

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

TEAM SCHIERL COMPANIES and
HEARTLAND FARMS, INC., on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

ASPIRUS, INC., and ASPIRUS NETWORK,
INC.,

Defendants.

No. 3:22-cv-00580-jdp

Hon. James D. Peterson, U.S.D.J.

Hon. Stephen L. Crocker, U.S.M.J.

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO COMPEL RESPONSES TO
PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS**

Pursuant to Federal Rules of Civil Procedure 26, 33, and 37, plaintiffs Team Schierl Companies and Heartland Farms, Inc. (“Plaintiffs”) file this brief in support of their motion to compel defendants Aspirus, Inc. (“Aspirus”) and Aspirus Network, Inc. (“ANI”) (collectively, “Defendants”) to provide complete responses to Plaintiffs’ First Set of Interrogatories to Defendants (collectively, “First Interrogatories”). *See* Declaration of Daniel J. Walker (“Walker Decl.”), Exs. A & B.

Plaintiffs served their First Interrogatories on September 6, 2023. The First Interrogatories seek information that is plainly relevant to the issues in this case, including: (1) how Defendants carried out their alleged anticompetitive scheme; (2) how Defendants’ alleged scheme impacted payers and providers in Wisconsin; (3) the common impact of the scheme on the proposed class’ members; and (4) damages. But for every Interrogatory—each of the seven served on Aspirus and each of the four served on ANI—Defendants provided no substantive

response at all. Instead, Defendants invoked Fed. R. Civ. P. 33(d), asserted that they will produce documents in the future, and that, when they do produce documents, Defendants will identify those that provide some of the information sought in the First Interrogatories.

By invoking Rule 33(d), Defendants concede that the First Interrogatories seek relevant information and that such information is in Defendants' control. But Rule 33(d) is not an appropriate tool to provide the kind of information sought for every Interrogatory that Plaintiffs served. Moreover, Defendants' invocation of Rule 33(d) with a promise to provide documents at some unspecified future time violates the express language of the Rule, which requires (among other things) that a party invoking Rule 33(d) must provide the documents at the time it provides the response. The invocation of Rule 33(d) is no answer at all without the documents that contain the information sought.

Counsel for the parties met and conferred by written correspondence and by video conference. Defendants' position is that no substantive response to Plaintiffs' First Interrogatories is necessary now and that a promise to identify documents in future productions is sufficient. Plaintiffs are entitled to more, however, and are seeking answers now because the information sought will guide further discovery from Defendants and nonparties. Plaintiffs respectfully request that Defendants be compelled to provide prompt, full responses to Plaintiffs' First Interrogatories.

GENERAL BACKGROUND

This is an antitrust case alleging illegal monopolization and price-fixing under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Plaintiffs allege that Aspirus, the dominant health care provider in Northern and Central Wisconsin, with over \$1 billion in annual revenue, and ANI, its subsidiary network of owned and purportedly "independent" affiliated health care

providers, engaged in an anticompetitive scheme that involves, *inter alia*, contractual provisions and negotiating positions that effectively tie Aspirus' dominant inpatient and outpatient health care services together, contracts that lock up competing providers to prevent price competition for payer contracts, and a network that allows ANI to fix prices for outpatient health care services. Motion to Dismiss Opinion and Order, ECF No. 47 at 1-2. Plaintiffs allege that this scheme effectively insulated Defendants from competition for health care services, and caused Plaintiffs, and similarly situated direct purchasers, to pay artificially inflated prices for health care. Class Action Complaint ("Complaint"), ECF No. 1, ¶¶ 8, 16-18, 33-37, 90-91.

Plaintiffs filed the Complaint on October 12, 2022. On February 24, 2023, the Court set a schedule with discovery opening on June 5, 2023, and closing on May 7, 2024. ECF No. 35. The Court almost entirely denied Defendants' motion to dismiss on October 17, 2023. ECF No. 47. Plaintiffs served requests for production of documents on June 5, 2023, the day discovery opened. Although the parties have been regularly meeting and conferring over the scope of Defendants' document production, Defendants' first real production of documents—constituting a small fraction of the documents that will be produced in this case—came on November 8, 2023. None of the documents produced appear to answer the First Interrogatories, and Defendants have not produced amended interrogatory responses.

Plaintiffs served their First Interrogatories on September 6, 2023. *See* Walker Decl., Exs. A & B. On October 6, 2023, Defendants submitted their Responses and Objections to the First Interrogatories ("Interrogatory Responses"). *See* Walker Decl., Exs. C & D. For all eleven Interrogatories, Defendants incorporated pages of boilerplate general objections, objections to definitions, and objections to instructions, among others. Defendants provided *no* substantive answer to *any* interrogatory, stating instead for each Interrogatory that they would, at some

undefined point in the future, “produce certain non-privileged documents ... that will satisfy this Interrogatory” pursuant to Rule 33(d). Defendants produced no documents along with their Interrogatory Responses.

Plaintiffs emailed Defendants on October 12, 2023, informing Defendants that Rule 33(d) is not appropriate for all of the First Interrogatories, and that, even assuming Rule 33(d) was appropriate for certain of the Interrogatories, a party cannot invoke Rule 33(d) by promising to produce documents at some date in the future. *See Walker Decl., Ex. E.* Plaintiffs notified Defendants that Plaintiffs would move to compel full answers to the First Interrogatories on an abbreviated timeline if this matter could not be resolved on a meet and confer. *Id.* On October 17, 2023, Defendants asserted, among other things, that Plaintiffs’ arguments are “premature and not yet ripe” because Defendants intend to “supplement their responses should relevant information become available during document discovery.” *Id.*

On October 24, 2023, the Parties met and conferred, and Plaintiffs reiterated that Defendants’ reliance upon Rule 33(d) is inappropriate. *Walker Decl.* at 2-3. Plaintiffs also informed Defendants that, absent any significant production from Defendants related to the Interrogatories, after over five months of discovery,¹ Plaintiffs need interrogatory answers in short order to guide further discovery. *Id.* Defendants maintained their position that they would not provide substantive responses prior to producing documents, and that after producing documents, Defendants would (at some indeterminate time) provide citations in the Interrogatory Responses to relevant documents, if any are produced.² *Id.*

¹ Defendants’ small production of documents on November 8, 2023 does not appear to answer any of the First Interrogatories, and there remains no indication when the Interrogatories will be answered, by citations to documents or otherwise.

² During the meet and confer, Defendants would not agree that impasse had been reached because Defendants asserted that they would consider answering the First Interrogatories if

LEGAL STANDARD

Rule 33(d) states that a responding party may produce business records as answers to interrogatories if the party: (1) “specif[ies] the records that must be reviewed, *in sufficient detail* to enable the interrogating party to locate and identify them as readily as the responding party could;” and (2) gives the interrogating party a “*reasonable opportunity to examine and audit* the records” Fed. R. Civ. P. 33(d)(1-2) (emphases added).

It is improper to invoke Rule 33(d) by pointing to documents that have not been produced. *See, e.g., Columbia Falls Aluminum Co., LLC v. Atl. Richfield Co.*, 2019 WL 3941234, at *3 (D. Mont. Aug. 21, 2019) (a party relying on Rule 33(d) to respond to interrogatories “cannot have it both ways; it cannot fail to produce responsive documents while also relying on those documents to answer . . . discovery requests.”); *Sandoval v. Carrco Painting Contractors*, 2016 WL 11602287, at *2 (W.D. Tex. Dec. 5, 2016) (finding that “answering ‘see documents produced’ without providing any such documents” is an “unsuitable response to these discovery requests”); *Roche Diagnostics GMBH v. Enzo Biochem, Inc.*, 2013 U.S. Dist. LEXIS 202972, at *8 (S.D.N.Y. Sept. 11, 2013) (holding that “bare reference to unspecified documents to be produced at some unspecified time is a misuse of Rule 33(d)”³); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 950282, at *6 n.12 (D. Kan. Mar. 26, 2007) (answering party has failed to comply with Rule 33(d) when referencing documents that have not been produced, as “obviously no specification could have been made

Plaintiffs unilaterally undertook an effort to narrow them. But Defendants did not explain why the Interrogatories are overbroad and refused to answer what information they might be willing to provide to any narrower interrogatory. Plaintiffs made clear that if Defendants were willing to provide *any* information, they should do so now, and then Plaintiffs would assess whether further responses were necessary. Walker Decl. at 2-3.

³ Plaintiffs were not able to locate a Westlaw citation for this case.

for any documents not yet produced”). And even when a party produces documents that answer an interrogatory, which is not the case here, it is improper not to specify which documents, in particular, respond to each interrogatory. *See, e.g., United States v. Cmty. Health Network, Inc.*, 2023 WL 3114211, at *3 (S.D. Ind. 2023) (overruling objections to magistrate’s conclusion that party had not met Rule 33(d) standard even when producing business records for review because it did not articulate which documents were responsive).

Moreover, Rule 33(d) is to be used only when interrogatory requests are of an “intensively objective nature.” *United Oil Co. v. Parts Assocs.*, 227 F.R.D. 404, 419 (D. Md. 2005) (“Rule 33 is well-suited to reply to inquiries of an intensely objective nature.”); *see also AMAG Pharms., Inc. v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 16950437, at *7 (D. Mass. Nov. 15, 2022) (stating that Rule 33(d) is best suited to interrogatories of an objective nature that seek a compilation of information); *Int’l Aero. Grp. Corp. v. Evans Meridians, Ltd*, 2017 WL 1927957, at *3 (S.D. Fla. May 10, 2017) (quoting *Morock v. Chautauqua Airlines, Inc.*, 2007 WL 4247767, at *2 (M.D. Fla. Dec. 3, 2007) for the proposition that Rule 33(d) is best suited for interrogatories seeking “objective facts.”); *United States v. Cmty. Health Network, Inc.*, 2022 WL 17337947, at *5 (S.D. Ind. 2022) (noting that Rule 33(d)’s burden requirement was not met when working beyond “simple business records like solitary issue spreadsheets or tax returns, where both parties can navigate the information in the same manner and with a similar level of difficulty.”); *Id.* at *4 (“[T]he option to produce business records is only available for interrogatories whose answer ‘may be derived from the party’s records, but many questions are not of that sort.’... ‘if a question calls for the recollections of parties or their employees or agents, the fact that some pertinent data might also be found in the records would not warrant use

of this option”) (*quoting Kadambi v. Express Scripts, Inc.*, 2015 WL 10985383, at *4 (N.D. Ind. July 14, 2015)).

ARGUMENT

Defendants failed to provide proper answers to the First Interrogatories, and Defendants’ reliance on Rule 33(d) is misplaced.

1. Defendants Cannot Rely on Rule 33(d)’s Document Production Alternative to Answering Interrogatories When They Have Not Produced Any Responsive Documents

When a party relies upon Rule 33(d) in lieu of providing a narrative response, that party must specify “in sufficient detail” which records must be reviewed such that the reviewing party is able to readily locate and identify them, and must also provide the reviewing party a “reasonable opportunity to examine and audit” the records. Fed. R. Civ. P. 33(d)(1-2). Merely referencing documents not yet produced is a deficient response under Rule 33(d). *See, e.g., Cmty. Health Network, Inc.*, 2022 WL 17337947, at *5; *Atl. Richfield Co.*, 2019 WL 3941234, at *3; *Enzo Biochem, Inc.*, 2013 U.S. Dist. LEXIS 202972, at *8; Advisory Comm. Note to 1980 Amendment, Fed. R. Civ. P. 33(c) (now 33(d)) (“[A] responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.”).

Defendants only recently produced a small set of documents. Walker Decl. at 3. Those documents do not appear to answer the First Interrogatories, as Defendants have not provided amended interrogatory responses that identify any of these documents. *Id.* Plaintiffs cannot review or audit records they have not received. Plaintiffs cannot even confirm whether documents exist that will provide the information sought in the First Interrogatories. Thus, Defendants’ sole reliance on Rule 33(d), without actually producing the responsive documents, violates the plain language of Rule 33(d) and is a deficient response.

2. Plaintiffs' Interrogatories Do Not Seek Solely Objective, Measurable Facts and Therefore Defendants Cannot Answer All Eleven Interrogatories via Rule 33(d)

Even if Defendants had produced responsive materials and cited them in their Interrogatory Responses, their reliance upon Rule 33(d) with respect to *all* of the First Interrogatories would still be misplaced. Several of Plaintiffs' Interrogatories do not seek only "objective facts" that can be easily discerned from document productions. Rather, they require Defendants to answer narratively more nuanced questions for which document productions would be insufficient. *See Cmty. Health Network, Inc.*, 2022 WL 17337947, at *5; *Evans Meridians, Ltd.*, 2017 WL 1927957, at *3.

For example, Interrogatories to Aspirus Nos. 3, 4, 5, 6, and 7 and Interrogatories to ANI Nos. 1 and 2 ask Defendants to "describe each instance" of a particular event occurring, whether that entails communications with providers about joining other provider networks (e.g., ANI Interrogatory No. 1) or, for example, descriptions of instances where Defendants allege payers violated confidentiality terms of a contract (e.g., Aspirus Interrogatory No. 5). Walker Decl., Ex. B at 8; Ex. A at 9. For these types of interrogatories in particular, it is likely that there is responsive information not contained in any document that needs to come from knowledgeable people within the Defendants' organization. For example, there likely are oral communications responsive to these interrogatories that are not contained in any documents. During meet and confer discussions, Defendants' counsel could not answer whether that was the case, and thus could not even assure Plaintiffs' counsel that a production of documents would constitute a complete answer. Walker Decl. at 2.

Some of the information sought by certain of the First Interrogatories might be the sort of

information reflected in documents that will be produced. As examples, Interrogatory to Aspirus No. 1 and Interrogatory to ANI No. 3 ask for the dates when certain agreements were in effect or first used, the dates of certain communications surrounding those contracts, and the identities of employees involved in negotiating and drafting such agreements. Walker Decl., Ex. A at 8; Ex. B at 8. However, even if some of the responsive information were reflected in documents that will eventually be produced, it is unlikely that *all* of the responsive information for these Interrogatories would be included in documents that will be produced, meaning that some narrative response will still be necessary even if there are documents forthcoming. Without being able to review any responsive documents, Plaintiffs have no way of knowing that these Interrogatories will ever be answered by documents.

Further, under Rule 33(d), it is not enough that the information sought might be contained in documents produced in the matter. Rule 33(d) can only be used “if the burden of deriving or ascertaining the answer will be substantially the same for either party.” Fed. R. Civ. P. 33(d). It is virtually certain that Defendants, who have access to the individuals involved in the events in question, will have an easier time deriving complete answers to the First Interrogatories. *See, e.g., United States ex rel. Fischer v. Cmty. Health Network, Inc.*, 2023 WL 4577445, at *2-3, *5 (S.D. Ind. 2023) (affirming the Rule 33(d) requirement that the burden be substantially the same for both parties). A prime example of this burden imbalance is Defendants’ response to Interrogatory to ANI No. 4, where Rule 33(d) *might* be appropriately invoked, as the request seeks names and contact information for affiliated providers. *See* Walker Decl., Ex. D at 25-26. Defendants simply referred Plaintiffs to a public website, which only lists *current* providers and does not confirm that this list of providers is exhaustive. Defendants undoubtedly have comprehensive and readily available documents that are responsive to this Interrogatory for the

entire relevant time period, and failing to produce them places a much higher burden on Plaintiffs to ascertain the full list of affiliate providers through time consuming online research and outreach (which, even then, may not yield accurate results for the entire relevant time period).

Plaintiffs' First Interrogatories seek information that will both help prove the claims in this case and guide further discovery. For example, Plaintiffs and Defendants have been negotiating Defendants' document custodians. Some of the responses to these Interrogatories might inform whether additional custodians need to be searched. Answers to the Interrogatories might also guide additional nonparty discovery. At the slow rate that Defendants' document production is going, it will likely be several months before Defendants have produced the relevant documents and can update their Interrogatory Responses to cite those documents. The delay is already prejudicing Plaintiffs' efforts to conduct discovery. Consequently, Plaintiffs respectfully request that the Court compel Defendants to provide full narrative responses as soon as possible.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion to compel and order Defendants to provide prompt, full responses to Plaintiffs' First Interrogatories.

Dated: November 13, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 13, 2023, a true and correct copy of the foregoing was filed with the Court via the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

Dated: November 13, 2023

/s/ Timothy W. Burns
Timothy W. Burns