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Civil No. 06-1-0720-04 EEH
(Complex Litigation)

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ATTORNEYS FOR PLAINTIFF

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

State of Hawaii,

Plaintiff,

vs.

Abbott Laboratories Inc., et al.

Defendants.

Civil No. 06-1-0720-04 EEH
(Complex Litigation)

PLAINTIFF'S RESPONSE TO
DEFENDANT MERCK & CO., INC.'S
FIRST REQUEST FOR ANSWERS TO
INTERROGATORIES

No Trial Date Set

PLAINTIFF'S RESPONSE TO DEFENDANT MERCK & CO., INC.'S
FIRST REQUEST FOR ANSWERS TO INTERROGATORIES

Plaintiff State of Hawaii Department of Human Services hereby responds to Defendant's First Request for Answers to Interrogatories.

PRELIMINARY STATEMENT

Information provided in these responses is based on such information as is presently available to Plaintiff. Plaintiff expressly reserves the right, without assuming any duty not required by the Hawaii Rules of Civil Procedure, to supplement these responses when and if additional information or documentation comes to its attention.

Plaintiff makes these responses without waiving its right to revise, correct, add to, or clarify its responses.

Each response is subject to all objections as to competence, relevance, materiality, propriety, admissibility, privilege, privacy, and the like, and any and all other objections on the grounds that would require the exclusion of any response herein if such were offered in court, all of which objections and grounds are reserved and may be interposed at time of trial.

Plaintiff's objections and responses herein are subject to all applicable protective orders, case management orders, and other directives of the First Circuit Court, other courts of competent jurisdiction and other State Attorneys General and law enforcement agencies.

No incidental or implied admissions are intended in these responses. That Plaintiff has responded to all or any part of a request should not be taken as an admission that Plaintiff accepts or admits the existence of any fact(s) set forth or

assumed by that request or that Plaintiff's response constitutes admissible evidence. That Plaintiff has responded to all or any part of a request also is not intended to be, and shall not be, a waiver by Plaintiff of all or any part of its objection(s) to that request.

Plaintiff's responses are based upon reasonable, diligent investigation heretofore, and are submitted in good faith; however, Plaintiff has not completed its investigation of the facts relating to this case, discovery in this action, or preparation for trial.

GENERAL OBJECTIONS

The following objections apply to Defendant's Requests in their entirety (including Defendant's instructions and definitions) and apply to the Response to each specifically numbered Request. The General Objections are incorporated by reference into each individual Response and will not be repeated in individual Responses unless necessary for clarification.

The Department of Human Services is the single state agency responsible for administering Hawaii's Medicaid program on whose behalf this suit is brought. Plaintiff objects to the definitions of "Plaintiff", "you", "your", "State" or "Hawaii", "Identify", "state the basis" and General Instructions Nos. 1, 2, 3 and 4 on the grounds that said definitions and general instructions are overly broad, cumulative, unduly burdensome, and impose discovery obligations that are beyond the scope of Plaintiff's obligations under the Hawaii Rules of Civil Procedure, and to the extent that they seek to impose on the Plaintiff the obligation to respond for, or produce documents maintained by other branches or agencies of the Hawaii State Government not involved in the operation of the Hawaii Medicaid program.

Plaintiff objects to the Requests to the extent they seek information or documents within the public domain. Information or documents within the public domain include, without limitation, information and documents available to the public on the website maintained by the Hawaii Department of Human Services at <http://www.hawaii.gov/dhs/>, on the website maintained by the Hawaii Med-Quest program <http://www.med-quest.us/>, on the website maintained by ACS State HealthCare at <http://www.himed-questffs.org/>, (the pharmacy benefit manager for the fee for service program) on the website maintained by First Health Services at <http://www.hawaii.fhsc.com>, (preferred drug list information, Pharmacy and Therapeutics Committee, etc.), on the website maintained by the Hawaii Legislative Reference Bureau at <http://hawaii.gov/lrb/>, on the website maintained by the United States Department for Health & Human Services, Centers for Medicare and Medicaid Services at <http://www.cms.hhs.gov/>, and on the website maintained by AdminaStar Federal at <http://www.adminastar.com>.

Plaintiff objects to the Requests to the extent they seek information or documents that are exclusively, or that are already, within in the possession, custody, or control of Defendants or Defendants' counsel.

Plaintiff objects to each Request to the extent that it seeks information or documents that are protected from disclosure pursuant to a protective order entered by a court of competent jurisdiction or confidentiality agreement to which Plaintiff is a party. Such protective orders and confidentiality agreements include, but are not limited to the following:

- (a) *Protective Order in State of Florida ex rel. Ven-A-Care of the Florida Keys, Inc. v. Boehringer Ingelheim Corp; Dey, Inc.; Dey, L.P.; EMD Pharmaceuticals Inc.; Lipha, S.A.; Merck, KGaA; Merck-Lipha, S.A.; Schering Corp.; Schering-Plough Corp; Roxane*

Laboratories, Inc.; and Warrick Pharmaceuticals Corporation. Civil Action No. 98-3032A, Leon County, Florida.

- (b) *Protective Order in State of Texas ex rel. Ven-A-Care of the Florida Keys, Inc. v. Dey, Inc.; Roxane Laboratories, Inc., Warrick Pharmaceuticals Corp.; Schering-Plough Corp.; and Schering Corp.* Case No. GV002327, Travis County District Court.
- (c) Confidentiality Agreement between the California Attorney General's Office and Abbott Laboratories, pursuant to initial administrative subpoena dated September 18, 2000.

The protective orders identified above were entered at the request of the Defendant(s) in those cases. Under the terms of the protective orders, Hawaii is prohibited from the further production or disclosure of documents subject to the protective orders absent an order authorizing the production or disclosure from the court that entered the protective order or a written authorization of the party that produced the documents in that action.

Plaintiff objects to the Requests to the extent that they seek documents relating to the Hawaii's "government knowledge" of Defendant's deceptive practices, which information is not relevant and not likely to lead to the discovery of admissible evidence.

INTERROGATORY NO. 1

Describe your method for ensuring that the Hawaii Medicaid Program has estimated the acquisition cost generally and currently paid by Providers as required by 42 C.F.R. § 447.331, including but not limited to:

- (a) The methods you currently use, and/or have used historically, for calculating the EAC for each type of pharmaceutical product or aggregate EAC;
- (b) The date of any change to the method for calculating EAC;
- (c) The date of any proposed change, whether or not implemented, for calculating EAC;
- (d) The reasons for implementing or not implementing each proposed change in the method of calculating EAC;

- (e) The identity of the Person(s) who proposed, recommended, or authorized the changes in the method for calculating EAC;
- (f) The identity of the Person(s) most knowledgeable about your methods for calculating EAC and the changes to those methods; and
- (g) The identity of the Person(s) who were involved in any way in the preparation of Assurance letters to the federal government.

ANSWER:

Objection: The defined terms improperly require Plaintiff to answer subparts or sub-questions in the response causing the interrogatories to greatly exceed the number allowed by HRCP rule 33 and RCC rule 30(b). This question is overly broad, vague, irrelevant and not calculated to lead to any admissible evidence.

Without waiving the objection Plaintiff responds as follows: The drug reimbursement methodology is set by regulation Haw. Admin. R. § 17-1739.1 et seq. in particular § 17-1739.1-11. EAC is defined by regulation as AWP less 10.5%. The method Hawaii uses is set forth in the State Plan and the documents accompanying the plan and its adoption by the Department of Human Services.

Each amendment shows the change to a prior plan. The Defendants have demanded the production of these plans as part of "Defendants' First Request For Production of Documents" and may discern from these documents the answer to the questions stated above.

Lynn Donovan, R.Ph. pharmacy consultant and Dr. Lynette Honbo medical consultant are knowledgeable about Hawaii's Med-Quest Medical Assistance Program Plans.

The Plaintiff will produce various documents from which the Defendants can discern the current and historical reimbursement methodology, names of individuals involved and the nature and extent of their involvement in the selection, adoption and implementation of the State Plan. Due to the volume of documents comprising the prior state plans, Plaintiff will make them available upon request.

INTERROGATORY NO. 2

Identify all data, mathematical or statistical computations, comparisons, and any other pertinent records used by the State in preparing its Findings and Assurance letters, as required by 42 C.F.R. § 447.333(c).

ANSWER:

Objection: The defined terms improperly require Plaintiff to answer subparts or sub-questions in the response causing the interrogatories to greatly exceed the number

allowed by HRCP rule 33 and RCC rule 30(b). This question is overly broad, vague, irrelevant and not calculated to lead to any admissible evidence.

Without waiving the objection Plaintiff responds as follows: Plaintiff will produce or make available the State Plans responsive to this request.

INTERROGATORY NO. 3

Describe the method by which you established a Medicaid dispensing fee, and identify the Person(s) most knowledgeable about how the State set a dispensing fee.

ANSWER:

Objection: This question is not relevant and not calculated to lead to any admissible evidence.

Without waiving the objection Plaintiff responds as follows: The dispensing fee was established in 1989. In general, the state set the dispensing fee based on the result of a survey on the cost of pharmacy operations. There is no one with Med-Quest who has knowledge as to how the current dispensing fee was set. The Plaintiff will produce historical documents from which the answer can be derived.

INTERROGATORY NO. 4

Identify all Persons currently or formerly employed by you or serving as a contractor to you who were involved with conducting the dispensing fee surveys referenced in Hawaii Medicaid Provider Manual § 19.1.8.2(a).

ANSWER:

Objection: This question is not relevant and not calculated to lead to any admissible evidence.

Without waiving the objection Plaintiff responds as follows: See the response to interrogatory No. 3.

INTERROGATORY NO. 5

Identify all Persons currently or formerly employed by you or serving as a contractor to you with any knowledge of, responsibility for, involvement in, or influence on:

- (a) the Reimbursement Methodology used to determine the amounts paid to Providers under Medicaid for pharmacy dispensed and physician-administered drugs, including any proposed changes to this methodology

and the criteria used to develop this methodology and any Findings and/or support related thereto;

- (b) the processing of payments for Providers' claims for reimbursement regarding Subject Drugs;
- (c) the adoption, rejection, amendment to, calculation, consideration, or negotiation of any State supplemental rebate agreements or establishment of a supplemental rebate program;
- (d) establishing, considering, determining, calculating, or setting of AWP, MACs, SMACs, WACs, EACs, Direct Prices, FULs, Usual and Customary Charges, or other prices, costs, reimbursement rates, or other benchmarks for Subject Drugs.
- (e) communicating with CMS concerning the reimbursement of Providers for pharmaceutical products under the Hawaii Medicaid Program; and

And for each such Person, state the subjects to which that Person is likely to have knowledge.

ANSWER:

Objection: The defined terms improperly require Plaintiff to answer subparts or sub-questions in the response causing the interrogatories to greatly exceed the number allowed by HRCP rule 33 and RCC rule 30(b). This question is overly broad, vague, irrelevant and not calculated to lead to any admissible evidence.

Without waiving the objection Plaintiff answers: See the responses provided to AstraZeneca interrogatories No. 1, 9, 10, 11, 13 and 14, which are incorporated herein.

HMSA was the fiscal agent responsible to process claims until mid-2001 then Affiliated Computer Services ("ACS") became the pharmacy fiscal agent.

Hawaii joined the National Medicaid Pooling Initiative ("NMPI") in 2004. Initially ACS Pharmacy Benefits Manager implemented the program but later the contract was competitively bid and First Health Services Corporation won the contract to administer the program. First Health is the PBM and works with the Pharmacy & Therapeutics committee to recommend the preferred drug list to DHS for the Medicaid Fee for Service program. First Health negotiates with drug manufacturers to obtain supplemental rebates for drugs. Robert Coppola at First Health is the contact person.

Alan Matsunami and Lynn Donovan R.Ph. assisted First Health to set up the preferred drug list. Ann Kittingham and Brian Pang have knowledge of supplemental rebates.

CMS communications on drug reimbursement would likely be by ACS the fiscal agent.

INTERROGATORY NO. 6

When did Plaintiff first receive a copy of the First DataBank document attached as Exhibit 1 to Complaint?

- (a) Describe the circumstances and identify any Persons with knowledge of the receipt or use by Plaintiff of the information in Exhibit 1.
- (b) Describe Your understanding of AWP as published by First DataBank in September 1991, and any changes in Your understanding since that time, providing for each such change: (i) the date of the change, (ii) the persons with knowledge of the changed understanding, (iii) the information that changed your understanding, and (iv) any changes to reimbursement of drugs resulting from the changed understanding.

ANSWER:

Objection: The defined terms improperly require Plaintiff to answer subparts or sub-questions in the response causing the interrogatories to greatly exceed the number allowed by HRCF rule 33 and RCC rule 30(b); this question is vague, ambiguous, redundant, overly burdensome and oppressive. Plaintiff objects to the phrase "Your understanding" as applied to the State because it implies that what some state employees may or may not "understand" is relevant when it is not. The State's understanding is expressed by the regulations that it uses to set the reimbursement rate for drugs.

Without waiving the objection Plaintiff answers: At this time, we are unable to determine when this document was first received. This answer will be supplemented if further information becomes known or available.

FDB represented AWP as the average wholesale price, determined by surveys taken by FDB. In March 2005, FDB reported that it was no longer going to survey wholesalers for information related to their catalog or list prices but it would continue to apply the mark-up against the WAC or DP and populate the Blue Book AWP with this value. Plaintiff will produce documents from FDB responsive to this request.

INTERROGATORY NO. 7

Identify any communication with First DataBank concerning AWP, including without limitation, each instance in which "First DataBank has represented that its published prices reflect actual average wholesale prices" as alleged in paragraph 43 of the Complaint.

ANSWER:

Objection: The defined terms improperly require Plaintiff to answer subparts or sub-questions in the response causing the interrogatories to greatly exceed the number allowed by HRCF rule 33 and RCC rule 30(b); this question is vague, ambiguous, redundant, overly burdensome and oppressive.

Without waiving the objection Plaintiff answers: See the response to question No. 6. The State will produce non-privileged documents in its possession responsive to this request as maintained in the usual and ordinary course of business.

All objections are made by the undersigned attorney for Plaintiff.

Dated: Honolulu, Hawaii, September 4, 2007.



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