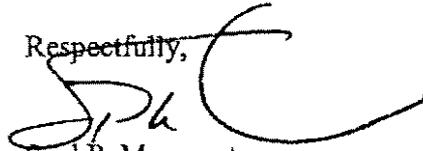
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November 3, 2006

hope that you find this helpful to understanding better the differences among the Defendants and the considerable problems inherent in the approach proposed by Plaintiff.

Feel free to call on me if you have any questions.

Respectfully,



Saul P. Morgenstern

Enclosure

Copies (w/encl.) to All Counsel

State of Alabama v. Abbot Labs, et al.  
Case No. CV-2005-219 (Cir. Ct. Montgomery County)

<p><b>Brand-Name Manufacturers and Affiliated Companies</b></p> <p>AstraZeneca Pharm. LP &amp; AstraZeneca LP Aventis Pharm., Sanofi-Synthelabo, Aventis Behring &amp; ZLB Behring Bayer Corp., Bayer Pharm. &amp; Bayer Healthcare <i>Biovail</i> Boehringer Ingelheim Corp. &amp; Boehringer Ingelheim Pharm., Inc. Bristol-Myers Squibb Fujisawa Healthcare &amp; Fujisawa USA Hoffman-LaRoche &amp; Roche Labs <i>Johnson &amp; Johnson, Alza, Janssen, McNeil-PPC, Ortho Biotech &amp; Ortho-McNeil</i> <i>Merck</i> Novartis Novo Nordisk Pfizer, Pharmacia &amp; Upjohn Co., Pharmacia, <i>Agouron &amp; GD Searle</i> SmithKline Beecham (GSK) Wyeth &amp; Wyeth Pharm.</p>	<p><b>Specialty Brands – Principally Self-Administered Drugs</b></p> <p><i>Alcon</i> <i>Eisai</i> <i>Endo*</i> <i>Organon Pharmaceuticals USA, Inc.</i> <i>Purdue</i> <i>Takeda</i> <i>TAP Pharmaceutical Products Inc.</i></p> <p>* Some generics</p>
<p><b>Manufacturers of Brand-Name and Generic Drugs and Affiliated Companies</b></p> <p>Abbott Laboratories Inc. Baxter Healthcare &amp; <i>Baxter Int'l</i> Dey <i>Forest Pharm. &amp; Forest Labs</i> Immunex King &amp; Monarch Watson Pharmaceuticals, Inc., Watson Pharma, Inc. &amp; <i>Watson Labs</i></p>	<p><b>Manufacturers of Generic Drugs and Affiliated Companies</b></p> <p><i>Alpharma &amp; Purepac</i> <i>Andrx</i> Barr <i>Ethex†</i> Mylan Pharm., <i>Mylan Labs.</i> &amp; UDL Labs <i>Par</i> Roxane <i>Sandoz</i> <i>Teva, Ivax Pharm. &amp; Ivax Corp.</i></p> <p>† Markets but does not manufacture generic drugs.</p>

Defendants in *italics* have no target drugs subject to Medicare Part B.

CERTIFICATE OF SERVICE

Lisa Mecca Davis certifies that she caused a copy of the attached Opposition to be served upon all counsel of record, by LexisNexis File & Serve, this 24th day of August, 2007.



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Lisa Mecca Davis